CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

171, 172, 173, 174 U. S.

BOOK 43,

LAWYERS' EDITION.

CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LL.D.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY,
ROCHESTER, NEW YORK.
1926.

43 L ed

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,
HON. HORACE GRAY,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN,
HON. GEORGE SHIRAS, JR.,
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM,
HON. JOSEPH MCKENNA.

ATTORNEY GENERAL,

HON. JOHN W. GRIGGS.

SOLICITOR GENERAL,

HON. JOHN K. RICHARDS.

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. J. C. BANCROFT DAVIS.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotment, Feb. 21, 1898, see Appendix VII. Book 42.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1898–1899.	Commissioned.	Sworn in.
Associate Justice HORACE GRAY, Massachusetts.	President Arthur.	First. Me., N. H., Mass., Rhode Island.	1881. (Dec. 20.)	1882. (Jan. 9.)
Associate Justice RUFUS W. PECKHAM. New York.	President Cleveland.	Second. Vermont, Conn., New York.	1895. (Dec. 9.)	1896. (Jan. 6.)
Associate Justice GEORGE SHIRAS, Jr., Pennsylvania.	President Harrison.	Third. New Jersey, Penn., Del.	1892. (July 26.)	1892. (Oct. 10.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C. W. Va., S. C.,	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice HENRY B. BROWN, Michigan.	President Harrison.	Seventh. Ind., Ill., Wis.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Wyo.	1889. (Dec. 18.)	1890. (Jan. 6.)

GENERAL TABLE OF CASES REPORTED

IN THIS BOOK.

VOLUMES 171, 172, 173, 174.

C.

D.

E.

F.

J.

K.

L.

M.

N.

T.

U.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1897.

Vol. 171.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERMS, 1897, 1898.

AND REPORTED HEREIN,

VOLUME 171,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 171 U. S.	Title.	Here in.
1	Schollenberger v. Pennsylvania ("Paul v. Pennsylvania")	49
2–4	" "	50
4–7	" "	51
7–10	" "	52
10–13	" "	53
13–15	" "	54
15–18	" "	55
18–21	" "	56
21–24	" "	57
24–26	" "	58
26–29	" "	59
29–30	" "	60
30–31	Collins v. New Hampshire -	60
31–34	" "	61
34	" "	62
35–37	Pounds v. United States -	62
37–38	" "	63
38–39	Harrison v. Morton - -	63
39–42	" " - -	64
42–45	" " - -	65
45–47	" " - -	66
48	Detroit Citizens' Street R. Co. v. Detroit Railway - -	67
48	" "	68
48–49	" "	69
49–52	" "	70
52–55	" "	71
55	" "	72
55–57	Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.	72
57–59	" "	73
59–60	" "	74
60–62	" "	75
62–65	" "	76
65–67	" "	77
67–69	" "	78
69–72	" "	79
72–75	" "	80
75–77	" "	81
77–80	" "	82
80–83	" "	83
83–86	" "	84

Off. Rep. 171 U. S.	Title.	Here in.
86–88	Del Monte Min. & M. Co. v. Last Chance Min. & M. Co.	85
88–91	" "	86
91–92	" "	87
92	Clark v. Fitzgerald - -	87
93	" "	88
93	Johnson v. Drew - -	88
94–96	" " - - -	89
96–99	" " - -	90
99–100	" " - - -	91
101	Tinsley v. Anderson - -	91
102–103	" " - -	95
103–106	" " -	96
106–108	" " - -	97
108	Central Nat. Bank v. Stevens	97
109	" "	98
110	North American Commercial Co. v. United States	98
110–113	" "	99
113–116	" "	100
116–118	" "	101
118–121	" "	102
121–124	" "	103
124–127	" "	104
127–130	" "	105
130–132	" "	106
132–135	" "	107
135–137	" "	108
138	Pullman's Palace Car Co. v. Central Transp. Co.	108
139	" "	109
139–142	" "	110
142–145	" "	111
145–148	" "	112
148–150	" "	113
150–153	" "	114
153–156	" "	115
156–159	" "	116
159–161	" "	117
161	District of Columbia v. Bailey ("Bailey v. District of Columbia") - - -	118
161–162	" "	119

Off. Rep. 171 U. S.	Title.	Here in.
162–164	District of Columbia v. Bailey ("Bailey v. District of Columbia") - - -	120
164–167	" "	121
167–169	" "	122
169–170	" "	123
170–173	" "	124
173–176	" "	125
176–178	" "	126
178–179	" "	127
179–181	Young v. Amy - - -	127
181–183	" " - - -	128
183–186	" " - - - -	129
186–187	" " - - -	130
187–188	The Irrawaddy - - - ("Flint, E. & Co. v. Christaall") - - - -	130
188–191	" "	131
191–194	" "	132
194–197	" "	133
197–200	" "	134
200–202	" "	135
202	" "	136
203–204	Hubbell v. United States -	136
205–207	" " -	137
207–210	" " -	138
210–213	Tide Water Oil Co. v. United States - - - -	139
213–216	" "	140
216–218	" "	141
218–219	" "	142
220	Ely v. United States - -	142
220–223	" " - -	143
223–226	" " - -	144
226–228	" " - -	145
228–231	" " - -	146
231–234	" " - -	147
234–237	" " - -	148
237–239	" " - -	149
239–241	" " - -	150
242	United States v. Maish -	150
242–243	" " -	151
244	Faxon v. United States -	151
244–247	" " -	152
247–251	" " -	153
251–252	" " -	154
252–255	" " -	155
255–258	" " -	156
258–260	" " -	157
260	Northern P. R. Co. v. Smith	157
260–263	" "	158
263–266	" "	159
266–268	" "	160
268–271	" "	161
271–274	" "	162
274–276	" "	163
277	Camou v. United States -	163
277–279	" " -	164
279–282	" " -	165
282–285	" " -	166
285–287	" " -	167
287–290	" " -	168
290–291	" " -	169
292	Perrin v. United States -	169
293–296	Walrath v. Champion Min. Co.	170
295–296	" "	171
296–298	" "	172
297–300	" "	173
300–303	" "	174
303–306	" "	175
306–309	" "	176
309–311	Walrath v. Champion Min. Co.	177
311–312	" "	178
312–313	New Orleans v. Texas & P. R. Co. - - - - -	178
313–316	" "	179
316–319	" "	180
319–322	" "	181
322–324	" "	182
324–327	" "	183
327–330	" "	184
330–333	" "	185
333–334	" "	186
335	" "	187
334–338	" "	188
338–341	" "	189
341–343	" "	190
343–344	" "	191
345	Patapsco Guano Co. v. North Carolina Bd. of Agriculture	191
345–348	" "	192
348–351	" "	193
351–354	" "	194
354–357	" "	195
357–359	" "	196
359–361	" "	197
361–362	Smyth v. Ames - - / Smyth v. Smith - - / Smyth v. Higginson - -	197
362–365	" " -	198
365	" " - -	199
366–367	White v. Berry - -	199
367–369	" " - - -	200
369–372	" " - -	201
372–375	" " - - -	202
375–378	" " - -	203
378	" " - - -	204
379	White v. Butler - - / White v. Ruckman - -	204
380	Thompson v. Missouri -	204
380–382	" " - -	205
382–384	" " -	206
384–387	" " - -	207
387–388	" " -	208
388	Baldy v. Hunter - -	208
389–392	" " - - - -	209
392–394	" " - - - -	210
394–397	" " - - - -	211
397–400	" " - - - -	212
400–402	" " - - - -	213
402–404	" " - - - -	214
404	King v. Mullins - -	214
405–407	" " - - -	215
407–410	" " - - - -	216
410–412	" " - - -	217
412–415	" " - - - -	218
415–418	" " - - -	219
418–420	" " - - - -	220
420–423	" " - - -	221
423–426	" " - - - -	222
426–428	" " - - -	223
428–431	" " - - - -	224
431–434	" " - - -	225
434–437	" " - - - -	226
437	" " - - -	227
437–438	King v. Panther Lumber Co.	227
441–442	California Nat. Bank v. Thomas - - - - -	231
442–445	" "	232
445–446	" "	233
447–448	California Nat. Bank v. Stateler - - - - -	233

Off. Rep. 171 U. S.	Title.	Here in.
448–449	California Nat. Bank v. Stateler	234
450	The G. R. Booth	234
450–452	" "	235
452–454	" "	237
454–457	" "	238
457–459	" "	239
459–462	" "	240
462	" "	241
462	The Silvia	241
463–464	" "	242
464–466	" "	243
466	Briggs v. Walker	243
467–469	" "	244
469–472	" "	245
472–474	" "	246
474	Hubbard v. Tod	246
474–477	" "	247
477–480	" "	248
480–483	" "	249
483–485	" "	250
485–488	" "	251
488–491	" "	252
491–494	" "	253
494–497	" "	256
497–499	" "	257
499–502	" "	258
502–504	" "	259
505	United States v. Joint Traffic Asso.	259
505–507	" "	260
507–509	" "	261
558–559	" "	283
559–562	" "	284
562–564	" "	285
564–567	" "	286
567–570	" "	287
570–573	" "	288
573–575	" "	289
575–578	" "	290
578	Hopkins v. United States	290
579–580	" "	291
580–583	" "	292
583–586	" "	293
586–589	" "	294
589–591	" "	295
591–594	" "	296
594–597	" "	297
597–599	" "	298
599–602	" "	299
602–604	" "	300

Off. Rep. 171 U. S.	Title.	Here in.
604	Anderson v. United States	300
605–608	" "	301
608–611	" "	302
611	" "	303
612	" "	304
612–615	" "	305
615–618	" "	306
618–620	" "	307
620	Northwestern Bank v. Freeman ("Northwestern Nat. Bank v. Freeman")	307
621–623	" "	308
623–626	" "	309
626–627	" "	310
627–629	" "	311
629–631	" "	312
631	Brown v. United States Curley v. United States	312
631–634	" "	313
634–636	" "	314
636–638	" "	315
638	Naeglin v. De Cordoba	315
638–641	" "	316
641	Pierce v. Somerset Railway	316
642–644	" "	317
644–647	" "	318
647–649	" "	319
649–650	" "	320
650	Pierce v. Ayer	320
650–652	St. Louis Min. & M. Co. v. Montana Min. Co.	320
652–654	" "	321
654–657	" "	322
657–658	" "	323
658–660	New York State v. Roberts ("People of the State of New York, ex rel. Parke, D. & Co. v. Roberts")	323
660–661	" "	324
661–663	" "	325
663–666	" "	326
666–669	" "	327
669–671	" "	328
671–674	" "	329
674–677	" "	330
677–679	" "	331
679–682	" "	332
682–683	" "	333
685–	Memorandum Cases	1177
690	" "	1188

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1897.

Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

[1] GEORGE SCHOLLENBERGER, *Plff. in Err.*,
v
COMMONWEALTH OF PENNSYLVANIA.

GEORGE E. PAUL, *Plff. in Err.*,
v.
COMMONWEALTH OF PENNSYLVANIA.

J. OTIS PAUL, *Plff. in Err.*,
v.
COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 1–30.)

Oleomargarine a subject of commerce—inspection—power of state—cannot be excluded from state—ten-pound packages—sale by agent—sale to consumers—Pennsylvania statute invalid.

1. Oleomargarine, having been recognized by the act of Congress of 1886 as a proper subject of taxation and of traffic and exportation and importation, and being a well-known article of food, is a proper subject of commerce among the states and with foreign nations.
2. The fact that inspection or analysis of the article imported is somewhat difficult and burdensome will not justify a state in totally excluding a pure and healthy food product.
3. A state cannot absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated, and which in its pure state is healthful, simply because such article in the course of its manufacture may be adulterated by dishonest manufacturers, for the purpcse of fraud or illegal gains.
4. As Congress taxes oleomargarine and recognizes it as a proper subject of commerce, it cannot be totally excluded from a state simply because the state decides that, for the purpose of preventing the importation of an impure or adulterated article, it will not permit the introduction within its borders of the pure and unadulterated article.
5. A sale of a 10-pound package of oleomargarine manufactured, imported, and sold by the importer under the circumstances found in the special verdict in this case, was a valid sale, although to a person who was a consumer.
6. An importer may sell original packages of oleomargarine by an agent as well as personally.
7. An importer has the right to sell oleomargarine in original packages to consumers as well as to wholesale dealers, and the exercise of this right will not be prevented by the fact that the packages are suitable for retail trade.
8. The Pennsylvania statute of 1885, to the extent that it prohibits the introduction of oleomargarine from another state, and its sale in the original package as described in the special verdict in this case, is invalid.

[Nos. 86–88.]

Argued March 23, 24, 1898. Decided May 23, 1898.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment of that court reversing the judgment of the trial court for the defendant in each of these cases and in favor of the Commonwealth of Pennsylvania convicting in pursuance of the special verdict said defendants severally of a violation of a statute of said state prohibiting the sale of oleomargarine, and remanding the

NOTE.—*As to implied warranty on sale of food,*—see note to McQuaid v. Ross (Wis.) 22 L. R. A. 195.

As to prohibition of sale of oleomargarine,—see note to Com. v. Miller (Pa.) 6 L. R. A. 633.

As to liability of vendor in cases of tort for sale of unwholesome food or drug; personal damages from negligent sale of drug; provisions sold to a consumer,—see note to Craft v. Parker (Mich.) 21 L. R. A. 139.

As to power of Congress to regulate commerce,—see note to State, Corwin, v. Indiana & O. Oil, Gas & Min. Co. (Ind.) 6 L. R. A. 579.

As to state tax or license as affecting commerce,—see note to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366.

cases for sentence. The cases were similar and the three cases were argued together. *Judgments of the Supreme Court reversed*, and the cases remanded for further proceedings.

See same case below, *Com.* v. *Paul*, 170 Pa. 284 [30 L. R. A. 396].

Statement by Mr. Justice **Peckham:**

[2] *The questions in these three cases are the same, and they arise out of the selling of certain packages of oleomargarine.

The plaintiffs in error were indicted for and convicted of a violation of a statute of Pennsylvania prohibiting such sale. The act was passed on the 21st of May, 1885, and is to be found in the volume of the laws of Pennsylvania for that year, page 22. It provides as follows:

"That no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food."

A violation of the act is made a misdemeanor and punishable by fine and imprisonment.

The jury found a special verdict in each case. The only difference between the facts stated in the verdict in number 86 and those contained in the other cases is that in the latter the package sold was 10 pounds instead of 40 pounds and was sold by the plaintiffs in error in those cases as agents of a different principal, carrying on the same kind of business in the state of Illinois, and the package was sold to a different person and upon a different date.

[3] *The following facts were set out in the special verdict in number 86:

"(1) The defendant, George Schollenberger, is a resident and citizen of the commonwealth of Pennsylvania, and is the duly authorized agent in the city of Philadelphia of the Oakdale Manufacturing Company of Providence, Rhode Island.

"(2) The said Oakdale Manufacturing Company is engaged in the manufacture of oleomargarine in the said city of Providence and state of Rhode Island, and as such manufacturer has complied with all the provisions of the act of Congress of August 2, 1886, entitled 'An Act Defining Butter; also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine.'

"(3) The said defendant, as agent aforesaid, is engaged in business at 219 Callowhill street, in the city of Philadelphia, as wholesale dealer in oleomargarine, and was so engaged on the 2d day of October, 1893, and is not engaged in any other business, either for himself or others.

"(4) The said defendant, on the 1st day of July, 1893, paid to the collector of internal revenue of the first district of Pennsylvania the sum of four hundred and eighty dollars as and for a special tax upon the business, as agent for the Oakdale Manufacturing Company, in oleomargarine, and obtained from said collector a writing in the words following:

Stamp for $480 per year. No. A 434.	United States internal revenue.	Special tax, $480 per year. No. A 434.

Received from George Schollenberger, agent for the Oakdale Manufacturing Company, the sum of four hundred and eighty dollars for special tax on the business of wholesale dealer in oleomargarine, to be carried on at 219 Callowhill street, Philadelphia, state of Pennsylvania, for the period represented by the coupon or coupons hereto attached.

Dated at Philadelphia, Pa., July first, 1893.

[Seal.] William H. Doyle,
$480. Collector, First District of Penna.

*"The following clauses appear on the margin of the above: [4]

"'This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any state for carrying on the said business within such state, and does not authorize the commencement nor the continuance of such business contrary to the laws of such state or in places prohibited by a municipal law. See § 3243, Revised Statutes, U. S.

"'Severe penalties are imposed for neglect or refusal to place and keep this stamp conspicuously in your establishment or place of business. Act of August 2, 1886.'

"Attached to this were coupons for each month of the year in form as follows:

"'Coupon for special tax on wholesale dealer in oleomargarine for October, 1893.'

"(5) On or before the said second day of October, 1893, the said Oakdale Manufacturing Company shipped to the said defendant, their agent aforesaid, at their place of business in Philadelphia, a package of oleomargarine separate and apart from all other packages, being a tub thereof containing forty pounds, packed, sealed, marked, stamped, and branded in accordance with the requirements of the said act of Congress of August second, 1886. The said package was an original package, as required by said act, and was of such form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant. Said packages forming said consignment were unloaded from the

cars and placed in defendant's store and then offered for sale as an article of food.

"(6) On the said second day of October, 1893, in the said city of Philadelphia, at the place of business aforesaid, the said defendant, as wholesale dealer aforesaid, sold to James Anderson the said tub or package mentioned in the foregoing paragraph, the oleomargarine therein contained remaining in the original package, being the same package, with seals, marks, stamps, and brands unbroken, in which it was packed by the said manufacturer in the said city of Providence, Rhode Island, and thence transported into the city of Philadelphia and delivered by the carrier to the defendant; and the said tub was not broken or opened on the said premises of the said defendant, and as soon as it was
[5] purchased by the said James *Anderson it was removed from the said premises.

"(7) The oleomargarine contained in said tub was manufactured out of an oleaginous substance not produced from unadulterated milk or cream, and was an article designed to take the place of butter, and sold by the defendant to James Anderson as an article of food; but the fact that the article was oleomargarine and not butter was made known by the defendant to the purchaser, and there was no attempt or purpose on the part of the defendant to sell the article as butter, or any understanding on the part of the purchaser that he was buying anything but oleomargarine, and the said oleomargarine is recognized by the said act of Congress of August 2, 1886, as an article of commerce.

"(8) The above transaction specifically found by the jury is one of many transactions of like character made by the defendant during the last two years."

Upon this special verdict the trial court directed judgment to be entered for the defendant. The case was taken by the commonwealth to the supreme court of the state, where, after argument, the judgment was reversed and judgment was entered in favor of the commonwealth, and the record remanded that sentence might be imposed by the court below. The plaintiffs in error have brought these judgments of conviction before this court for review by virtue of writs of error.

The opinion of the supreme court of the state is to be found reported under the name of *Commonwealth* v. *Paul,* in 170 Pa. 284 [30 L. R. A. 396].

Messrs. **William D. Guthrie,** *Richard C. Dale, Henry R. Edmunds,* and *Albert H. Veeder* for plaintiffs in error.

Mr. **John G. Johnson** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

Counsel in behalf of the commonwealth rests the validity of the statute in question upon two principal grounds:

(1) That oleomargarine is a newly invented or discovered article, and that each state has the right in the case of a newly invented or discovered food product to determine for its citizens the question whether it is wholesome and nondeceptive, and neither the Congress of the United States nor the legislatures of other states can deprive it of this right, and that being such newly discovered article it does not belong to the class universally recognized as articles of commerce, and hence the legislation of Pennsylvania does not regulate or affect commerce; that nondiscriminative legislation enacted in good faith for the protection of health and the prevention of deception, not hampering the actual transportation of merchandise, is not presumptively void but is conclusively valid.

(2) That if the right of citizens of another state to send oleomargarine into the commonwealth of Pennsylvania be admitted, it can only be introduced in original packages suitable for wholesale trade, and where the article imported is intended and used for the supply of the retail trade or is sold by retail directly to the consumer, the package in which it is imported from another state is not an "original package" within the protection of the interstate commerce provision of the Constitution of the United States.

These are the main grounds upon which the conviction is sought to be sustained. The supreme court of the state upheld the statute upon the ground that it was a legitimate exercise of the police power of the state not inconsistent with the right of the owner of the product to bring it within the state in appropriate *packages suitable for sale to the whole- [7]
sale dealer and not intended for sale at retail by the importer to the consumer, and that in the cases under consideration the packages were not wholesale original packages and their sale amounted to a mere retail trade.

Upon the first ground for sustaining the conviction in these cases the argument upon the part of the commonwealth runs somewhat as follows: It may be admitted that actually pure oleomargarine is not dangerous to the public health, but whether it be pure depends upon the method of its manufacture, and its purity cannot be ascertained by any superficial examination, and any certain and effective supervision of the method of its manufacture is impossible. It is manufactured to imitate in its appearance butter, with a view to deceiving the ultimate consumer as to its character, and this deception cannot be avoided by coverings, labels, or marks upon the product; the legislature of Pennsylvania was therefore so far justified in protecting its citizens against oleomargarine by prohibiting its sale; that the legislation in question does not discriminate in favor of the citizens of Pennsylvania or in any manner against any particular state or any particular manufacturer of the article, and, as there is nothing in the case tending to prove the contrary, it must be assumed that the legislation was enacted in good faith for the protection of the health of the citizens and for the prevention of deception, and as such legislation did not hamper the actual transportation of merchandise, the statute must be held to be within the power of the legislature to enact, and is therefore valid; at all events,

the state has a right in cases of newly invented food products to determine for its citizens the question whether they are wholesome and nondeceptive, and that oleomargarine is one of that class of products and is necessarily subject to the right of the state, either to regulate or absolutely to prohibit its sale.

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject
[8] is found in the record. *We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

Any legislation of Congress upon the subject must, of course, be regarded by this court as a fact of the first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration. By reference to the statutes we discover that Congress in 1886 passed "An Act Defining Butter, also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine." 24 Stat. at L. 209, chap. 840. In that statute we find that Congress has given a definition of the meaning of oleomargarine and has imposed a special tax on the manufacturers of the article, on wholesale dealers and upon retail dealers therein, and the provisions of the Revised Statutes in relation to special taxes are, so far as applicable, made to extend to the special taxes imposed by the 3d section of the act, and to the persons upon whom they are imposed. Manufacturers are required to file with the proper collector of internal revenue such notices, and to keep such books and conduct their business under such supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. Provision is made for the packing of oleomargarine by the manufacturer in packages containing not less than 10 pounds and marked as prescribed in the act, and it provides that all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in the original stamped packages. A tax of 2 cents per pound is laid upon oleomargarine to be paid by the manufacturer, and the tax levied is to be represented by coupon stamps. Oleomargarine imported from foreign countries is taxed in addition to the import duty imposed on the same an internal revenue tax of 15 cents per pound. Provision is made for warehousing, and a penalty imposed for selling the oleomargarine thus imported if not properly
[9] stamped. Provision is *also made for the appointment of an analytical chemist and microscopist by the Secretary of the Treasury, and such chemist or microscopist may examine the different substances which may be submitted in contested cases, and the Commissioner of Internal Revenue is to decide in such cases as to the taxation, and his decision is to be final. The Commissioner is also empowered to decide "whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, composed of the surgeon general of the army, the surgeon general of the navy and the commissioner of agriculture, and the decisions of this board shall be final in the premises." Provision is also made for the removal of oleomargarine from the place of its manufacture for export to a foreign country without payment of tax or affixing of stamps thereto, and there is a penalty denounced against any person engaged in carrying on the business of oleomargarine who should defraud or attempt to defraud the United States of the tax.

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself.

As to the extent of the manufacture and its commercial nature, it is not improper to refer to the reports of the Secretary of the Treasury, which show that the tax receipts from its manufacture and sale in the United States under the act above mentioned during the nine years, beginning with 1887, amounted to over $10,000,000.

When we come to an inquiry as to the properties of oleomargarine and of what the substance is composed, we find that answers to such inquiries are to be found in the various *encyclopædias of the day, and in the [10]
official reports of the commissioner of agriculture and in the legal reports of cases actually decided in the courts of the country. In brief, every intelligent man knows its general nature, and that it is prepared as an article of food, and is dealt in as such to a large extent throughout this country and in Europe.

Upon reference to the Encyclopædia Britannica it is said that "pure oleomargarine butter is said to contain every element that enters into cream butter, and to keep pure much longer; but there is the defect of not knowing when it is pure or what injurious ingredients, or objectionable processes, may be used in its manufacture by irresponsible parties." The article also says: "We append a comparative analysis of natural and artificial butter, which shows that, when properly made, the latter is a wholesome and satisfactory substitute for the former."

There is contained in the 17th volume of the Encyclopædia Britannica an extract from a report by the secretary of the British em-

bassy at Washington, in 1880, describing the method of obtaining oleomargarine oil. This shows the article was then well known.

In *Ex parte Scott* and others, the circuit court for the eastern district of Virginia (66 Fed. Rep. 45), speaking by Hughes, district judge, said: "It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. . . . It is entering rapidly into domestic use and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a source of revenue. . . . Provincial prejudice against this now staple article of commerce is natural, but a city of the size and prospects of Norfolk as a world's entrepot ought not to be foremost in manifesting such a prejudice."

[11] *In *People* v. *Marx,* 99 N. Y. 377 [52 Am. Rep. 34], which was a prosecution under the New York statute (chap. 202, Laws of 1884) prohibiting the manufacture or sale of oleomargarine, the court of appeals of New York held the act unconstitutional. It appears from the opinion that on the trial of that action on the part of the defendant "it was proved by distinguished chemists that oleomargarine was composed of the same elements as dairy butter. That the only difference between them was that it contained a smaller proportion of fatty substance known as butterine. That this butterine exists in dairy butter only in a small proportion—from three to six per cent. That it exists in no other substance than butter made from milk and it is introduced into oleomargarine butter by adding to oleomargarine stock some milk, cream, or butter, and churning, and when this is done it has all the elements of natural butter, but there must always be a smaller percentage of butterine in the manufactured product than in butter made from milk. The only effect of the butterine is to give flavor to the butter, having nothing to do with its wholesomeness. That the oleaginous substances in the oleomargarine are substantially identical with those produced from milk or cream. Professor Chandler testified that the only difference between the two articles was that dairy butter had more butterine. That oleomargarine contained not over 1 per cent of that substance, while dairy butter might contain four or five per cent, and that if four or five per cent of butterine were added to the oleomargarine, there would be no difference; it would be butter; irrespective of the sources, they would be the same substances. According to the testimony of Professor Morton, whose statement was not controverted or questioned, oleomargarine, so far from being an article devised for purposes of deception in trade, was devised in 1872 or 1873 by an eminent French scientist who had been employed by the French government to devise a substitute for butter." This extract from the opinion in the New York case, speaking of the testimony given before the trial judge, is not quoted for the purpose of proving the facts therein stated, but for the purpose of showing that as *long ago as the time when [12]
that case was decided—June, 1885—the article was then well known as an article of food, and manufactured as a substitute for butter, and we may notice from some of the histories of the article the fact (which is stated in the opinion) that it was first devised as long ago as 1872 or 1873 by a French gentleman who had been employed by the French government to devise a substitute for butter. The article is a subject of export, and is largely used in foreign countries. Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the states and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

In *Minnesota* v. *Barber,* 136 U. S. 313 [34: 455, 3 Inters. Com. Rep. 185], it was held that an inspection law relating to an article of food was not a rightful exercise of the police power of the state if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held in relation to the slaughter of animals whose meat was to be sold as food in the state passing the so-called inspection law. The principle was affirmed in *Brimmer* v. *Rebman,* 138 U. S. 78 [34: 862, 3 Inters. Com. Rep. 485], and in *Scott* v. *Donald,* 165 U. S. 58, 97 [41: 632, 644].

Is the rule altered in a case where the inspection or analysis of the article to be imported is somewhat difficult and burdensome? Can the pure and healthy food product be totally excluded on that account? No case has gone to that extent in this court. The nearest approach to it was the case of *Peirce* v. *New Hampshire,* 46 U. S. 5 How. 504 [12: 256], involving the importation of intoxicating liquors. But in *Leisy* v. *Hardin,* 135 U. S. 100 [34: 128, 3 Inters. Com. Rep. 36], the New Hampshire case was overruled, and it was stated by the present Chief Justice, in speaking for the court, *that "whatever [13]
ever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; al-

though, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

To the same effect, we think, is the case of *Hannibal & St. J. Railroad Company* v. *Husen*, 95 U. S. 465 [24:527], in which it was said that "whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations." The court, therefore, while conceding the right of the state to enact reasonable inspection laws to prevent the importation of diseased cattle, held the law of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the act, even though they were perfectly healthy and sound.

The court said that a state could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy, and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure.

[14] *We do not think the fact that the article is subject to be adulterated by dishonest persons in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state through its legislature to forbid the introduction of the unadulterated article into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopædias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purposes the state cannot absolutely prohibit the introduction within the state of an article of commerce like pure oleomargarine. It has ceased to be what counsel for the commonwealth has termed it, a newly discovered food product. An article that has been openly manufactured for nearly a quarter of a century, where the ingredients of the pure article are perfectly well known, and have been known for a number of years, and where the general process of manufacture has been known *for an equal period, [15]
cannot truthfully be said to be a newly discovered product within the proper meaning of the term as here used. The time when a newly discovered article ceases to be such cannot always be definitely stated, but all will admit that there does come a period when the article cannot be so described. In this particular case we have no difficulty in holding that oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients, and effect upon the health are and have been for many years as well known as almost any article of food in daily use. Therefore, if we admit that a newly discovered article of food might be wholly prohibited from being introduced within the limits of a state, while its properties, whether healthful or not, were still unknown, or in regard to which there might still be doubt, yet this is not the case with oleomargarine. If properly and honestly manufactured it is conceded to be a healthful and nutritious article of food. The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the state. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the state is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question.

It is claimed, however, that the very statute under consideration has heretofore been

held valid by this court in the case of *Powell* v. *Pennsylvania,* 127 U. S. 678 [32: 253]. That case did not involve rights arising under the commerce clause of the Federal Constitution. The article was manufactured and sold within the state, and the question was one as to the police power of the state
[16] acting upon a subject always *within its jurisdiction. The plaintiff in error was convicted of selling within the commonwealth two cases containing 5 pounds each of an article of food designed to take the place of butter, the sale having taken place in the city of Harrisburg, and it was part of a quantity manufactured in and, as alleged, in accordance with the laws of the commonwealth. The plaintiff in error claimed that the statute under which his conviction was had was a violation of the 14th Amendment to the Constitution of the United States. This court held that the statute did not violate any provision of that amendment, and therefore held that the conviction was valid.

The *Powell Case* did not and could not involve the rights of an importer under the commerce clause. The right of a state to enact laws in relation to the administration of its internal affairs is one thing, and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the state and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the state of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other states arising under the commerce clause of that instrument.

Referring what is said in the opinion in *Powell's Case* to the facts upon which the case arose, and in regard to which the opinion was based and the case decided, there is nothing whatever inconsistent with that opinion in holding, as we do here, that oleomargarine is a legitimate subject of commerce among the states, and that no state has a right to totally prohibit its introduction in its pure condition from without the state under any exercise of its police power. The legislature of the state has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the state or to entirely forbid such manufacture and sale, so long as the legisla-
[17] tion is confined to the manufacture *and the sale within the state. Those are questions of public policy which, as was said in the case of Powell, belong to the legislative department to determine; but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the state of an article like oleomargarine, properly and honestly manufactured.

The *Powell Case* was, in the opinion of the court, governed in its important aspect by that of *Mugler* v. *Kansas,* 123 U. S. 623 [31: 205], in which case it was said that it did not involve any question arising under the commerce clause of the Constitution of the United States. The last cited case was followed in *Kidd* v. *Pearson,* 128 U. S. 1 [32: 346, 2 Inters. Com. Rep. 232].

Nor is the question determined adversely to this view in the case of *Plumley* v. *Massachusetts,* 155 U. S. 462 [39:223]. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of the same, and the statute contained a proviso that nothing therein should be "construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." This court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, *but manufactured in imitation of yellow butter produced from pure unadulterated milk or cream, was valid.* Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form and in such manner as would advise the consumer of the real character was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice in such matters a fraud upon the general public; that the statute seeks to suppress false pretenses and to promote fair dealing in the
*sale of an article of food, and that it compels [18]
the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term "commerce among the states" did not mean a recognition of a right to practice a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the Constitution of the United States did not take from the states the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever state manufactured, and that that instrument did not secure to anyone the privilege of committing a wrong against society.

It will thus be seen that the case was based entirely upon the theory of the right of a state to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the state was upheld. The question of the right to totally prohibit the introduction from another state of the pure article did not arise, and, of course, was not passed upon. The act of Congress, above cited, was referred to by the counsel for the appellant in the *Plumley Case* as furnishing a full system of legisla-

tion upon the subject, and he claimed that it excluded any legislation on the same subject by the state, but it was held that there was no ground to suppose that Congress intended by that enactment to interfere with the exercise by the states of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine, and, as § 3243 of the Revised Statutes was referred to in the act, it was held that the section was incorporated in the act for the purpose of making it clear that Congress did not intend to restrict the power of the states over the subject of the manufacture and sale of oleomargarine within their respective limits.

The taxes prescribed by that act were held to have been imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine within any
[19] state which lawfully *forbade such manufacture or sale, or to disregard any regulations which a state might lawfully prescribe in reference to that article. It was also held that the act of Congress was not intended as a regulation of commerce among the states.

By the reference which we have already made to this statute we have not intended to claim that it was a regulation of commerce among the states further than the provisions of the act distinctly applied to its manufacture and sale. We refer to it for the purpose of showing that the article itself was therein recognized as a proper and lawful subject of commerce with foreign nations and among the several states under such lawful regulations as the state might choose to impose. We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular state simply because the state may choose to decide that, for the purpose of preventing the importation of an impure or adulterated article, it will not permit the introduction of the pure and unadulterated article within its borders upon any terms whatever.

We are therefore of opinion that the first ground for upholding the conviction in these cases cannot be sustained.

Nor do we think the conviction can be sustained upon the ground taken in the opinion of the supreme court of Pennsylvania.

The question in regard to packing the oleomargarine first arose in the case of *Commonwealth* [*Philadelphia County*] v. *Schollenberger*, 156 Pa. 201 [22 L. R. A. 155]. The defendant in that case was an agent of a nonresident manufacturer of oleomargarine, and he sold at his store in Pennsylvania a package of the article weighing eighty pounds, made and stamped and branded in Rhode Island for use as an article of food. It was held that the case did not show that the sales were made in the original package of commerce. And it was said that a jury would be justified in finding that the mode of putting up the package was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful intrastate retail trade. But the special verdict in this case shows what the court *said was lacking in the case just cited, for it [20]
appears in the verdict that the package in which the oleomargarine was sold was an original package, as required by the act of Congress, and was of such "form, size, and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size, and weight were adopted in good faith, and not for the purpose of evading the laws of the commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment shipped by the said company to the said defendant." It also appears from the special verdict that the defendant was engaged in business in the city of Philadelphia as a wholesale dealer in oleomargarine as agent for the manufacturer; that he had paid the special tax upon the business as a wholesale dealer, and had otherwise complied with all the requirements of the act of Congress, and the article was openly sold as oleomargarine, and that fact was made known to the purchaser, and he understood that he was buying oleomargarine and as soon as the tub was purchased it was removed unbroken from the place of sale by the purchaser thereof.

Upon the facts found in the special verdict, it is said in the opinion of the court below (170 Pa. 291 [30 L. R. A. 396]) that "it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an original package within the proper meaning of that phrase. The nonresidence of the manufacturer does not play any important part in this case. for he comes into this state to establish a 'store' for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store. selling its stock of goods to its customers for their consumption, from its own shelves; and unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.
. . . The *question . . . is whether [21]
a package intended and used for the supply of the retail trade is an 'original package,' within the protection of the interstate commerce cases."

What are the rights of one engaged in interstate commerce in regard to the introduction of a lawful article of commerce into a state? Those rights have been declared by various decisions of this court, some of them made at a very early date, and coming down to the present time.

In the leading case of *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 193 [6: 23, 69], it was said by Marshall, Chief Justice, that the commerce clause extends to every species of commercial intercourse among the several states, and that it does not stop at the external

boundary of a state, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

In *Brown* v. *State of Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], it was stated that this power to regulate commerce could not be stopped at the external boundary of a state, but must enter its interior, and that if the power reached the interior of the state and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that "sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce."

Years after the decision of the last case and after many other decisions had been made upon the general subject of the commerce clause, this court in *Bowman* v. *Chicago & Northwestern Railway Company*, 125 U. S. 465 [31: 700, 1 Inters. Com. Rep. 823], held that the state could not for the purpose of protecting its people against the evils of intemperance pass an act which regulated commerce by forbidding any common carrier to bring intoxicating liquors into the state from another state or territory, excepting upon conditions mentioned in the act. Such act was held to be repugnant to the Constitution of the United States as affecting inter-
[22] state*commerce in an essential and vital part. But whether the right to transport an article of commerce from one state to another included by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminated was not decided. In *Brown* v. *Maryland, supra*, it was said that the right of transportation did include the right to sell, as to foreign commerce, and in the course of his opinion Chief Justice Marshall said that the conclusion would be the same in the case of commerce among the states; but as it was not necessary to express any opinion upon the point, it was simply held in the *Bowman Case* that the power to regulate or forbid the sale of a commodity after it had been brought into a state does not carry with it the right and power to prevent its introduction by transportation from another state.

The case of *Leisy* v. *Hardin*, 135 U. S. 100 [34: 128, 3 Inters. Com. Rep. 36], went a step further than the *Bowman Case*, and held that the importer had the right to sell in a state into which he brought the article from another state in the original packages or kegs, unbroken and unopened, notwithstanding a statute of the state prohibiting the sale of such articles except for the purposes therein named and under a license from the state. Such a statute was held to be unconstitutional as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several states. Mr. Chief Justice Fuller, in speaking for the court, said: "Under our decision in *Bowman* v. *Chicago & N. W. R. R. Co. supra*, they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure or any other action, in prohibition of importation and sale by the foreign or nonresident importer." The right of the state to prohibit the sale in the original package was denied in the absence of any law of Congress upon the subject permitting the state to prohibit such sale. *There is no such [23]
law of Congress relating to articles like oleomargarine. Such articles are therefore in like condition as were the liquors in the case above cited.

Subsequent to the decision in the *Leisy Case* and on the 8th of August, 1890 (26 Stat. at L. 313, chap. 728), Congress passed an act commonly known as the Wilson act, which provided that upon the arrival in any state or territory of the intoxicating liquors transported therein they should be subject to the operation and effect of the laws of the state or territory enacted in the exercise of its police power to the same extent and in the same manner as though such liquors had been produced in such state or territory, and that they should not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This was held to be a valid and constitutional exercise of the power conferred upon Congress. *Re Rahrer, Petitioner* [*Wilkerson* v. *Rahrer*] 140 U. S. 545 [35: 572]. In the absence of Congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state.

The case of *Emert* v. *Missouri*, 156 U. S. 296 [39: 430, 5 Inters. Com. Rep. 68], involved the validity of a statute of Missouri providing that peddlers of goods, going from place to place within the state to sell them, should take out and pay for licenses. The statute was held not to violate the commerce clause of the Constitution of the United States because it made no discrimination between residents or products of the state and those of other states. The conviction of the plaintiff in error for a violation of the statute was upheld, although he was an agent of a corporation which manufactured the property in another state and sent it to him to sell as its agent. It was held to be within the police power of the state to regulate the occupation of itinerant peddlers and to compel them to obtain licenses to practice their trade, and such power had been exerted from the earliest times. The remark of Chief Justice Marshall in *Brown* v. *Maryland, supra*, was quoted, that "the right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the *state to make sales in a pecul- [24]

iar way." Page 313 [39: 434]. It was the privilege of selling in a peculiar way, as a peddler, which was licensed in the *Emert Case*, and such a person, it was therein decided, could properly be made to pay a license for selling in that way an article manufactured in another state and sent into Missouri, as well as for selling in the same way articles manufactured in Missouri, so long as there was no discrimination between the two classes of goods.

The *Emert Case* does not overrule or affect the cases above cited as to the right to sell.

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten-pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the state. *Waring* v. *The Mayor* [*Waring* v. *Mobile*], 75 U. S. 8 Wall. 110–122 [19: 342–346]. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different states in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and
[25] does not substantially *prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The act of the legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid. *The judgments are therefore reversed*, and the cases remanded to the supreme court of Pennsylvania for further proceedings not inconsistent with this opinion.

Mr. Justice **Gray**, with whom concurred Mr. Justice **Harlan**, dissenting:

Mr. Justice Harlan and myself cannot concur in this judgment, and will state, as briefly as may be, some of the grounds of our dissent. The question at issue appears to us to be so completely covered by two or three recent judgments of this court, as to make it unnecessary to cite other authorities.

As has been said by this court, speaking by the present chief justice: "The power of the state to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided, expressly or by implication, to the national government." *Rahrer's Case* [*Wilkerson* v. *Rahrer*], 140 U. S. 545, 554 [35: 572, 574].

The statute of Pennsylvania of May 21, 1885, under which the plaintiffs in error were indicted and convicted for selling in Pennsylvania oleomargarine in the original packages *in which it had been sent to them [26]
from other states, provides that "no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same, as an article of food." Penn. Stat. 1885, chap. 25.

In *Powell* v. *Pennsylvania*, 127 U. S. 678 [32: 253], the defendant was indicted, under this very statute, for selling, and for having in his possession with intent to sell, oleomargarine manufactured in Pennsylvania before the passage of the statute; and, at the trial, in order to show that the statute was not a lawful exercise of the police power of the state, offered to prove that the articles which he sold, and those which he had in his possession for sale, were, in fact, wholesome and nutritious, and were part of a large quantity manufactured by him before the passage of the statute, by the use of land, buildings, and machinery, purchased by him at great expense for carrying on this business, and the value of which would be destroyed if he were prevented from continuing it. The evidence offered was excluded, and the defendant was convicted; and his conviction was affirmed by the supreme court of Pennsylvania, and by this court upon writ of error.

This court in its opinion upholding this statute as a constitutional and valid exercise of the police power of the state, after mentioning the defendant's offer to prove that the articles which he sold or had in his possession for sale were in fact wholesome

and nutritious, proceeded as follows: "It is entirely consistent with that offer, that many, indeed, that most, kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it
[27] must be assumed that *such is the fact. . . Whether the manufacture of oleomargarine or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. . . . The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds, other than those produced from unadulterated milk, or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles." 127 U. S. 684-686 [32: 256, 257].

That decision appears to us to establish that the courts cannot take judicial cognizance, without proof, either that oleomargarine is wholesome or that it is unwholesome; and we are unable to perceive how judicial cognizance of such a fact can be acquired by referring to the various opinions which have found expression in scientific publications, or in testimony given in cases before other courts and between other parties.

[28] *Evidence that the articles sold were wholesome and nutritious having been excluded as immaterial, when offered in defense in *Powell's Case*, it necessarily follows that the commonwealth in the case at bar had no occasion to offer evidence to prove the contrary.

The decision in *Powell's Case* conclusively establishes that the statute in question is a constitutional exercise of the police power of the state, unless it can be considered as affected by the power to regulate commerce, as granted to or exercised by Congress under the Constitution of the United States.

The act of Congress of August 2, 1886, chap. 840, imposing internal revenue taxes upon manufacturers and sellers of oleomargarine, and defining what shall be considered as oleomargarine for the purposes of that act, expressly provides, in § 3, that § 3243 of the Revised Statutes, so far as applicable, shall apply to such taxes and persons. 24 Stat. at L. 209. By § 3243 of the Revised Statutes, "the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any state from placing a duty or tax on the same trade or business, for state or other purposes."

As was said by this court in *Plumley* v. *Massachusetts*, 155 U. S. 461 [39:223]: "It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the states over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any state which lawfully forbade such manufacture or sale, or to disregard any regulations which a state might lawfully prescribe in reference *to that article [29]
. . . Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the states. Its provisions do not have special application to the transfer of oleomargarine from one state of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the states of any authority they possess of preventing deception or fraud in the sales of property within their respective limits." 155 U. S. 466, 467 [39: 225]. "If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not

show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states." 155 U. S. 472 [39: 227].

In *Plumley's Case*, it was accordingly adjudged by this court, affirming the judgment of the supreme judicial court of Massachusetts, that a statute of Massachusetts, imposing a penalty on the manufacture, sale, offering for sale, or having in possession with intent to sell, "any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk, or cream from the same, which shall be in imitation of yellow butter produced from pure and unadulterated milk, or cream from the same," was constitutional and valid, as applied to sales in Massachusetts of oleomargarine made in another state, artificially colored so as to look like yellow butter, and imported in the packages in which it was sold.

The necessary result of the decisions in *Powell's Case* and in *Plumley's Case* and of the reasoning upon which those decisions
[30] *were founded, and by which alone they can be justified, appears to us to be that each state may, in the exercise of its police power, without violating the provisions of the Constitution and laws of the United States concerning interstate commerce, make such regulations relating to all sales of oleomargarine within the state, even in original packages brought from another state, as the legislature of the state may deem necessary to protect the people from being induced to purchase articles, either not fit for food, or differing in nature from what they purport to be; that the questions of danger to health, and of likelihood of fraud or deception and of the preventive measures required for the protection of the people, are questions of fact and of public policy, the determination of which belongs to the legislative department, and not to the judiciary; and that, if the legislature is satisfied that oleomargarine is unwholesome, or that, in the tubs, pots, or packages in which it is commonly offered for sale, it looks so like butter that the only way to protect the people against injury to health, in the one case, or against fraud or deception, in the other, is to absolutely prohibit its sale, it is within the constitutional power of the legislature to do so.

CLARENCE E. COLLINS, *Plff. in Err.*,
v.
STATE OF NEW HAMPSHIRE.

(See S. C. Reporter's ed. 30–34.)

Power of a state—purpose of a statute—restriction of commerce—sale of oleomargarine—statute of New Hampshire.

1. Where the state has not the power to absolutely prohibit the sale of an article of commerce, like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the New Hampshire statute.

2. A state law which necessitates and provides for adulteration of an article of commerce, and enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to import and sell it, is an unlawful restriction of commerce.

3. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

4. Although under the wording of such statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.

5. The statute of New Hampshire making it unlawful to sell or keep in possession, with intent to sell in said state, any oleomargarine unless it is of a pink color, when applied to oleomargarine imported into that state from another state for sale, is invalid.

[No. 17.]

Argued March 23, 24, 1898. Decided May 23, 1898.

IN ERROR to the Supreme Court of the State of New Hampshire to review the judgment of that court sustaining a conviction of Clarence E. Collins of a violation of the statute of that state prohibiting the sale of oleomargarine unless it is of a pink color. *Reversed*, and case remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **William D. Guthrie,** *Richard C. Dale, Henry R. Edmunds,* and *Albert H. Veeder* for plaintiff in error.

No brief filed for defendant in error but *Mr.* **John G. Johnson** was for the defendant in error in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1 *(ante,* 49), which was argued with this case.

Mr. Justice **Peckham** delivered the opinion of the court:

This case comes here by virtue of a writ of error to the supreme court of the state of New Hampshire, by which we are called upon to review the judgment of that court sustaining a conviction of the plaintiff in error in the court of first instance of a violation of the public statutes of the state, prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color. The law is to be found in §§ 19 and 20, chap. 127, Public Statutes 1891. The two sections are set forth in the margin.†

† Sec. 19. It shall be unlawful to sell, offer for sale, or keep in possession with intent to sell, in this state, any substance or compound made wholly or in part of fats, oils, or grease, not produced from milk or cream, in imitation of, or as a substitute for, butter or cheese, unless the same is contained in tubs, firkins, boxes, or other packages, each of which has upon it, to indicate the character of its contents, the words "Adulterated butter," "Oleomargarine," or "Imitation cheese" as the case may be, in plain Roman letters not less than one half inch in length, and so placed and made or attached

The plaintiff in error was convicted of selling a package of [32] *oleomargarine not of pink color, in violation of the statute, and was sentenced to pay a fine of $100, and to pay the costs of prosecution, and to stand committed until sentence was performed.

The following are the facts appearing in the record:

"The respondent is agent at Manchester of Swift & Co., an Illinois corporation, having its principal place of business in Chicago. The corporation manufactures oleomargarine and puts it up in packages in Chicago, and distributes the packages from there to different places—one of which is Manchester—where it maintains stores and sells the article at wholesale in the original packages. It has paid the special United States taxes imposed by the act of Congress of August 2, 1886 (Supp. to R. S. of U. S., v. 1, p. 505), and has complied with all other requirements of that act in respect to the manufacture and sale at wholesale of oleomargarine. The article has the color of butter, the same coloring matter being used to color it that is frequently used to color butter, and is made wholly or in part of fats, oils, or grease not produced from milk or cream, in imitation of or as a substitute for butter. It is not manufactured in this state. The respondent as such agent sold in Manchester, at wholesale, at the store of the company, a package of said article weighing 10 pounds in the form it was put up in Chicago by his principal. The provisions of § 19, chap. 127, Public Statutes of this state, were complied with, so far as the package was concerned, except the color of its contents was not pink. The oleomargarine sold was the oleomargarine of commerce as the same is known and dealt in as an article of food.

"The respondent claimed that upon these facts he was not guilty, because the statute of this state is in contravention of the Constitution of the United States and its amendments and of the laws of Congress; otherwise he admitted his guilt. The court ruled against the respondent as to the above claim, and he excepted."

It was stated on the argument that since the conviction of the plaintiff in error the statute above cited had been repealed, but that such repeal did not affect the conviction,
[33] because of the *provision made in the New Hampshire statutes that "no suit or prosecution, pending at the time of the repeal of an act, for any offense committed or for the recovery of a penalty or forfeiture incurred, under the act so repealed, shall be affected by such repeal." We are therefore called upon to determine the validity of the conviction.

The plaintiff in error claims that the statute under which he was indicted and convicted is void, because in contravention of the Constitution of the United States, which gives power to Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

We think this case comes within the principle of the cases just decided regarding the statute of the commonwealth of Pennsylvania prohibiting the introduction of oleomargarine into that commonwealth. This statute is in its practical effect prohibitory. It is clear that it is not an inspection law in any sense. It provides for no inspection, and it is apparent that none was intended. The act is a mere evasion of the direct prohibition contained in the Pennsylvania statute, and yet, if enforced, the result, within the state, would be quite as positive in the total suppression of the article as is the case with the Pennsylvania act.

In a case like this it is entirely plain that if the state have not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute *must be taken into [34]
consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York* [*Henderson* v. *Wickham*], 92 U. S. 259 [23: 543]; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, at 462 [30: 237, 241]. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.

If this provision for coloring the article were a legal condition, a legislature could

---

that they can be readily seen and read and cannot be easily defaced; and if the substance or compound is a substitute for cheese, unless the cloth surrounding it has a like inscription; and if it is a substitute for butter, unless it is of a pink color. When any such substance or compound is sold in less quantities than the original packages contain, the seller shall deliver to the purchaser with it a label bearing the words indicating its character as above, in like letters.

Sec. 20. If any person shall sell, or offer for sale, or keep in possession with intent to sell, in this state, any substance or compound of the kinds described in the preceding section in a manner that is made unlawful by said section, or shall sell, offer for sale, or keep in possession with intent to sell, any such substance or compound without disclosing its true character, he shall be fined not more than one hundred dollars, or be imprisoned not more than sixty days, or both.

not be limited to pink in its choice of colors. The legislative fancy or taste would be boundless. It might equally as well provide that it should be colored blue or red or black. Nor do we see that it would be limited to the use of coloring matter. It might, instead of that, provide that the article should only be sold if mixed with some other article which, while not deleterious to health, would nevertheless give out a most offensive smell. If the legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor would not be just as valid as one prescribing the particular color. The truth is, however, as we have above stated, the statute in its necessary effect is prohibitory, and therefore upon the principle recognized in the Pennsylvania cases it is invalid.

The judgment of the Supreme Court of New Hampshire is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice **Harlan** and Mr. Justice **Gray** dissented.

---

[35] GEORGE POUNDS, *Plff. in Err.,*
v.
UNITED STATES.

(See S. C. Reporter's ed. 35-38.)

Indictment for concealing distilled spirits—separation of jury.

1. An indictment in the language of U. S. Rev. Stat. § 3296, charging the concealment of distilled spirits on which the tax had not been paid, which had been removed to a place other than the distillery warehouse provided by law, is sufficiently certain and sufficiently alleges the existence of a warehouse provided for such spirits.

2. A claim that a jury separated before the verdict was returned is ineffectual, where that fact does not appear on the record, but it does appear that a sealed verdict was returned, under agreement of counsel for both parties, in open court and in the presence of the defendant.

[No. 298.]

Submitted May 6, 1898. Decided May 23, 1898.

IN ERROR to the District Court of the United States for the Northern District of Alabama to review a judgment convicting George Pounds for concealing distilled spirits on which the tax had not been paid. *Affirmed.*

Statement by Mr. Justice **McKenna:**

The indictment under which the defendant (plaintiff in error) was tried contained fifteen counts. He was convicted on the sixth count, which read as follows:

"The grand jurors aforesaid, upon their oaths aforesaid, do further present, that, at the time and place and within the jurisdiction aforesaid, the said George Pounds unlawfully did conceal and aid in the concealment of distilled spirits on which the tax had not been paid, which said spirits had been removed to a place other than the distillery warehouse provided by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The count was drawn under § 3296 of the Revised Statutes, which provides that:

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals, or aids in the concealment of, any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids *in the [36] concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

After the verdict, and before the judgment, the plaintiff in error filed his motion in arrest of judgment, as follows:

"Now comes the defendant after the rendition of the verdict of the jury finding him guilty as charged in the sixth count of the indictment and before judgment and sentence, and moves the court to arrest the judgment in this case, upon the ground that the sixth count of the indictment is too vague and uncertain to authorize a judgment and sentence against the defendant."

Afterwards an amended motion in arrest of judgment was filed, as follows:

"By leave of the court first had and obtained the defendant amends his motion in arrest of judgment by adding the following grounds:

"First. The said sixth count of the indictment fails to show that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed.

"Second. That the jury separated before the verdict of the jury was returned into court."

The overruling of this motion is assigned as error.

Mr. **J. A. W. Smith** for plaintiff in error.

Mr. **James E. Boyd**, Assistant Attorney General, for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

Section 3271 of the Revised Statutes provides that "every distiller shall provide, at his own expense, a warehouse, to be *situated [37] on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture

until the tax thereon shall have been paid; . . . and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper, assigned thereto by the Commissioner."

Section 3287 provides that all distilled spirits shall be drawn from the receiving cisterns into casks of a designated capacity and the quantity of spirits marked thereon, "and shall be immediately removed into the distillery warehouse," and stamps designating the quantity of spirits shall be applied thereto.

Other sections provide that no distilled spirits upon which the tax has been paid shall be stored or allowed to remain on any distillery premises, and such spirits found in a cask containing 5 gallons or more without having the stamp required by law shall be forfeited.

To secure the enforcement of this provision, § 3296 was enacted.

Plaintiff in error says:

"It seems clear that section 3296 of the Revised Statutes intended to provide a punishment for a distiller who had complied with the various provisions of chapter four of the Revised Statutes, and had provided a warehouse as required by section 3271, and then concealed or aided in the concealment of distilled spirits which had been removed, the tax not having been paid, to a place other than the distillery warehouse so provided."

And it hence claimed that the indictment is too uncertain to sustain the judgment, because it does not inform the defendant that a warehouse was provided in which the spirits which he is charged to have concealed should have been stored until the tax was paid. Undoubtedly, the statute was intended to punish a distiller who violated its provisions. It was also intended to punish any-
[38] one else who did, and the *offense could be committed by a removal of spirits from the premises before storage in the distillery warehouse or by concealment of the spirits so removed. And it is this concealment which the indictment charges, and it sufficiently alleges the existence of a warehouse. It also alleges that the tax had not been paid. The offense was purely statutory. In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter. *United States* v. *Simmons*, 96 U. S. 360 [24: 819]; *United States* v. *Britton*, 107 U. S. 655 [27:520].

One of the acts which is made an offense by § 3296 is the concealment of distilled spirits on which the tax has not been paid, removed to a place other than the distillery warehouse provided by law. The indictment charges in the language of the statute the performance of that act at a particular time and place. It was therefore sufficiently certain.

As to the second ground of motion in arrest of judgment, it is enough to say that there is nothing in the record to show that the jury separated before the verdict was returned into court, but the record does show that a sealed verdict was returned by the jury by agreement of counsel for both parties in open court and in the presence of the defendant. This verdict was rightly received and recorded. *Commonwealth* v. *Carrington*, 116 Mass. 37.

The judgment is affirmed.

WALTER H. HARRISON, *Plff. in Err.*,
v.
FRANKLIN J. MORTON.

Review of state judgment—when this court will not review it.

(See S. C. Reporter's ed. 38-47.)

1. To give this court jurisdiction to review a state judgment, a Federal question must have been presented to the state court and decided adversely to the party claiming the Federal right, or it must appear that the judgment could not have been rendered without deciding such question.
2. This court will not review a state judgment, although a Federal question was decided adversely to the plaintiff in error, if another question, not Federal, was also raised and decided against him, the decision of which is sufficient to sustain the judgment.

[No. 245.]

Argued May 2, 3, 1898. Decided May 23, 1898.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment of that court affirming the judgment of the state trial court in favor of the defendant, Franklin J. Morton, in an action brought by Walter H. Harrison, plaintiff, to recover damages for breach of contract for the sale of certain patent rights. *Dismissed.*

See same case below, 83 Md. 456.

Statement by Mr. Justice **McKenna:**

This suit was brought by the plaintiff in error Harrison against the defendant in error on the 8th of February, 1895, in the Baltimore city court, to recover the sum of $300,000 damages for the breach of a contract under seal for the sale of certain patent rights.

Under the alleged contract the plaintiff in error sold, and the defendant in error bought

NOTE.— *As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,*—see notes to Martin v. Hunter, 4 : 97 ; Matthews v. Zane, 2 : 654 ; and Williams v. Norris, 6 : 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7 : 679, and Commercial Bank v. Buckingham, 12 : 169.

and agreed to pay for, a certain machine, method, and device for making barrels and kegs, and all his right, title, and interest in certain pending letters patent therefor, when issued, at and for the price of $300,000, whereof $100,000 were to be paid in cash within ten days after the issuing of letters patent, and the remaining $200,000 were to be paid in the full-paid, nonassessable shares of a corporation, to be incorporated and organized by the defendant in error Morton under the laws of Maryland, with a capital stock of $500,000.

The pleas were:

First. *Non est factum.*

Second. That the signature of the defendant in error to the alleged agreement was procured by the fraud of the plaintiff in error.

Third. That the signature of the defendant in error was procured by the undue influence of the plaintiff in error.

And also three supplemental pleas on equitable grounds:

1st. That there was no consideration for the alleged agreement.

2d. That at the date of the alleged agree-
[40] ment Harrison *was not the owner of and had no valid title to the machine, method, and device mentioned in the declaration.

3d. That at the time of the alleged assignment of the patent Harrison was not the owner of and had not a valid title to the said patent.

The defendant also filed a plea of set-off, and upon demand for a bill of particulars of such set-off filed a bill of particulars, amounting to thirty-one thousand, seven hundred and ninety-one dollars and fifty-two cents ($31,791.52).

Replications were duly filed and issues joined on all of them.

The case was tried before the judge without a jury.

At the trial the parties asked the court to rule on certain propositions contained in what the record calls "prayers." They were as follows, with the action of the court expressed thereon:

"Plaintiff's First Prayer.

"The plaintiff, by his counsel, prays the court to rule that if it shall find from the evidence that the contract between the plaintiff and defendant, dated December 8, 1894, and read in evidence, was signed and sealed by the plaintiff and defendant, and left in the possession of the defendant as a complete and operative instrument according to its terms, and that in accordance with said contract, shortly after the execution thereof, the plaintiff executed to the defendant the assignment read in evidence of his right to the invention therein mentioned, on which application for a patent was then pending, and that defendant afterwards employed and paid patent attorneys to procure for him the patent from the government of the United States and from the governments of other countries; and if the court shall further find that the said application for a patent was allowed by the government of the United States, and subsequently that letters patent for said invention were granted, bearing date January 22, 1895, as read in evidence, and that the plaintiff, at the time of the execution of said agreement with the *plaintiff*, had no knowledge or notice of the agreement between Henry Campbell and the Campbell Barrel Company offered in evidence, then the plaintiff is entitled to recover.

"('And that there is no evidence that the* [41]
plaintiff had any knowledge or notice of said agreement between said Campbell and said Campbell Barrel Company.') (Rejected as fered, but granted as modified by omitting the words in italics.)

"Plaintiff's Second Prayer.

"The plaintiff, by his counsel, prays the court to rule that the defendant has offered no evidence legally sufficient to show that the contract set out in the declaration was procured by the plaintiff from the defendant by fraud or by undue influence. (Conceded.)

"Plaintiff's Third Prayer.

"The plaintiff, by his counsel, prays the court to rule that the defendant has offered no evidence legally sufficient to show that there was no consideration for the agreement set out in the declaration. (Rejected.)

"Plaintiff's Fourth Prayer.

"The plaintiff prays the court to rule that if the court shall find that on the 11th day of September, 1894, Henry Campbell made to the plaintiff the assignment of one-half interest in his then pending application to the United States Patent Office for a patent for the invention in said assignment mentioned, and subsequently, on or about the 26th of November, 1894, made to the plaintiff a further assignment of all his interest in his said pending application and to the patent thereon, whenever the same should thereafter be granted; then, by virtue of said two assignments, the plaintiff acquired an inchoate title to said invention and to the patent thereon, when the same should thereafter be granted, which title it was competent for the plaintiff to sell, assign, and dispose of; and if the court shall further find that on or about the 10th day of December, 1894, the plaintiff executed to the defendant the assignment read in the evidence and dated the 8th day of December, 1894, for the consideration therein mentioned, and that subsequently, on or about the 22d day of January, 1895, a patent was issued by the United States in the name of said Henry Campbell, for the invention described *in said [42]
several assignments from said Campbell to the plaintiff and from the plaintiff to the defendant, then the defendant, by virtue of said letters patent, acquired a valid title to and became the owner of said patent, and said assignment from the plaintiff to the defendant, bearing date the 8th day of December, 1894, was supported by a good and sufficient consideration, and the plaintiff is entitled to recover upon the contracts set out in the declaration, provided the court, sitting as a jury, shall find that the said contract was signed and sealed by the plaintiff to the defendant, and was designed by them to be an operative instrument according to its terms; and provided further that at that time of the execu-

tion of said contract, the plaintiff had no knowledge or notice of the agreement between Henry Campbell and the Campbell Barrel Company, bearing date the — day of January, 1892, and offered in evidence by the defendant, and that there is no evidence legally sufficient to show that the plaintiff had any such knowledge or notice of said agreement. (Rejected.)

"Fifth Prayer.

"That the agreement of January, 1892, between Henry Campbell and the Campbell Barrel Company, offered in evidence by the defendant, is no defense to this action, if the court shall find that by the true construction of said agreement the invention and device described in the contract set out in the declaration is not embraced within said agreement. (Granted.)"

And the defendant offered the following two prayers:

"Defendant's First Prayer.

"The defendant asks the court to rule as matter of law that upon the pleadings of the case the burden is upon the plaintiff to prove the delivery of the sealed instrument sued on, and if the court, sitting as a jury, finds that the paper sued on never was delivered, the verdict must be for the defendant. (Granted.)

"Defendant's Second Prayer.

"If the court, sitting as a jury, shall find that when the paper sued on was presented
[43] by the plaintiff to the defendant *for the latter's signature, with the request that he would sign it, the defendant declined so to do, as the terms of such papers did not correspond with any agreement made or talked of between the plaintiff and defendant, and that thereupon it was agreed between them that the papers in duplicate should be signed by the defendant, and both kept in his possession, and should not be of any force, and should belong to the defendant until he chose to put them in force, and that in pursuance of this agreement they were then signed by the defendant, and always afterwards kept in his possession until produced at the trial of this cause, on notice, and that at no time after the signing of said papers did the defendant ever exercise his option of putting into force, but, on the contrary, subsequently thereto, exercised his option by declining to recognize them as in force, then the verdict shall be for the defendant. (Granted.)"

The trial judge rendered a general verdict for the defendant, on which judgment was entered for $35,091.65, with interest and costs.

An appeal having been taken to the court of appeals of Maryland by the plaintiff Harrison, the judgment of the court below was affirmed by the said court of appeals on the 17th of June, 1896, for $39,091.65, with interest from the 13th of December, 1894, until paid, and costs.

On September 21, 1896, a writ of error to review this judgment was issued to the court of appeals of Maryland.

There are nine assignments of error. They embrace rulings on testimony, on the prayers, and the following:

"1. It was error to decide that under the laws of the United States the assignments from Henry Campbell to Walter H. Harrison, dated the 11th day of September, a. d. 1894, and the 26th day of November, 1894, respectively, purporting to convey to the said Harrison the 'entire right, title, and interest in and to the application for patent—serial number, 522,266—and the patent right contained therein and covered thereby,' operated to convey to the plaintiff Harrison merely the equitable title in and to said invention and the patent rights covered by said application.

"2. It was error to decide that the said assignments were *not drawn as the laws re- [44]
quired and hence did not convey the legal title to the invention in question."

The opinion of the supreme court of Maryland is quite long, necessarily so, as it passes upon all the points which were raised by plaintiffs. The parts of it which concern the case are as follows:

"We think there can be no doubt that the defendant's two prayers were properly granted. By the first the court declared as matter of law that upon the pleadings the burden was upon the plaintiff to prove the delivery of the sealed instrument sued on, and that if the court, sitting as a jury, should find that said paper never was delivered, the verdict must be for the defendant. The second prayer recites the evidence more at length, but asserts the same proposition of law which appears to be well settled in this state. *Edelin* v. *Sanders*, 8 Md. 129. We discover no inconsistency between the two prayers. The plaintiff specially excepted to the second on the ground that there was no evidence in the cause legally sufficient to prove the facts therein set forth. It is clear, however, that the testimony of the witnesses Morton and Coale support the facts set forth in this prayer, and we have already held it to be competent and admissible under the issue made by the plea of *non est factum*.

"We will now consider the prayers of the plaintiff. He offered five, the second having been conceded and the fifth granted.

"The controlling proposition in this part of the case is that contended for by the plaintiff in his first, third, and fourth prayers, namely, that there is no legally sufficient evidence in the case to show that he had any knowledge or notice of the agreement between the inventor, Campbell, and the Campbell Barrel Company.

"The correctness of this contention of the plaintiff depends first, upon the legal effect of the assignments from Campbell to the plaintiff, and, secondly, upon the effect of the contract of Campbell with the Campbell Barrel Company—that is to say, whether said *company* thereby assigned to said company an equitable title to his invention prior in date to the title he *claims to have assigned to [45]
the defendant, which latter title the plaintiff claims to be an absolute legal title, and the defendant's contention, on the contrary, is

that it is a mere equitable title, subsequent in date and therefore inferior to the title of the barrel company. The plaintiff claims title through two assignments from Campbell, each being for one-half interest in a certain application filed in the Patent Office of the United States, at Washington, D. C., which application is for letters patent covering the invention of a machine for forming and making barrels and kegs.

"It will befound upon an examination of these instruments that they do not contain a request to the Commissioner of Patents to issue letters patent to the plaintiff. Notwithstanding they were recorded in the Patent Office, letters patent were issued in the name of Henry Campbell, the inventor, and the defendant contends that the legal effect of such an assignment, in which the inventor fails to embody a request to the Commissioner of Patents to issue letters to the assignee, is to convey to such assignee only an equitable title. It is conceded that by one of the rules of the Patent Office the Commissioner will not and cannot issue the letters patent to an assignee, unless specially requested so to do by the terms of the assignment. One of the witnesses refers to this rule in his testimony. The patent having been issued to Campbell instead of to the defendant, the witness thus explains: 'I ascertained that the probable reason why it (the patent) had not been issued to Mr. Morton was this: The original assignment from Mr. Campbell to Mr. Harrison did not contain the request which the rules of the Patent Office required in order that the patent should be issued in the name of the assignee.' Rule 26, Rules of Practice in the United States Patent Office, page 9. Revised April 1, 1892."

After considering authorities, the opinion decides that—

"If, therefore, the Campbell Barrel Company acquired an equitable title to the patent, as it undoubtedly did, under its contract with the inventor, before the assignment of the equity to the defendant, the latter took subject to the equitable title in the said company, and the first, third and fourth prayers
[46] of the *plaintiff were properly refused, for they all asked the court to say that there was no legally sufficient evidence to show that the plaintiff had knowledge or notice of the agreement between the plaintiff and the barrel company, but, as we have seen, knowledge and notice will be imputed to him, as Ch. J. Gibson said in *Chew* v. *Barnet, supra* [11 Serg. & R. 389], 'whether he had notice or not,' holding as he did only an equitable title."

The opinion concludes as follows: "Finding no error in the rulings of the learned judge below, the judgment will be affirmed."

Messrs. **William Pinkney Whyte, Frederic D. McKenney,** and *Samuel F. Phillips* for plaintiff in error.

Messrs. **Bernard Carter** and **Edgar H. Gans** for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that is, in the nature of instructions. They were given and the verdict was generally for the defendant. It is therefore natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the supreme court of the state. It affirmed the ruling as correct in law and as supported by competent testimony. The supreme court, it is true, passed on other grounds, passed on the one
which it is *claimed involved a Federal ques- **[47]**
tion, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in *Eustis* v. *Bolles*, 150 U. S. 361 [37:1111]. It is sufficient to announce the rule pronounced in the case:

"It is settled law that, to give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v *Memphis*, 87 U. S. 20 Wall. 590 [22: 429]; *Cook County* v. *Calumet & Chicago Canal & D. Co.* 138 U. S. 635 [34:1110]. It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised, and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment." See also *Wade* v. *Lawder*, 165 U. S. 624 [41:851].

The writ of error must therefore be dismissed.

Mr. Justice **Gray** did not hear the argument and took no part in the decision.

[48] DETROIT CITIZENS' STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

DETROIT RAILWAY and the City of Detroit.

(See S. C. Reporter's ed. 48–55.)

Power of common council of Detroit—privilege to build railroads on streets—power to grant easements in public streets.

1. The common council of Detroit had no inherent power to confer the exclusive privilege claimed by the Detroit Citizens' Street Railway Company to construct and operate railways on certain streets, under the ordinance of November 24, 1862.

2. The Michigan tram railway act. conferring on railway companies the exclusive right to use and operate railways constructed by them, provided that they shall not be authorized to construct a railway through the streets of any city without the consent of its municipal authorities, did not give the city of Detroit the power to grant to a railway company the exclusive privilege to occupy its streets for railway purposes.

NOTE.—*As to municipal power to impose conditions when giving assent to street railway in street; power to assent as involving power to impose conditions; agreement by railroad; conditions enforced; express power to impose conditions; want of power or consent; conflict with other authority; conditions after completion of contract; right to control street,*—see note to Galveston & W. R. Co. v. Galveston (Tex.) 36 L. R. A. 33.

As to acquiring right of way; authority to use streets,—see note to Adams v. Chicago, B. & N. R. Co. (Minn.) 1 L. R. A. 493.

As to right of street railways to use streets,—see note to People, Third Ave. R. Co., v. Newton (N. Y.) 3 L. R. A. 174.

Street railroads; rights of, in the street; grants to, by municipal corporations; power of such corporations to impose restraints or conditions upon street railways; consents by abutting owners; forfeiture of rights.

An irrepealable contract for the use of a street by a street-railway company is not in excess of the powers of a municipal corporation which is invested with full power to regulate and control the use of streets. Baltimore Trust & G. Co. v. Baltimore, 64 Fed. Rep. 153.

A city of the third class is not prohibited from granting by special ordinance to an electric railway company the right to construct its tracks in the city streets, by Pa. act June 14, 1887, § 32, prohibiting cities of the second class from so doing. McHale v. Easton & B. Transit Co. 169 Pa. 416.

A consent given by the supervisor of a township to a street-railway company to construct a line on its highways, upon the consideration that the latter employ him and his son for life at an agreed price per day, does not bind the township, and is void. Lehigh Coal & Nav. Co. v. Inter-County Street R. Co. 167 Pa. 75.

A mere license, and not a franchise, is given to a street-railway company by an ordinance granting the consent of a city to the use of streets for its tracks. Belleville v. Citizens' Horse R. Co. 152 Ill. 171, 26 L. R. A. 681.

A provision in a city charter, making it unlawful to grant the right to construct a street railroad except to one who will agree to carry passengers thereon at the lowest rate of fare, is superseded by N. Y. Laws 1890, chap. 565, giving every railroad corporation the power to construct its road upon any highway which its route shall touch, subject to the limitations of such chapter. Adamson v. Nassau Electric R. Co. 89 Hun, 261.

The consent of property holders on a designated street is not necessary to enable a street railway company to make use of the tracks of another company already in operation, under N. Y. Const. art. 3, § 18, providing that no street railway can be constructed or operated without the consent of such owners. Ingersoll v. Nassau Electric R. Co. 89 Hun, 213.

A city council which is authorized to regulate the use of streets and to permit or prohibit any street railroad in any street, but which has "no power to grant" the right to lay down any railroad track in any street except on a specified petition, cannot grant the use of a street for railroad purposes except on the petition provided for. North Chicago Street R. Co. v. Cheetham, 58 Ill. App. 318.

The right of a city to grant or withhold its consent to the operation of a street railroad is not property of the city, so as to constitute a grant thereof for a less price to one party than another is ready to pay a waste of property, within a statute authorizing an action to prevent waste of city property. Adamson v. Nassau Electric R. Co. 89 Hun, 261.

The question of the consent of the municipal authorities to the construction of a street railroad does not necessarily arise on a motion to confirm the appointment of commissioners under N. Y. Laws 1890, chap. 565, § 94, making such appointment depend upon the failure to secure the consent of the property owners. Re Auburn City R. Co. 88 Hun, 603.

The consent of township supervisors to the construction of a street railway upon an ordinary township road is sufficient where such consent is given at a meeting held for the purpose after four meetings to deliberate upon and discuss what their action should be, although no minutes of their proceedings were kept by them. Scranton & P. Traction Co. v. Delaware & H. Canal Co. 1 Pa. Super. Ct. 409.

The consent of the township committee is necessary to legalize the construction of street railroads in any township, under N. J. P. L. 1893, p. 144, prohibiting the construction of any street railroad on the street of any "municipality" without the consent of the "governing body" having the control of the streets in such municipality. West Jersey Traction Co. v. Camden Horse R. Co. 53 N. J. Eq. 163.

A city in consenting to street-railway franchises under Milliken & Vertrees (Tenn.) Code, § 1921, cannot limit such consent to a period less than the duration of the franchise granted by the state. Africa v. Knoxville, 70 Fed. Rep. 729.

In the absence of a statute there is no implied restriction springing from public policy upon the power of a city to grant a street easement to a railroad or street-car company having the requisite franchises from the state unlimited as to time. Louisville Trust Co. v. Cincinnati, 47 U. S. App. 36, 76 Fed. Rep. 296, 22 C. C. A. 334.

A resolution by the dock department of a city granting a revocable license to a street-railroad company to construct its road over a given street confers no authority for its construction, where such department has no power to grant any franchises. Central Crosstown R. Co. v. Metropolitan Street R. Co. 16 App. Div. 229.

City authorities have no right to grant street-railway franchises except in so far as they may be authorized by the legislature, and then only in the manner and under the conditions prescribed by the statute. Beekman v. Third Ave. R. Co. 153 N. Y. 144.

Validity of conditions imposed by city or highway authorities in granting consent to a street railways to use the streets. People, West Side Street R. Co. v. Barnard, 110 N. Y. 548; Abraham v. Meyers. 29 Abb. N. C. 384; Cincinnati v. Mt. Auburn Cable R. Co. 28 Ohio L. J. 276; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411; Cincinnati v. Cincinnati Street R. Co. 31 Ohio L. J. 308; Plymouth Twp. v. Chestnut Hill & N. R. Co. 168 Pa. 181.

The legislature can, without consulting the municipality, grant the right to a street-railway company to lay its tracks on the streets of the city. Central Railway & Electric Co.'s Appeal, 67 Conn. 197.

A city can impose no terms on the construction of a street railway upon its streets, where

8. The power to grant easements in the public streets, in perpetuity and in monopoly, must be conferred in express words, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.

[No. 236.]

Argued April 26, 27, 1898. Decided May 23, 1898.

IN ERROR to the Supreme Court of the State of Michigan to review a decree of that court affirming the decree of the Circuit Court of the County of Wayne, in said state, dismissing a suit in equity brought by the Detroit Citizens' Street Railway Company against the city of Detroit *et al.* to enjoin said city *et al.* from acting under an ordinance granting to others the right to construct street railways upon certain streets in said city. *Affirmed.*

Statement by Mr. Justice **McKenna:**

The plaintiff in error is a street railway company of the state of Michigan, organized

---

the city's consent is not made necessary for the construction of the road. Philadelphia v. Empire Pass. R. Co. 177 Pa. 382.

A street-railway company has the right to diverge from the highway and to construct its railroad on property secured for that purpose in order to avoid a grade crossing at the intersection of a railroad. Pennsylvania R. Co. v. Glenwood & D. Electric Street R. Co. 184 Pa. 227.

The provision of N. Y. Const. art. 3, § 18, requiring the consent of the abutting owners and local authorities, or the substituted consent of the court, to the grant of street-railroad franchises, does not authorize the legislature to confer upon local authorities power to consent to such a grant if otherwise illegal, or prevent it from repealing such power by subsequent legislation. Norris v. Wurster, 23 App. Div. 124.

The consent of all the local authorities through whose districts the established route of an electric passenger railway passes must be obtained, in Pennsylvania, before any part of the road can be built. Reading Co. v. Schuylkill Valley Traction Co. 14 Mont. Co. L. Rep. 10.

A permit granted by the park commissioner of the city of Brooklyn, under N. Y. Laws 1888, chap. 583, tit. 16, § 2, subd. 5, which designates the location for a railway switch, will not authorize its construction in the absence of the consent of the common council, since the provisions of N. Y. Laws 1896, chap. 825, do not impliedly repeal the ordinance making such consent necessary. Irvine v. Atlantic Ave. R. Co. 23 App. Div. 112.

The consents of abutting owners to the construction of a street railway, contemplated by the New York Constitution and the railroad act, cannot be acquired by an individual and assigned by him to a corporation thereafter organized to construct the road, but they must be given in the first instance to a corporation authorized to construct the road. Geneva & W. R. Co. v. New York C. & H. R. R. Co. 24 App. Div. 335.

A city may require the payment of license fees as a condition of granting a franchise to a street-railroad company, and such company on accepting the franchise becomes liable to pay the fee, under the provision of the Illinois statute. Byrne v. Chicago General R. Co. 169 Ill. 75.

A corporation incorporated under the Pennsylvania general railroad laws as a steam railroad company cannot acquire the rights and franchises of a street passenger railroad company, without reincorporation under the street railroad laws. Potts v. Quaker City Elev. R. Co. 161 Pa. 396.

A corporation organized under Pa. act April 4, 1868, becomes necessarily a steam railroad for the carriage of passengers and freight in the manner provided by the general railroad laws, and has no power to carry on the business of a street passenger railway company. Com., Atty. Gen., v. Northeastern Elev. R. Co. 161 Pa. 409.

That a street-railway company under its general corporate powers may have the authority to receive an estate in the streets beyond its own life does not necessarily empower the city to grant such an estate. Detroit v. Detroit City R. Co. 56 Fed. Rep. 867.

Conditions imposed by a municipal corporation in giving the consent required by Pa. Const. art. 17, § 9, to the construction of a street railway within its limits, that a fixed fare shall be charged for passengers and a certain percentage of the dividends be paid to the city,—are valid. Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411.

The "public convenience or necessity" contemplated by Conn. Pub. Acts 1893, chap. 169, § 8, providing that no street railroad shall be built or extended from one town to another in the public highways so as to parallel any other street or steam railway, unless the superior court or a judge thereof shall have found that public convenience or necessity requires its construction,—means such a condition existing at the time of the application in respect to the applying railroad, the mode of public travel, the manner in which those needs are to be supplied, and the probable effect of the proposed road upon the whole question of adequately supplying those needs, as well as in respect to the road proposed to be paralleled, that in the judgment of the trior will justify the interference with the private right of the latter road. Re Shelton Street R. Co. 69 Conn. 626.

An obligation to maintain a street railway is not imposed by the grant of a mere privilege to construct and maintain it. San Antonio Street R. Co. v. State, Elmendorf, 90 Tex. 520, 35 L. R. A. 662.

A municipality has no authority to grant a right to lay a street-railway track in an alley and operate cars thereon, where, in view of the narrowness of the alley and the frequency with which the cars are required to be run, it would result in the loss of the benefit of the use of the alley to the abutting owners. Watson v. Robertson Ave. R. Co. 69 Mo. App. 548.

Time fixed by Civ. Code, § 502, before its amendment in 1895, within which a street-railway track must be completed in order to preserve the franchise to occupy the street, cannot be changed in the grant of the franchise. People, Warfield, v. Sutter Street R. Co. 117 Cal. 604.

City may attach to grant of the right to occupy its streets with street-railway tracks conditions necessary to protect itself from pecuniary liability and to secure the health and welfare of its citizens, and may resume the rights granted, upon noncompliance with such conditions by the grantees or their successors. Springfield v. Robertson Ave. R. Co. 69 Mo. App. 514.

The consent of the local authorities having control of the street and of the owners of one half in value of the abutting property required by N. Y. Const. art. 3, § 18, and of the N. Y. railroad law, § 91, to construction, extension, or operation of a street railroad, is necessary to entitle a street railroad company to use the line of another company. Colonial City Traction Co. v. Kingston City R. Co. 153 N. Y. 540, Affirming 15 App. Div. 195.

A municipality does not waive the forfeiture of the franchise of a street railway company to maintain and operate its road in the streets for nonperformance of conditions subsequent, by its failure to take any action to remove the tracks after the breach of the conditions, or to take any proceedings to have the franchise declared forfeited. People, Warfield, v. Sutter Street R. Co. 117 Cal. 604.

A street-railway company which has accepted

for the purpose of owning and operating lines in the city of Detroit, and is the successor in interest of a similar corporation named the Detroit City Railway. The rights asserted by it arise from an ordinance of the common council of that city passed upon November 24, 1862. This provided that the Detroit City Railway was "exclusively authorized to construct and operate railways as herein provided, on and through [certain specified streets], and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit and assented to in writing by said corporation. . . . And provided the corporation does not assent in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route."

The ordinance provided also that "the powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

Section 2 of the ordinance is only necessary to be quoted, and it is inserted in the margin.†

*There is also inserted in the margin §§ 33 and 34 of the tram railway act.†† [49]

---

from a village the grant of a franchise to lay a street railroad cannot rescind the contract and recover an amount deposited as liquidated damages for failure to perform the contract to construct the road, on the ground that the grant was impracticable. Peekskill, S. C. & M. R. Co. v. Peekskill, 21 App. Div. 94.

Power given by a city charter to authorize the use of the streets for "horse and steam railroads," before electricity came into use as a means of propulsion, authorizes the city to grant a franchise for operating a street railway by electricity on the trolley system. Buckner v. Hart, 52 Fed. Rep. 835.

A general grant of power to a city to permit, allow, and regulate the laying down of tracks for street cars, upon such terms and conditions as the city may prescribe, does not empower it to grant for a term of years an exclusive franchise to occupy its streets with street railways. Parkhurst v. Capital City R. Co. 23 Or. 471.

The resolution of the board of aldermen of the city of New York consenting to the grant of a street-railway franchise under N. Y. Laws 1890, chap. 565, need not be published as required by the New York consolidation act, § 80, in regard to resolutions disposing of property of the city. Abraham v. Meyers, 29 Abb. N. C. 384.

A special charter of a street-railway company, empowering it to commence at a certain street corner and construct its tracks eastwardly and westwardly through such street, or any other streets in the borough, with the right to construct branches to its main track through any streets of the borough, does not give it the right to occupy a thoroughfare running north and south, in so far as the right to construct its main track is concerned, and the provision as to branches is so indefinite that new tracks cannot be constructed thereunder after the expiration of twenty-eight years and after the village has become a city and the street has been granted to another company. Junction Pass. R. Co. v. Williamsport Pass. R. Co. 154 Pa. 116.

A franchise granted to a street-railway company under a city charter requiring publication of the terms and specifications of the franchise is void as to a street sixteen blocks in length not mentioned in the publication, although such street was substituted for one mentioned in the publication on which tracks had already been authorized. Buckner v. Hart, 52 Fed. Rep. 835.

A street-railway franchise required by statute to be disposed of by a city to the highest bidder is invalid when advertised and sold to the highest bidder "in square yards of gravel pavement." Buckner v. Hart, 52 Fed. Rep. 835.

Failure to comply with N. Y. Laws 1884, chap. 252, § 4, requiring the time and place when an application is to be made for a street-railway franchise to be advertised in two papers, by advertising in but one, invalidates the frfanchise. People, St. Nicholas Ave. & C. T. R. Co., v. Grant, 50 N. Y. S. R. 465.

A legislative act authorizing a street-railway company to extend its line to certain streets between another street and a certain road, "with the right to connect the same on any street between these two points," does not authorize the laying of any track for connection or otherwise, even with the consent of councils, on any part of such road. Philadelphia v. Citizens' Pass. R. Co. 151 Pa. 128; Germantown Pass. R. Co. v. Citizens' Pass. R. Co. 151 Pa. 138.

An ordinance giving a street-railway company the right to lay double tracks on certain streets may be repealed, and the right limited to the use of a single track. Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 352, 20 L. R. A. 126.

A franchise to a street-railway company in a particular street prevents the grant to an electric company of a franchise to use such street in any way obstructing, hindering, or embarrassing the use under the former franchise. Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co. 53 Fed. Rep. 687.

Municipal authorities consenting to the construction of a street railway in a street are not confined to the conditions required by the New York railroad act, but may affix any further conditions not contravening the statute or relating to matters over which other bodies have complete control. Abraham v. Meyers, 29 Abb. N. C. 384.

---

† Sec. 2. The said grantees are, by the provisions of this ordinance, exclusively authorized to construct and operate railways as herein provided, on and through Jefferson, Michigan, and Woodward avenues, Witherell, Gratiot, Grand River, and Brush or Beaubien streets; and from Jefferson avenue through Brush or Beaubien streets to Atwater street; and from Jefferson avenue, at its intersection with Woodbridge street, to Third street; up Third street to Fort street and through Fort street to the western limits of the city; and through such other streets and avenues in said city as may from time to time be fixed and determined by vote of the common council of the said city of Detroit, and assented to, in writing, by said corporation, organized as provided in section first of this ordinance. And provided, The corporation does not assent, in writing, within thirty days after the passage of said resolution of the council ordering the formation of new routes, then the common council may give the privilege to any other company to build such route, and such other company shall have the right to cross any track of rails already laid, at their own cost and expenses; Provided, always, that the railways on Grand river street, Gratiot street and Michigan avenue shall each run into and connect with the Woodward avenue railways, in such direction that said railways shall be continued down to, and from, each of them, one continuous route to Jefferson avenue; Provided, always, that said railroad down Gratiot street may be continued to Woodward aveue, through State street, or through Randolph street, and Monroe avenue, and the Campus Martius, as the grantees, or their assigns, under this ordinance may elect.

†† Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this state.

Sec. 34. All companies or corporations formed

By an ordinance passed November 14, 1879, it was provided further that "the powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the
[50] amendments *thereto, are hereby extended and limited to thirty years from this date."

On November 20, 1894, the common council passed an ordinance granting to several third parties the right to construct street railways upon portions of certain streets upon which the plaintiff in error was maintaining and operating street railways, and also the right to construct, maintain, and operate railways on certain other streets, alleys, and public places in the city of Detroit, without giving to plaintiff in error the opportunity to decide whether it would construct the same. The present suit was brought in the circuit court for the county of Wayne and state of Michigan, to enjoin the grantees named in the latter ordinance, and also the city, from acting thereunder, upon the ground that it impaired the contract between the city and the plaintiff in error arising from the ordinances first aforesaid. The bill was dismissed, and, on appeal to the supreme court of the state, the decree of dismissal was affirmed. From that decree the present writ of error has been duly prosecuted to this court.

There are five assignments of error. They present the contention that the grant to the plaintiff in error was a contract within the protection of the provision of the Constitution of the United States, which prohibits any state from passing any law impairing the obligation of a contract, and that the subsequent grant to the defendant in error, the Detroit Railway, was a violation and an impairment of the obligation of that contract.

Messrs. **Henry M. Duffield, John C. Donnelly, Fred A. Baker,** *Michael Brennan, David Willcox,* and *Frank Sullivan Smith* for plaintiff in error.

Messrs. **John B. Corliss, Charles Flowers, Joseph H. Choate,** and *Philip A. Rollins* for defendant in error.

Mr. Justice **McKenna** delivered the opinion of the court:

[51] *The controversy turns primarily upon the power of the city of Detroit over its streets, whether original under the Constitution of the state, and hence as extensive as it would be in the legislature, or whether not original but conferred by the legislature, and hence limited by the terms of the delegation.

The first proposition is asserted by the plaintiff in error; the second proposition by the defendants in error.

The provisions of the Constitution which are pertinent to the case are as follows:

"The state shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of land or other property.

"There shall be elected annually on the first Monday of April in each organized township . . . one commissioner of highways . . . and one overseer of highways for each highway district.

"The legislature shall not . . . vacate or alter any road laid out by the commissioners of highways, or any street in any city or village, or in any recorded town plat.

"The legislature may confer upon organized townships, incorporated cities and villages, and upon boards of supervisors of the several counties such powers of a local, legislative, and administrative character as they may deem proper."

The supreme court of Michigan, in its opinion (68 N. W. 304 [35 L. R. A. 859]), interprets these provisions adversely to the contention of plaintiff in error, and, reviewing prior cases, declares their harmony with the views expressed. "The scope of the earlier decisions," the court said, "is clearly stated by Mr. Justice Cooley in [*People*] *Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 239 [15 Am. Rep. 202]. After stating that the opinion in *People* [*Le Roy*] v. *Hurlbut* [24 Mich. 44, 9 Am. Rep. 103], had been misapprehended, Justice Cooley said: 'We intended, in that case, to concede most fully that the state must determine for each of its municipal corporations the powers it should exercise and the capacities it should possess, and that it must also decide what restrictions should be placed upon these, as well to prevent clashing of action and interest in the state as to protect individual corporators
*against injustice and oppression at the hands [52]
of the local majority. And what we said in that case we here repeat, that while it is a fundamental principle in this state, recognized and perpetuated by express provisions of the Constitution, that the people of every hamlet, town, and city of the state are entitled to the benefits of local self-government, the Constitution has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state, from considerations of general policy, as well as those which pertain to the local benefit and local desires. And in conferring those powers it is not to be disputed that the legislature may give extensive capacity to acquire and hold property for local purposes, or it may confine the authority within the narrow

for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them; Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; Provided, further, that, after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining, and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

bounds, and what it thus confers it may enlarge, restrict, or take away at pleasure."'

This decision of the supreme court of Michigan is persuasive if not authoritative; but, exercising an independent judgment, we think it is a correct interpretation of the constitutional provisions. The common council of Detroit, therefore, had no inherent power to confer the exclusive privilege claimed by the plaintiff in error.

Did it get such power from the legislature? It is contended that it did by the act under which the Detroit City Railway Company, the predecessor of plaintiff in error, was organized, and to whose rights and franchises it succeeded. This act is the tram railway act, and at the time of the adoption of the first ordinance in 1862, § 34 of that act provided that "all companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have the exclusive right to use and operate any railways constructed, owned, or held by them: Provided, that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

[53] *In 1867 the further proviso was added that, after such consent should be given and accepted, such authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right of constructing, maintaining, and operating such railway.

It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the Constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in *Minturn* v. *Larue*, 64 U. S. 23 How. 436 [16:575]; *Wright* v. *Nagle*, 101 U. S. 791 [25:921]; *State* [*Atty. Gen.*] v. *Cincinnati Gaslight and Coke Co.* 18 Ohio St. 262; *Parkhurst* v. *City of Salem* [*Parkhurst* v. *Capital City R. Co.* 23 Or. 471] 32 Pac. 304; *Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. Rep. 529, decided by Mr. Justice Brown of this court; *Long* v. *Duluth* [49 Minn. 280], 51 N. W. 913. See also *Grand Rapids Electric Light & Power Co.* v. *Grand Rapids Edison E. L. & Fuel Gas Co.* 33 Fed. Rep. 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also *Oregon Railway & Nav. Co.* v. *Oregonian Railway Co.* 130 U. S. 1 [32:837]; **Central Transportation Co.* [54]
v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55].

The power, therefore, must be granted in express words or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in *Grand Rapids Electric Light & Power Co.* v. *Grand Rapids, Edison E. L. & Fuel Gas Co. supra*, says "that municipal corporations . . . possess and can exercise only such powers as are 'granted in express words or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.'" The italics are his. This would make "necessarily implied" mean inevitably implied. The court of appeals of the sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson* v. *Adam*, 1 Ves. & B. 466, that a "necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator [the party using the language], cannot be supposed." If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark; or if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough—would have been natural under any Constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little, if any, breadth from the expression of it. But assuming the power to prescribe terms does acquire breadth from such expression, surely there is sufficient range for its exercise which stops short, or which rather does not extend to granting an exclusive privilege of occupation. Surely there is not so strong a probability of an intention of granting so extreme a power that one contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given or necessarily to be implied from it, which is the test of the cases. The rule is one of *construction. Any grant of power in [55]
general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—

from the general purview of the act which confers it. A municipality is a governmental agency—its functions are for the public good, and the powers given to it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs.

Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.

Decree affirmed.

Mr. Justice **Shiras** did not hear the argument, and took no part in the decision.

DEL MONTE MINING & MILLING COMPANY, *Appt.*,

v.

LAST CHANCE MINING & MILLING COMPANY.

(See S. C. Reporter's ed. 55-92.)

Rights of owner of mining claim—lines of junior location, when may be laid across senior location—New York lode mining claim—right of locator to follow dip of vein—rights below the surface—when extend beyond side lines—when side lines are end lines.

1. Congress having prescribed the conditions upon which extralateral rights of a mining claim may be acquired, a locator must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory.
2. Any of the lines of a junior-lode location of a mining claim may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location.
3. The easterly side of the New York Lode mining claim, in this case, is not an end line of the Last Chance Lode mining claim within the meaning of U. S. Rev. Stat. §§ 2320, 2322.
4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, the locator of such vein can follow it upon its dip beyond the vertical side line of his location.
5. The location as made on the surface by the locator determines the extent of his rights below the surface.
6. Every vein the top or apex of which lies inside the surface lines of a lode mining claim extended downward vertically belongs to the locator, and may be pursued by him to any depth beyond his vertical side lines, although in doing so he enters beneath the surface of some other proprietor.
7. The only exception to the rule that the end lines of a location as the locator of a lode mining claim places them establish the limits beyond which he may not follow the vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case what he called his side lines are his end lines, and what he called end lines are in fact side lines.

[No. 147.]

Argued December 8, 9, 1879. Decided May 23, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying certain questions to be answered in this case between the Del Monte Mining & Milling Company, and the Last Chance Mining & Milling Company, in regard to the rights of conflicting mining claims. *First and fourth questions answered in the affirmative the third in the negative; the second and fifth are not answered.*

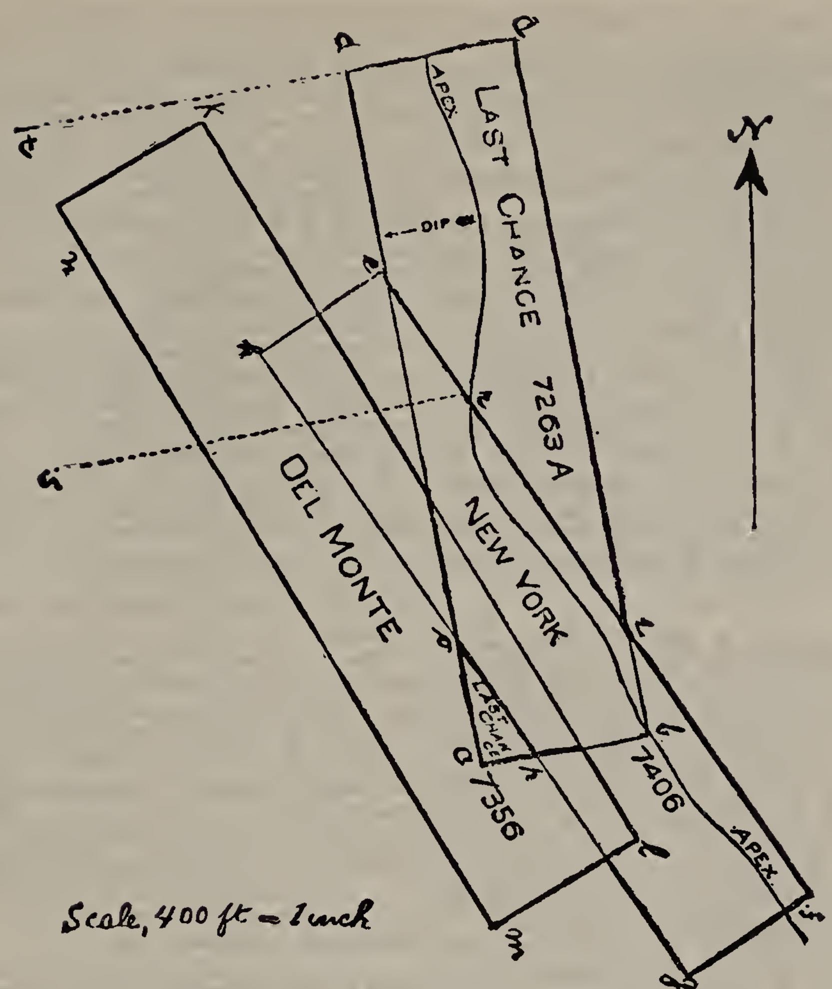
Statement by Mr. Justice **Brewer:**

This case is before this court on questions certified by the court of appeals for the eighth circuit. The facts stated are as follows: The appellant is the owner in fee of the Del Monte Lode mining claim, located in the Sunnyside mining district, Mineral County, Colorado, for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance Lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York Lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown on the following diagram:

NOTE.—*As to ownership of mines; United States statute as to; right to support of surface,*—see note to United States v. Castillero, 17 : 448.

As to title to water by appropriation; common-law rule; rule of mining state,—see note to Atchison v. Peterson, 22 : 414.

As to conveyance of mineral beneath surface of land; rights of owner of surface and of mineral,—see note to Lillibridge v. Lackawanna Coal Co. (Pa.) 13 L. R. A. 627.



Both in location and patent the Del Monte claim is first in time, the New York second, and the Last Chance third. When the owners of the Last Chance claim applied for their patent, proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States circuit court for the district of Colorado. This [58] action terminated *in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte, except so much thereof as was also in conflict between the Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all of its territory, except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory, except that in conflict with the New York, in which last-named patent was included the [59] triangular surface *conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode, or ledge of silver and lead bearing ore, which crosses its north end line and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location, which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim and between two vertical planes, one drawn through the north end line of the Last Chance claim extending westerly, and the other parallel thereto and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"1. May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

"2. Does the patent of the Last Chance Lode mining claim, which first describes the

rectangular claim by metes and bounds, and then excepts and excludes therefrom the premises previously granted to the New York Lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"3. Is the easterly side of the New York Lode mining claim an 'end line' of the Last Chance Lode mining claim, within the meaning of §§ 2320 and 2322 of the Revised Statutes of the United States?

[60] *"4. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"5. On the facts presented by the record herein, has the appellee the right to follow its vein downward beyond its west side line and under the surface of the premises of appellant?"

Messrs. **Charles S. Thomas,** *William H. Bryant,* and *Harry H. Lee,* for appellant:

One who discovers a lode on the national domain and locates a claim therein, in accordance with the law, segregates the premises included within his boundaries as completely from the public territory as though the government had executed and delivered to him a patent therefor. It is his private property upon which no other citizen may intrude except to follow a vein underneath its surface which outcrops somewhere else.

The statutory right of patent is permissive merely. He may avail himself of it or not. If he does not his tenure continues, provided he shall annually expend $100 in labor or improvements thereon. Failing to do this, his location lapses, and the ground which it covers reverts to the government, after which it becomes open to relocation.

Oscamp v. *Crystal River Min. Co.* 19 U. S. App. 18, 58 Fed. Rep. 293, 7 C. C. A. 233; *Belk* v. *Meagher,* 104 U. S. 279 (26: 735); *Lockhart* v. *Rollins* (Idaho) 21 Pac. 413; *Garthe* v. *Hart,* 73 Cal. 541; *Harris* v. *Equator Min. & Smelting Co.* 8 Fed. Rep. 863; *McFeters* v. *Pierson,* 15 Colo. 201; *Keller* v. *Trueman,* 15 Colo. 143.

One who enters upon ground staked and claimed by another under an assertion of discovery, and attempts to institute a claim of his own, is a wrongdoer simply, and can be ousted by action of ejectment.

Erhardt v. *Boaro,* 113 U. S. 527 (28: 1113); *Craig* v. *Thompson,* 10 Colo. 517; *Thompson* v. *Spray,* 72 Cal. 528; *North Noonday Min. Co.* v. *Orient Min. Co.* 6 Sawy. 299, *Weese* v. *Barker,* 7 Colo. 178; *Omar* v. *Soper,* 11 Colo. 380.

And if the point of discovery or the discovery shaft of a lode claim is located upon a previous valid and subsisting location the former is invalid.

Gwillim v. *Donnellan,* 115 U. S. 45 (29: 348); *Upton* v. *Larkin,* 5 Mont. 600; *Armstrong* v. *Lower,* 6 Colo. 393; *Golden Terra Min. Co.* v. *Mahler* (Dak.) 4 Mining Rep. 390; *McGinnis* v. *Egbert,* 8 Colo. 54; *Miller* v. *Girard,* 3 Colo. App. 278; *Girard* v. *Carson,* 22 Colo. 345.

It is incumbent upon a junior locator, if he would avail himself of any advantage to be gained by the forfeiture or abandonment of a conflicting senior location, to appropriate the ground in conflict by relocating it. Failing to do so, he must stand or fall by the merits of his junior location as against the earlier one, which must stand as to him as though it had never been abandoned.

Lindley, Mines, § 363.

Whatever may pass by words of grant may be excepted by like words, and the same consequences attach to such an exception as would have attached had it been a grant.

3 Washb. Real Prop. 435.

By an exception the grantor withdraws from the operation of the conveyance something which is in existence and included under the terms of the grant.

1 Devlin, Deeds, § 221; *Whitaker* v. *Brown,* 46 Pa. 197; *Randall* v. *Randall,* 59 Me. 338.

The end lines of a lode claim are those which lie "crosswise of the general course of the vein," and these, to justify a departure from its vertical boundary, must be parallel.

Flagstaff Silver Min. Co. v. *Tarbet,* 98 U. S. 463 (25: 253); *Argentine Min. Co.* v. *Terrible Min. Co.* 122 U. S. 478 (30: 1140); *Iron Silver Min. Co.* v. *Elgin Min. & Smelting Co.* 118 U. S. 196 (30: 98); *King* v. *Amy & S. Consol. Min. Co.* 152 U.S. 222 (38: 419); *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683 (39: 859).

But if the appellee should successfully contend that the line of crossing is not an end line, or that its lines of shadow beyond it are lines of substance for the purpose of its claim, we have then presented the question whether a claim, the vein within which crosses an end and a side line, has any right to go beyond its boundaries in the pursuit of its vein. There are a few cases arising under the act of 1872 in which such a right has been recognized.

Colorado C. Consol. Min. Co. v. *Turck,* 4 U. S. App. 290, 50 Fed. Rep. 888, 2 C. C. A. 67, 12 U. S. App. 85, 54 Fed. Rep. 262, 4 C. C. A. 313; *Del Monte Min. & Mill. Co.* v. *New York & L. C. Min. Co.* 66 Fed. Rep. 212; *Last Chance Min. Co.* v. *Tyler Min. Co.* 15 U. S. App. 456, 61 Fed. Rep. 557, 9 C. C. A. 613; *Consolidated Wyoming Gold Min. Co.* v. *Champion Min. Co.* 63 Fed. Rep. 540; *Carson City Gold & S. Min. Co.* v. *North Star Min. Co.* 73 Fed. Rep. 598.

Wherever a mine owner asserts the right to enter into the land of his neighbor by following the dip of his vein, the burden of proof is upon him to establish the existence of all conditions made necessary to such right by the statute.

Iron Silver Min. Co. v. *Campbell,* 17 Colo. 267; *Stevens* v. *Williams* (Colo.) 1 Mining Rep. 557; *Iron Silver Min. Co.* v. *Cheesman,* 2 McCrary, 191; *Iron Silver Min. Co.* v. *Murphy,* 3 Fed. Rep. 368; *Hyman* v. *Wheeler,* 29 Fed. Rep. 347.

Messrs. **Joel F. Vaile** and *Edward O. Wolcott,* for appellee:

What are the "end lines" of a lode mining claim is to be determined, not by the lines of patented surface, but by the lines of the claim as located.

Flagstaff Silver Min. Co. v. *Tarbet,* 98 U. S. 468 (25: 255); *Iron Silver Min. Co.* v. *Elgin Min. & Smelting Co.* 118 U. S. 205 (30: 101)

If the apex of a vein enters a location across one end line thereof, the locator will own as much of the vein at any depth as he owns of its apex, subject only to superior rights of other apex claimants.

Del Monte Min. & Mill. Co. v. *New York & L. C. Min. Co.* 66 Fed. Rep. 212; *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683, 695 (39: 859, 861); *Flagstaff Silver Min. Co.* v. *Tarbet,* 98 U. S. 463, 468 (25: 253, 255); *Iron Silver Min. Co.* v. *Elgin Min. & Smelting Co.* 118 U. S. 196, 207 (30: 98, 102); *Tyler Min. Co.* v. *Sweeney,* 7 U. S. App. 463, 54 Fed. Rep. 284, 4 C. C. A. 329.

Where several overlapping claims are located along the apex of the vein, the senior claimant holds as much of the vein at any depth as he holds of the apex within his location. The next in rank holds as much of the vein at any depth as there is of its apex within his location, except as to the portion thereof owned by the first in rank; and so on with subsequent claimants.

Iron Silver Min. Co. v. *Elgin Min. & Smelting Co.* 118 U. S. 206 (30: 102.)

Mr. Justice **Brewer** delivered the opinion of the court:

The questions thus presented are not only important but difficult, involving, as they do, the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States, and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, Who owns the surface? Unquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines (vol. 1, § 4,) that in certain parts of England and
[61] Wales so-called *local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. *Flagstaff Silver Mining Company* v. *Tarbet* (98 U. S. 463, 468 [25:253,255]; 1 Lindley on Mines, § 13). The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican, as by the common, law, the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government, the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the government. For nearly a century there was practically no legislation on the part of Congress for the disposal of mines or mineral lands. The statute of July 26, 1866 (14 Stat. at L. 251), was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807 (2 Stat. at L. 448, § 5), which authorized the President to lease any lead mine in the Indiana territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts (4 Stat. at L. 364; 9 Stat. at L. 37, 146, 179) also such legislation as is found in the act of February 27, 1865 (13 Stat. at L. 440) providing for a district and circuit court for the district of Nevada, in which it was said, in § 9, "that no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession;" *that of May 5, 1866 (14 Stat. at [62]
L. 43), concerning the boundaries of the state of Nevada, which provided that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located, and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the state of Nevada, shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories;" and the act of July 25, 1866 (14 Stat. at L. 242), which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of pre-emption of lodes within 2,000 feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands; one on July 1, 1864, and one on March 3, 1865. (13 Stat. at L. 343, 529.)

Notwithstanding that there was no general legislation on the part of Congress, the fact of explorers searching the public domain for mines, and their possessory rights to the

mines by them discovered, was generally recognized, and the rules and customs of miners in any particular district were enforced as valid. As said by this court in *Sparrow* v. *Strong*, 3 Wall. 97, 104 [18: 49, 50]: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See also *Forbes* v. *Gracey*, 94 U. S. 762 [24: 313] *Jennison* v. *Kirk*, 98 U. S. 453-459 [25:240-243]; *Broder* v. *Natoma Water & Min. Company*, 101 U. S. 274-276 [25: 790,791]; *Manuel* v. *Wulff*, 152 U. S. 505-510 [38:532-534]; *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449 [41: 221, 223].

[63] The act of 1866 was, however, as we have said, the first *general legislation in respect to the disposal of mines. The first section provided "that the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same . . . and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a vein. Section 3, which set forth the steps necessary to be taken to secure a patent and required the payment of $5 per acre for the land conveyed, added: "But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in § 4 being: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: And provided further, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons." Obviously the statute contemplated the patenting of a certain *number of feet of the par- [64] ticular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the Land Department in each particular case to grant so much of the surface as was "fixed by local rules," or was, in the absence of such rules, in its judgment necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under the statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein on its course or strike departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff mine in Utah illustrates this. There was a local custom giving to the locator of a mine 50 feet in width on either side of the course of the vein, and the Flagstaff patent granted a superficies *100 feet wide by 2,000 feet long, [65] with the right to follow the vein described therein to the extent of 2,600 feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein on its course passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of 2,600

feet. This was denied by the supreme court of Utah. *McCormick* v. *Varnes*, 2 Utah, 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect to the controversy with the location on the east of the Flagstaff is not reported, but the case came to this court. *Flagstaff Silver Mining Company* v. *Tarbet*, 98 U. S. 463 [25: 253]. In the course of the opinion (pages 467, 468) [25:255] it was said:

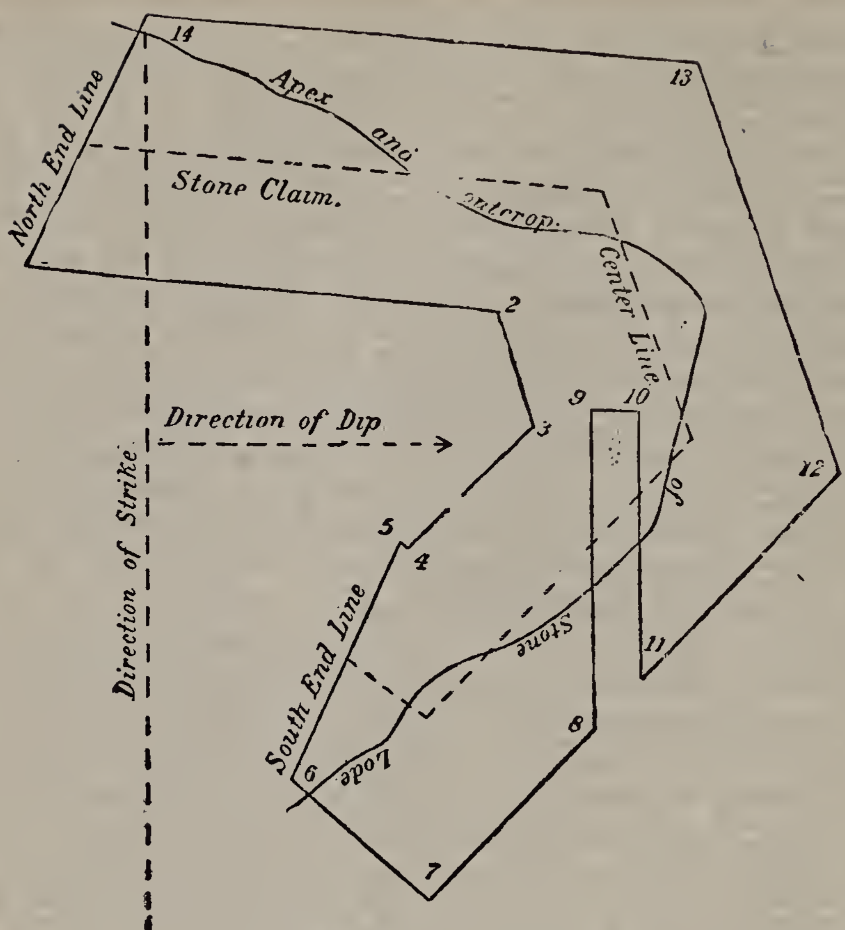
"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only 100 feet wide, that 100 feet is all he has a right to."

These decisions show that while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872 (17 Stat. at L. 91), found in the Revised Statutes, §§ 2319 and following. This is the statute which is in force to-
[66] day, and under which the controversies *in this case arise. Section 2319, Revised Statutes (corresponding to § 1 of the act of 1872), reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States."

It needs no argument to show that if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along *its course or strike, a [67]
right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level and veins constantly pursued a straight line, there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions, where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and if so it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, What saith the statute? Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (§ 2320.) It is not within the province of the courts to ignore such provision, and hold that a locator, failing to comply with its terms has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied, and so it has been adjudged. *Iron Silver Mining Company* v. *Elgin Mining & S. Company*, 118 U. S. 196 [30:98].

This case, which is often called the "Horseshoe Case," on account of the form of the location, is instructive. The following diagram, which was in the record in that case, illustrates the scope of the decision:



SCALE - 200 FEET = 1 INCH

The locator claimed in his application for a patent the lines 1, 14 and 5, 6, as the end lines of his location, and because of their parallelism, that he had complied with the letter of the statute, but the court ruled against him, saying in the opinion (page 208 [30: 102]):

"The exterior lines of the Stone claim
[68] formed a curved *figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and apparently for no other reason than their parallelism called them end lines.

"We are therefore of opinion that the objection that, by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof."

[69] *It is true the court also observed that if the two lines named by the locator were to be considered the end lines, no part of the vein in controversy fell "within vertical planes drawn down through those lines, continued in their own direction." But notwithstanding this observation the point of the decision was that the lines, which were the end lines of the location as made on the surface of the ground, were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the Chief Justice, who, with Mr. Justice Bradley, dissented, in which he said:

"I cannot agree to this judgment. In my opinion the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downwards, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface."

In other words, the court took the location as made on the surface by the locator, determined from that what were the end lines, and made those surface end lines controlling upon his rights, and rejected the contention that it was proper for the court to ignore the surface location and create for the locator a new location whose end lines should be crosswise of the general course of the vein as finally determined by explorations. That this decision and that in the *Tarbet Case*, *supra*, were correct expositions of the statute, and correctly comprehended the intent of

Congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, Congress has not seen fit to change the language of the statute, or in any manner to indicate that any different measure of rights should be awarded to a mining locator.

With these preliminary observations we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior-lode lo-
[70] cation be laid *within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By § 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the Land Department, and, although equitable rights may be established, Congress retains a certain measure of control. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589 [42: 591]. The grant is, as is often said, in process of administration. Passing to § 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim, it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. . . . The end lines of each claim shall be parallel to each other."

Section 2322 gives to the locators of all mining locations, so long as they comply with laws of the United States, and with state, territorial, and local regulations not in conflict therewith, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the lo-
[71] cator or possessor *of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 in terms authorizes "the miners of each mining district to make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides for the issue of a patent. It reads:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land *for such purposes who [72]
has or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such no-

tice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim ex-
[73] ists; and thereafter no *objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 is as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained *shall be construed to [74]
prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," and negatively, that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence, it is said that affirmatively and negatively is it provided that the locator shall have exclusive possession of the surface, and that no one shall have a right to disturb him in such possession. How, then, it is asked, can anyone have a right to enter upon such location for the purpose of making a second location? If he does so he is a trespasser, and it cannot be presumed that Congress intended that any rights should be created by a trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in § 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right *superior to [75]
any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys, but whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The

law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface, and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with a view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced vein, as is possible.

Further, Congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground,
[76] are *not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves,—men inexperienced in the matter of surveying, and so in the nature of things there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes, or other particular marks required by the rules and regulations of the mining district may be placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes, or other monuments, although sufficient at first and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made, and, indeed, in every mining camp where large discoveries have been made locations, in fact, overlap each other again and again. *McEvoy* v. *Hyman*, 25 Fed. Rep. 596-600. This confusion and conflict is something which must have been expected, foreseen,—something which in the nature of things would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in § 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. *Now, although [77]
a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has in terms provided for the settlement of disputes and conflicts, for by § 2325, when a locator makes application for a patent (thus seeking to have a final determination by the Land Department of his title), he is required to make publication and give notice so as to enable anyone disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then by § 2326 proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who by that judgment is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons, and that the right of each to a portion may be adjudicated, is shown by a subsequent sentence in that same section, which provides that "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim . . . and patents shall issue to the several parties according to their respective rights." So it distinctly appears that, notwithstanding the

provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that [78] *locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind, is a statutory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court as suggested by counsel. It is true there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in *Belk* v. *Meagher*, 104 U. S. 279, 284 [26: 735, 737], it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in *Gwillim* v. *Donnellan*, 115 U. S. 45, 49 [29: 348, 349]:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered by a prior subsisting and valid location, and it was held [79] it is *not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior-lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text books. Thus in 1 Lindley on Mines, § 363, the author says:

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The *same principles of law [80] apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void."

It will be seen that while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact hat overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the Land Department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted and the territory excluded. The instructions from the Land Department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the Commissioner of the Land Office to the surveyor general of Colorado, of date November 5, 1874, reported in 1 Copp's Land Owner, p. 133, are these instructions:

"In this connection I would state that the surveyor general has no jurisdiction in the

matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, as *located*, if held by him in accordance with the local laws and congressional enactments.

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the dis-
[81] tances from the established *corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the Land Department on November 16, 1882, found in 9 Copp's Land Owner, p. 162, it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"1. The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"2. The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"3. Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"4. The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows."

Again, on August 2, 1883, in a letter from the acting commissioner to the surveyor general of Arizona, reported in 10 Copp's Land Owner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure with parallel end lines, the provisions of U. S. Rev. Stat. § 2320, being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why
[82] the survey lines should not conform *directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the Land Department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the Land Department has not been absolutely uniform, and yet the descriptions which are found in the patents before us show that, notwithstanding the circular of 1884, the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass, and that to justify such an entry is to sanction a forcible trespass, and thus precipitate a breach of the peace. But no such conclusion necessarily follows. The case of *Atherton* v. *Fowler*, 96 U. S. 513 [24: 732], illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of Congress; that while so in possession a party of persons, who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied, and built on and cultivated parts of it under pretense of establishing a right of pre-emption to the several parts which they had so seized. It was held that such forcible seizure of the premises gave no rights under the pre-emption law, and it was said (p. 516 [24: 733]):

"It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In the parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring, and the unscrupulous to dispos-
sess by *force the weak and the timid from ac- [83]
tual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the Government when it comes into market."

But while thus declaring that it cannot be presumed that Congress countenanced any such forcible seizure of premises, the court also observed (p. 516 [24:733]):

"Undoubtedly there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of pre-emption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, uninclosed, and neither party interferes with the actual possession of the other. In such cases the settlement of the latter of the two may be bona fide for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another person may become pre-

emptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession and exclude everyone from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, uninclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange—on the contrary it is something to be expected, and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while in the adjustment of those conflicts the rights of the first locator to the surface with-
[84] in his location, as well as to veins *beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation simply works delay and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

In this connection it may be properly inquired, What is the significance of parallel end lines? Is it to secure the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein, and it was expected that the locator would so place it as in his judgment would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are *bounded by the sev- [85]
eral lines of his location, and the end lines must be parallel in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

For these reasons, therefore, we are of the opinion that the first question must be answered in the affirmative.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line r s, even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line e h, the end line of the New York claim, extended downward into the earth will at a certain distance pass to the south of the line r s, and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, b c, extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westerly between the line a d t and the line r s, and to appropriate so much of it as is not held by the prior location *of the [86]
New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we therefore pass it.

The third question is also practically answered by the same considerations, and in the view we have taken of the statutes the

easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is—

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are *Flagstaff Silver Mining Company* v. *Tarbet*, 98 U. S. 463 [25: 253]; *Iron Silver Mining Company* v. *Elgin Mining & S. Company*, 118 U. S. 196 [30:98]; *Argentine Mining Company* v. *Terrible Mining Company*, 122 U. S. 478 [30: 1140]; *King* v. *Amy & S. Consol. Mining Company*, 152 U. S. 222 [38·419].

Two of these cases have been already noticed in this opinion. In *Flagstaff Silver Mining Company* v. *Tarbet* a surface location, 2,600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2,600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In *Iron Silver Mining Company* v. *Elgin Mining & S. Company* the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and
[87] *inasmuch as one of the side lines was substantially parallel with one of the end lines it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention and held that the end lines were those which were in fact end lines of the claim as located, and that as they were not parallel there was no right to follow the vein on its dip beyond the side lines. In *Argentine Mining Company* v. *Terrible Mining Company* the claims of the plaintiff and defendant crossed each other, and in its decision the court affirmed the ruling in *Flagstaff Silver Mining Company* v. *Tarbet*, saying (p. 45 [30: 1142]):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In *King* v. *Amy & S. Consol. Mining Company* the prior cases were reaffirmed and those lines which on the face of the location were apparently side lines were adjudged end lines because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is, first, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1,500 feet in length along the vein or lode;" and, third, that when subsequent explorations disclose that the location has been made, not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one *end line. So, when *Last* [88]
Chance Mining Company v. *Tyler Mining Company*, 157 U. S. 683, 696 [39: 859, 865], was before us (in which the question here stated was presented but not decided, the case being disposed of on another ground) we said, after referring to the prior cases, "but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location, that he is entitled to make a location not exceeding 1,500 feet in length along the course of such vein and not exceeding "300 feet on each side of the middle of the vein at the surface," that a location thus made discloses end and side lines, that he is required to make the end lines parallel, that by such parallel end lines he places limits, not merely to the surface area, but limits beyond which below the surface he cannot go on the course of the vein, that it must be assumed that he will take all of the length of the vein that he can, we find from § 2322 that he is entitled to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits, he can pursue that vein as far

as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his location, for the statute provides that the "right of possession to such [89] outside *parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein, whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein, "the top or apex of which lies inside of such surface lines extended downward vertically" and the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein "the top or apex of which lies inside of such surface lines extended downward vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them es- [90] tablish the *limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Flagstaff Silver Mining Company* v. *Tarbet*, 98 U. S. 463, 468 [25: 253, 255].

These conclusions find support in the following decisions: *Stevens* v. *Williams*, 1 McCrary, 480, 490, in which is given the charge of Mr. Justice Miller to a jury, in the course of which he says: "You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes; and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines, but if he happens to strike out diagonally, as far as his side lines include the apex, so far he can pursue it laterally." *Wakeman* v. *Norton*, decided by the supreme court of Colorado, June 1, 1897, 49 Pac. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as trial judge in the mining districts of Leadville and Aspen, as well as on the supreme bench of the state, are entitled to great consideration, said, p. 286: "In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its *course pass [91]
through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." *Fitzgerald* v. *Clark*, 17 Mont. 100 [30 L. R. A. 803], a case now pending in this court on writ of error. *Tyler Mining Company* v. *Last Chance Mining Company*, court of appeals, ninth circuit, decided by Circuit Judge McKenna, now a justice of this court, Circuit Judge Gilbert and District Judge Hawley, 7 U. S. App. 463. *Consolidated Wyoming Gold Mining Company* v. *Champion Mining Company*, circuit court northern district California, decided by Hawley, District Judge, 63 Fed. Rep. 540. *Tyler Mining Company* v. *Last Chance Mining Company*, circuit court district of Idaho, decided by Beatty District Judge, who in the course of his opinion pertinently observed: "What reason under the law can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground

rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of its location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner." 71 Fed. Rep. 848, 851. *Carson City Gold & Silver Mining Company* v. *North Star Mining Company*, circuit court northern district of California, decided by Beatty, District Judge, 73 Fed. Rep. 597. *Republican Mining Company* v. *Tyler Mining Company*, circuit court of appeals ninth circuit, decided by Circuit Judges Gilbert and Ross and District Judge Hawley, 48 U. S. App. 213. See also 2 Lindley on Mines, § 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question in effect seeks from this [92] court a decision *of the whole case, and therefore is not one which this court is called upon to answer. *Cross* v. *Evans*, 167 U. S. 60 [42: 77]; *Warner* v. *New Orleans*, 167 U. S. 467 [42:239].

It will therefore be certified to the Court of Appeals that *the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.*

WILLIAM A. CLARK, *Plff. in Err.*,
v.
WILLIAM F. FITZGERALD *et al.*

(See S. C. Reporter's ed. 92, 93.)

1. Del Monte Mining Co. v. Last Chance Mining Co. 171 U. S. 92 [*ante*, 72] followed.
2. If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, the locator of such vein can follow it upon its dip beyond the vertical side line of his location.

[No. 145.]

Argued December 7, 8, 1897. Decided May 23, 1898.

IN ERROR to the Supreme Court of the State of Montana to review the judgment of that court affirming the judgment of the District Court of the County of Silver Bow in said state in favor of the plaintiffs, William F. Fitzgerald *et al.*, against the defendant, William A. Clark, for damages for ores extracted from the Niagara lode mining claim in said county and state, and adjudging that two thirds of the vein in controversy are the property of the plaintiffs. *Affirmed.*

See same case below, 17 Mont. 100 [30 L. R. A. 803].

Messrs. **Robert B. Smith** and *Robert L. Word*, for plaintiff in error:

This cause comes here on a writ of error directed to the supreme court of the state of Montana, and the questions involved grow out of the following state of facts:

The plaintiff in error is the owner and in possession of the "Black Rock" lode mining claim situated in the "Summit Valley" mining district in Silver Bow county, Montana.

The defendants in error own two-thirds interest, and the plaintiff in error one-third interest in the "Niagara" lode mining claim situated in the same district and county. The "Niagara" lode lies alongside of the "Black Rock" lode so that the south side line of the "Niagara" forms or is a part of the north side line of the "Black Rock" lode.

The "Black Rock" lode is the older of the two locations. As appears from the pleadings in the cause the vein or lead crosses the east end line and south side line of the "Niagara" lode 513 feet west of the northeast corner of the "Black Rock" lode and dips to the south and under the surface of the "Black Rock" lode claim.

The plaintiff in error entered upon that part of the vein east of the point where it crosses the division side line between the "Black Rock" and "Niagara" lode claims and extracted ore from the said vein on its dip under the "Black Rock" lode at the point above described.

Thereupon the defendants in error, who, as stated *supra*, own two-thirds interest in the "Niagara" lode claim, brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of $27,242.54 being two thirds the value of the ore extracted, and for ($234.50) two hundred and thirty-four and 50-100 dollars, the cost of the suit.

An appeal was taken to the supreme court of the state and the judgment of the lower court was affirmed.

The questions presented by this record for decision are raised solely by the judgment roll consisting of the pleadings and judgment of the lower court and opinion of the supreme court of the state.

This cause presents to this court for the first time a new question for adjudication. In some respects analogous questions have already been settled by this tribunal, but the exact question here presented has never been decided.

Last Chance Min. Co. v. *Tyler Min. Co.* 157 U. S. 696 (39: 865).

The apex of the vein or lode of the "Niagara" claim crosses the east end line and the south side line of said "Niagara" claim. The plaintiff in error entered upon said vein upon its downward course or dip into the earth and extracted therefrom certain valuable ores, for an accounting of which this action was brought.

The ore taken by the plaintiff in error was from that portion of the vein which had its apex within the surface lines of the "Niagara," but the ore was taken from the vein on its downward course or dip, the vein dipped to the south and underneath the "Black Rock" claim, and it was upon this dip or downward course of the said vein that the plaintiff in error entered and extracted the ore sued for.

The question thus presented for determi-

nation by this court by the pleadings in this case is as follows: Where a vein or lead of quartz in place crosses one end line of the surface location as marked upon the ground, and also crosses one of the side lines of said location, has the owner or patentee of such location a right to follow the said lead, or so much thereof as has its apex within the surfact lines of his location on its pitch or dip into the earth outside of planes drawn vertically downward through the surface lines of his location?

By § 2320 of the Revised Statutes of the United States it will be seen that the first requirement of the statute in respect to the it frequently happens that the side lines are claims shall be parallel, and that so much vein as lies between planes drawn vertically downward through the end lines until the ledge is intersected by such planes belongs to the locator on its dip into the earth. The lines designated by the locator in his surface location as end lines are not necessarily such; it frequently happens that the side lines are in fact the end lines of the lode or vein.

Flagstaff Silver Min. Co. v. *Tarbet*, 98 U. S. 463 (25: 253); *Argentine Min. Co.* v. *Terrible Min. Co.* 122 U. S. 478 (30: 1140).

If, then, side lines which are not parallel become end lines by reason of having been laid across the strike of the vein, has the claimant any extralateral rights?

What rights, then, can a claimant have whose location is so made that one of the lines he designates as an end line, and one of his side lines, crosses the vein or ledge so that the same departs from the claim through one end line and one side line?

As the end lines of the "Niagara" claim, or rather the surface lines of the "Niagara," crossed by the vein or lode are not parallel, have the respondents then any extralateral or extraterritorial right? This question is answered in the negative by the following authorities:

Iron Silver Min. Co. v. *Elgin Min. & Smelting Co.* 118 U. S. 196 (30: 98), 14 Fed. Rep. 377; *Montana Co.* v. *Clark*, 42 Fed. Rep. 626; *King* v. *Amy & S. Consol. Min. Co.* 152 U. S. 222 (38: 419); *Colorado C. Consol. Min Co.* v. *Turck*, 4 U. S. App. 290, 50 Fed. Rep. 888, 2 C. C. A. 67; *Tombstone Mill. & Min. Co.* v. *Way Up Min. Co.* 1 Ariz. 426; *Blue Bird Min. Co.* v. *Largey*, 49 Fed. Rep. 291; *McCormick* v. *Varnes*, 2 Utah, 355.

Mr. **James W. Forbis**, for defendants in error:

What is the effect of a vein crossing both end lines of a claim when in its course it passes through a side line?

This court has in express terms stated that the question here presented has never been by this court decided.

Last Chance Min. Co. v. *Tyler Min. Co.* 157 U. S. 683 (39: 859).

The act of May 10, 1872, required that the end lines of each claim should be parallel, and prohibited the claimant from passing beyond these end lines extended downward indefinitely in their own direction.

There may be numerous veins within the claim and each may have a different course with many variations therefrom, but the line of the dip for one and all is in the same direction—the direction fixed by the end line.

Whatever point on the claim may be selected, whether it be at the end lines or the center of the claim, there is no uncertainty as to what is the plane of the claim, for it has been determined by the fixing of the end lines.

The statute expressly declares that the claimant shall have "all veins, lodes, or ledges throughout their entire depth, the top or apex of which lie inside such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside the vertical side lines of such surface locations."

The question, so far as this court is concerned, stands undecided.

In not a single case cited by plaintiff in error was the question here in issue discussed or decided.

On the other hand, this identical question has arisen and been decided, as we contend is correct, in the following cases:

Tyler Min. Co. v. *Last Chance Min Co.* 7 U. S. App. 463, 54 Fed. Rep. 284. 4 C. C. A. 329; *Consolidated Wyoming Gold Min. Co.* v. *Champion Min. Co.* 63 Fed. Rep. 540; *Del Monte Min. & Mill. Co.* v. *New York & L. C. Min. Co.* 66 Fed. Rep. 212; *Tyler Min. Co.* v. *Last Chance Min. Co.* 71 Fed. Rep. 848; *Republican Min. Co.* v. *Tyler Min. Co.* 48 U. S. App. 213, 79 Fed. Rep. 733, 25 C. C. A. 178; *Carson City Gold & S. Min. Co.* v. *North Star Min. Co.* 73 Fed. Rep. 597; *Fitzgerald* v. *Clark*, 17 Mont. 100, 30 L. R. A. 803 (the case at bar).

The question is also discussed and the same principle announced in—

Doe v. *Sanger*, 83 Cal. 203.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is before us on error to the supreme court of Montana. It is unnecessary to state its facts in detail, and it is sufficient to say that *the answer given to the fourth question in the opinion just filed compels an affirmance of the judgment*, and it is so ordered.

JAMES JOHNSON, *Plff. in Err.*,
v.
GEORGE F. DREW.

(See S. C. Reporter's ed. 93-100.)

Equitable pleas in ejectment—defense against patent for land.

1. The rejection of equitable pleas in eject-

NOTE.— *As to pre-emption rights*—see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud,—see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5: 423.

ment is immaterial, when the defendant could give evidence of all matters of defense set up in the equitable pleas under the plea of not guilty filed by him.

2. A party cannot defend against a patent for land, duly issued by the United States upon an entry made at a local land office, on the ground that he was in actual possession of the land at the time of the issue of the patent.

[No. 239.]

Submitted April 28, 1898. Decided May 31 1898.

IN ERROR to the Supreme Court of the State of Florida to review a judgment of that court affirming the judgment of the Circuit Court of that state in an action of ejectment brought by George F. Drew, plaintiff, against James Johnson, to recover possession of a tract of land, the judgment being for plaintiff. *Affirmed.*

Statement by Mr. Justice **Brewer:**

In September, 1886, defendant in error commenced an action of ejectment in the circuit court of the state of Florida, for the county of Hillsborough to recover possession of a tract of land described as follows:

"Lot eight (8) of section nineteen (19), township twenty-nine (29) south, of range nineteen (19) east, and lot seven (7) of section twenty-four (24), in township twenty-nine (29) south, of range eighteen (18) east, containing about forty and nineteen one-hundredths (40.19) acres."

The defendant, now plaintiff in error, filed a plea of not guilty and also a plea based on equitable grounds. A demurrer to this latter plea was sustained, and thereupon the defendant asked leave to file an amended equitable plea. This application was denied, the court holding that the grounds of defense set up therein were not sufficient. That plea alleged in substance that the plaintiff's title rested on a patent from the United States, issued on a location of Valentine scrip; that such scrip was, by the terms of the statute under which it was issued, to be located only upon unoccupied and unappropriated lands of the United States; that the land in controversy was, at the time of the location of the scrip, a part of Fort Brooke military reservation, and was also in the actual occupancy of the defendant. The case came on for trial in September, 1889, and the defendant offered evidence in support of all of his defenses, including therein the matters set up in the equitable plea which he had been refused leave to file. This testimony was held insufficient by the court, and the trial resulted in a verdict and judgment for the plaintiff, which judgment was thereafter, and in June, 1894, affirmed by the supreme court of the state; whereupon the defendant sued out this writ of error.

The Valentine scrip act was passed April
[95] 5, 1872 (17 Stat. at L. 649), chap. 89, *and authorized the location of such scrip on "the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws." The patent to the plaintiff was issued September 30, 1882, and recited that it was upon a location of Valentine scrip, and in his equitable plea defendant averred that the patent was predicated upon an entry at the local land office of the United States at Gainesville, Florida. On August 18, 1856, Congress passed an act (11 Stat. at L. 87, chap. 129) containing this provision:

"That all public lands heretofore reserved for military purposes in the state of Florida, which said lands in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be, and are hereby, placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: Provided, That said lands shall not be so placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing, shall be filed and recorded."

At that time there was in existence what was known as the Fort Brooke military reservation, near the town of Tampa, Florida. As appears from the testimony offered by the defendant, on July 24, 1860, the Secretary of War wrote to the Secretary of the Interior as follows:

War Department, July 24, 1860.

Sir: Referring to the correspondence between the two departments on the subject, I have the honor to inclose to you a report of the quarter-master general showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

Very respectfully, your obedient servant,
John B. Floyd, Secretary of War.

Hon. J. Thompson, Secretary of the Interior.

*The inclosed report from the quartermaster [96]
general stated that all the movable property of the government had been sold, and that there was no reason why the military reservation should not be turned over to the Interior Department. Probably the exigencies of the war, which soon thereafter commenced, prevented any further action by either department, for on April 6, 1870, the following communication was sent by the Secretary of War to the Secretary of the Interior:

War Department, Washington City,
April 6, 1870.

The Honorable Secretary of the Interior.

Sir: I have the honor to reply to a letter addressed to this department by the Commissioner of the General Land Office on the 26th ultimo relative to the public lands occupied by this department for military purposes at Fort Brooke, Florida, and to inform you that there is no longer any objection to their

disposition by the General Land Office under the laws governing the subject.

Very respectfully, your obedient servant,
Wm. W. Belknap, Secretary of War.

From the date of this last communication up to 1877 the record discloses no action by either department, but in January, 1877, the Secretary of War requested that a military reservation at Fort Brooke be declared and set apart by the executive. Subsequently, and on May 29, 1878, the Secretary of War addressed a communication to the President, as follows:

War Department, Washington City,
May 29, 1878.

To the President.

Sir: In accordance with recommendation of commanding general department of the south, concurred in by division commanders, I have the honor to request that a military reservation at the post of Fort Brooke, Tampa, Florida, with boundaries as hereinafter described, may be duly declared and set apart by the executive in lieu of the lands at that post reserved by executive order dated January 22, 1887, to wit: Beginning at the intersection of the line which bounds the
[97] town *of Tampa on the south with the Hillsborough river, running thence along said line which bounds the town of Tampa on the south, and in prolongation thereof north 68 degrees 45 minutes east 2,976 feet; thence north 4 degrees 28 minutes west 2,342 feet; thence north 38 degrees east 1,052 feet; thence south 52 degrees east 459.2 feet; thence south 38 degrees west 1,052 feet; thence south 4 degrees 28 minutes east 1,931 feet; thence south 5 degrees 29 minutes east 2,007.2 feet to the Hillsborough bay; thence westerly along the shore of Hillsborough bay and the shore of Hillsborough river to the place of beginning, containing 155 and one half acres, more or less. A plat of the reservation and report and notes and survey by Lieutenant James C. Bush, 5th artillery, are inclosed herewith.

I have the honor to be, sir, with great respect, your obedient servant,
Geo. W. McCrary,
Secretary of War.

This request was approved and the reservation was made and declared accordingly. The plat, notes, and survey referred to in this letter were not introduced in evidence, so that the exact boundaries of the reservation then ordered were not distinctly shown, nor can it be determined from the description in the letter alone whether it included the lands in controversy. In March, 1883, this last reservation was abandoned, and the land again turned over to the Interior Department. Defendant also offered a diagram, certified by the Commissioner of the Land Office, of sections 18 and 19 of township 29, range 19, and section 24 of township 29, range 18, which, as the record recites, "shows the contiguity of the land in question to that portion of the Fort Brooke military reservation last relinquished by the Secretary of War to the Secretary of the Interior." The diagram is not very definite, and it is difficult to determine therefrom the boundaries of either the earlier or later Fort Brooke military reservation. The defendant also offered evidence tending to show that he entered into occupation of the tract in controversy in 1871, and had continued in occupancy ever since.

*Mr. **Samuel Y. Finley** for plaintiff in error. [98]

Messrs. **C. M. Cooper** and **J. C. Cooper** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The ruling of the trial court in sustaining the demurrer to the first equitable plea and refusing leave to permit the second to be filed presents no question for the consideration of this court, for it was held by the supreme court of the state that under the plea of not guilty all the matters of defense set up in these equitable pleas could be offered in evidence and made available; and, in fact, the defendant on the trial did offer his testimony to establish them. So, the substantial rights of the defendant were not prejudiced, and the ruling involved merely a question of state practice.

We pass, therefore, to a consideration of the merits of the case: Was the land within the limits of any military reservation at the time that it was patented? The supreme court of the state said in respect to this matter:

"There is doubt whether the documentary evidence offered by the defendant shows that the particular lots of land described in the declaration were embraced in the Fort Brooke reservation when the patent was issued."

It is clear to us that they were not. The description of the reservation asked for in the letter of May 29, 1878, from the Secretary of War to the President, is not of itself sufficient to show whether the land was within or without the limits of such reservation. The plat, notes and survey were not in evidence. But the record recites that the diagram, certified by the Commissioner of the Land Office, "shows the contiguity of the land in question." If contiguous it was not within, and while the diagram is unsatisfactory, yet it tends to support this statement of the record. Again, the testimony of the defendant is that he entered into possession of this land in 1871, which was before the reservation was established, and *continued in such possession [99] until after the restoration in 1883, and this is in accord with the averments in the equitable plea. This also indicates that the land was not included in any government reservation. Further and finally, the plat on file in the General Land Office, and a part of the public records, puts the question at rest and locates the land outside the reservation. Hence, as shown by the testimony and by the public records, this land ever since 1870 has been part of the public lands of the United

States. and subject to disposal in accordance with the general land laws. It was unappropriated land within the meaning of the act of 1872.

It being so a part of the public domain, subject to administration by the land department and to disposal in the ordinary way, the question arises whether a party can defend against a patent duly issued therefor upon an entry made in the local land office on the ground that he was in actual possession of the land at the time of the issue of the patent? We are of opinion that he cannot. It appears from the testimony that the defendant, although in occupation of this land, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and in fact did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights. But whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts. The law in reference to this matter was summed up in the case of *Burfenning* v. *Chicago, St. Paul, M. & O. Railway Co.* 163 U. S. 321, 323 [41: 175, 176], as follows:

It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the land department, and that its judgment thereon is final. Whether.
[100]for instance, a certain tract is swamp *land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the land department, one way or the other, in reference to those questions, is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson* v. *Towsley*, 13 Wall. 72 [20: 485]; *St. Louis Smelting & Ref. Company* v. *Kemp*, 104 U. S. 636 [26: 875]; *Steel* v. *St. Louis Smelting & Ref. Company*, 106 U. S. 447 [27: 226]; *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039]; *Heath* v. *Wallace*, 138 U. S. 573 [34: 1063]; *McCormick* v. *Hayes*, 159 U. S. 332 [40: 171].

"But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. *St. Louis Smelting & Ref. Company* v. *Kemp*, 104 U. S. 636, 646 [26: 875, 879]; *Wright* v. *Roseberry*, 121 U. S. 488, 519 [30: 1039, 1048]; *Doolan* v. *Carr*, 125 U. S. 618 [31: 844]; *Davis's Admr.* v. *Weibbold*, 139 U. S. 507, 529 [35: 238, 246]; *Knight* v. *United States Land Asso.* 142 U. S. 161 [35: 974].

Reference is made in the brief to the act of Congress of July 5, 1884 (23 Stat. at L. 103, chap. 214) concerning the disposal of abandoned and useless military reservations. But obviously that statute can have no significance in this case, for the patent had issued and the title passed from the government prior to its enactment. We see no reason to doubt that upon the facts in this case *the judgment of the Supreme Court of Florida was right, and it is therefore affirmed.*

THOMAS TINSLEY, *Appt.*, [101]
v.
ARCHIE R. ANDERSON, Sheriff of Harris County, Texas.

SAME
v.
SAME.

(See S. C. Reporter's ed. 101-108.)

Power of circuit courts—dismissal of habeas corpus—equal protection of the laws—commitment for contempt—lien on property, when a defense—jury trial.

1. Circuit courts of the United States should not, except in urgent cases, relieve from custody, by habeas corpus, persons held under state authority in violation of a Federal right, but should leave them to their remedy by review.
2. The dismissal of a writ of habeas corpus by the highest court of the state having jurisdiction of the case is reviewable by this court on writ of error, if it denies the prisoner any right specially set up and claimed by him under the Constitution, laws, or treaties of the United States.
3. Equal protection of the laws is not denied by a law or course of procedure which would have been applied to any other person in the state under similar circumstances and conditions.
4. A commitment for contempt does not deprive a person of liberty without due process of law, unless the commitment was void.
5. The claim of an equity or lien on property held by an officer of a corporation to secure a debt to himself does not defeat the jurisdiction of a court which has appointed a receiver

NOTE.—*When habeas corpus may issue, and when not; and from what courts and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus,—see note to *Re* Carll, 27: 288.

As to suspension of writ of habeas corpus,—see note to Luther v. Borden, 12: 581.

As to what is due process of law,—see note to Pearson v. Yewdall, 24: 436.

for the corporation in a suit to which the officer is a party, after hearing on due notice and appearance, to order him to turn over such property to the receiver.

6. A jury trial is not necessary to due process of law on an inquiry for contempt.

[Nos. 632, 633.]

Argued May 5, 6, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Texas dismissing a writ of habeas corpus to inquire into the cause of the imprisonment of Thomas Tinsley for a contempt; and in error to the Court of Criminal Appeals of the State of Texas to review a judgment dismissing a writ of habeas corpus and remanding said Tinsley to the custody of the sheriff for the same contempt of court, which was disobeying the order of the District Court of the County of Harris in said State, requiring him to deliver to the receiver of the Houston Cemetery Company certain books and property of that company. *Judgments of the Circuit Court and of the Court of Criminal Appeals affirmed.*

See same case below (Tex. Civ. App.) 36 S. W. Rep. 802, 37 Tex. Crim. Rep. —, 40 S. W. 306.

The facts are stated in the opinion.

Mr. **James L. Bishop** for appellant and plaintiff in error:

The commitment and the order on which it was made were void.

Distinct and incompatible proceedings were blended in one judgment.

Re Chiles, 22 Wall. 157 (22: 819); *People, Munsell*, v. *New York County Ct. of Oyer & Terminer*, 101 N. Y. 245, 54 Am. Rep. 691.

Regarding the order as made in the proceeding as a civil remedy directing the appellant to deliver the property specified to the receiver, or in default of delivery that he be

As to powers of court to punish for contempt,—see note to *Ex parte* Robinson, 22: 205.

That there is no review of decree punishing for contempt; limits to rule,—see note to New Orleans v. New York Mail S. S. Co. 22: 354.

As to powers and duties of receivers,—see note to Davis v. Gray, 21: 447.

As to presumption of innocence in habeas corpus proceedings,—see note to State v. Jones (N. C.) 22 L. R. A. 678.

As to jurisdiction of United States courts, to issue writs of habeas corpus,—see note to *Re* Reinitz (C. C. S. D. N. Y.) 4 L. R. A. 236.

Habeas corpus; power of Federal courts to issue; in what cases; when discharge granted; review of decisions; contempt proceedings.

The circuit courts of the United States have jurisdiction to issue a writ of habeas corpus in favor of a person unlawfully restrained of his liberty by state officers under a statute in violation of the Constitution of the United States. Baker v. Grice, 169 U. S. 284 (42: 748).

Error in submitting to the jury only the question of murder in the first degree, while the evidence is sufficient at the most to convict of murder in the second degree, does not constitute such a jurisdictional defect in a conviction for murder in the first degree as to sustain a writ of habeas corpus. Crossley v. California, 168 U. S. 640 (42: 610).

The action of the circuit court of the United States in refusing to grant appeals in habeas corpus cases in favor of a prisoner under judgment of a state court cannot be revised on application to the Supreme Court of the United States for such a writ. *Re* Boardman, 169 U. S. 39 (42: 653).

A determination by a state court that judgment of conviction in a capital case shall not be stayed, notwithstanding the pendency of an appeal which is alleged to present Federal questions, will not be interfered with by the Supreme Court of the United States on a writ of habeas corpus. *Re* Boardman, 169 U. S. 39 (42: 653).

A Federal court will not on habeas corpus discharge a prisoner charged with a violation of the criminal laws of one state and apprehended in another, where it appears by the recitals contained in the warrant under which he was arrested and the record of the extradition proceedings, that no right, privilege, or immunity secured to him by the Constitution and laws of the United States will be violated by remanding him to the custody of the agent of the demanding state. Dawson v. Rushin, 49 U. S. App. 674, 83 Fed. Rep. 306, 28 C. C. A. 354.

The regular course of justice in a state court will not be interfered with by habeas corpus in a Federal court, unless the case is of an exceptional nature. Baker v. Grice, 169 U. S. 284 (42: 748).

Habeas corpus will lie to prevent the execution of the petitioner under order of a state court, pending an appeal in previous habeas corpus proceedings instituted by him in a Federal court, the effect of which is to stay proceedings in the state court. *Re* Ebanks, 84 Fed. Rep. 311.

Federal officers arrested under a charge made in state courts will be discharged by a Federal court on habeas corpus where there is no ground for a criminal charge under the state laws. *Re* Lewis, 83 Fed. Rep. 159.

The finding of a commissioner holding a prisoner for removal to another Federal district, as to probable cause to believe that he has been guilty of a crime, will not be disturbed where the testimony, though not strong, tends to show the commission of the offense charged. *Re* Price, 83 Fed. Rep. 830.

A writ of habeas corpus will not be granted by a Federal court to investigate the detention of a person for selling cigarettes without a license, under a plain statute making no discriminations against foreign goods or foreign citizens, but simply requiring every person engaged in the business of selling cigarettes to pay a special license tax. *Re* May, 82 Fed. Rep. 422.

The court cannot upon habeas corpus review a judgment of deportation made by a United States commissioner in respect to a Chinese person upon the facts. *Re* Tsu Tse Mee, 81 Fed. Rep. 702.

A complaint in habeas corpus alleging invalidity of process or proceedings under which the party is held in custody must set out copies of such process or proceedings, or the essential parts thereof; and mere averments of conclusions of law are inadequate. Craemer v. Washington, 168 U. S. 124 (42: 407).

Writ of habeas corpus cannot perform the office of a writ of error to review proceedings in extradition before an officer authorized to entertain such proceedings. It is efficient only to reach error fatal to the jurisdiction of the officer over the person accused, or over the subject-matter of the accusation. Sternaman v. Peck, 51 U. S. App. 312, 80 Fed. Rep. 883, 26 C. C. A. 214.

Habeas corpus will lie to review an imprisonment under one sentence of a state court, where the question is whether such court had jurisdiction to hear and determine the charge. *Re* Waite, 81 Fed. Rep. 359.

Federal courts will not, except in extreme cases, if at all, interfere by habeas corpus with confinement of insane person, because steps provided for by the state statute have not been followed, but the proper redress is by application to the state courts. *Re* Huse, 48 U. S. App. 318, 79 Fed. Rep. 305, 25 C. C. A. 1.

One held for extradition upon charge of forgery should not be released upon habeas corpus,

committed until he make delivery, it was void for the reason that the court had no authority in a proceeding to punish for contempt to determine the right of possession of property claimed adversely to the receiver or give judgment for the payment of a debt.

Ex parte Hollis, 59 Cal. 405; *Parker* v. *Browning*, 8 Paige, 388, 35 Am. Dec. 717; *Havemeyer* v. *San Francisco City & County Super. Ct.* 84 Cal. 385, 10 L. R. A. 627; *Davis* v. *Gray*, 16 Wall. 218 (21: 452); *Baldwin* v. *Wayne County Circuit Judge*, 101 Mich. 119; *State, Boardman*, v. *Ball*, 5 Wash. 387; *Re Muehlfeld*, 16 App. Div. 401; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 534; *State* v. *Start*, 7 Iowa, 501, 74 Am. Dec. 278; *Ex parte Hardy*, 68 Ala. 303.

The uniform rule is that where a receiver has been appointed he cannot compel the delivery of property in the possession of third persons, who claim title or right to possession adverse to the judgment debtor by proceedings for contempt.

Rodman v. *Henry*, 17 N. Y. 482; *Barnard* v. *Kobbe*, 54 N. Y. 516; *West Side Bank* v. *Pugsley*, 47 N. Y. 368; *Krone* v. *Klotz*, 3 App. Div. 587; *Re Havlik*, 45 Neb. 747; *Edgarton* v. *Hanna*, 11 Ohio St. 323.

Jurisdiction means something more than that a party has been brought before the court, or that the court has a general jurisdiction of the subject-matter—it requires that the particular subject-matter shall have been brought into issue in the particular action before the court.

Reynolds v. *Stockton*, 140 U S. 254 (35 : 464); *Bigelow* v. *Forrest*, 9 Wall. 339 (19: 696) *Seamster* v. *Blackstock*, 83 Va. 232; *Risley* v. *Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Shaw* v. *Broadbent*, 129 N. Y. 114; *Stannard* v. *Hubbell*, 123 N. Y. 520; *Allen* v. *Farmers' Loan & T. Co.* 18 App. Div. 27.

The title of the receiver related only to the date of his appointment. He took the property as of that date subject to such

---

where there was legal, though circumstantial, evidence before the commissioner which he deemed sufficient to sustain the charge of forgery under the provisions of the treaty. *Re* Bryant, 80 Fed. Rep. 282.

While the general rule is that parties under prosecution in state courts will not be released by a Federal court on habeas corpus, but will be left to reach the United States Supreme Court by writ of error, the Federal court has the power to do so if special circumstances require. *Re* Grice, 79 Fed. Rep. 627.

Courts of the United States may exercise a discretion in determining the question of the discharge of a person on habeas corpus who has been arrested as a fugitive in a state proceeding in aid of a prosecution for the violation of the laws of another state. Iasigi v. Van De Carr, 166 U. S. 391 (41: 1045).

A writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal. *Re* Lennon, 166 U. S. 548 (41: 1110); *Re* Rowe, 40 U. S. App. 516, 77 Fed. Rep. 161, 23 C. C. A. 103.

A conviction on a verdict which fails to specify the degree of the crime, when the law divides it into degrees, with punishment varying according to the degree, although it is erroneous, is not a jurisdictional defect for which the convict can be released on habeas corpus. *Re* Eckart, 166 U. S. 481 (41: 1085).

Habeas corpus in contempt proceedings: *Ex parte* Smith, 177 Ill. 63; *Ex parte* Terry, 128 U. S. 289 (32: 405); *Ex parte* Ah Men, 77 Cal. 198; *Re* Morris, 39 Kan. 28; *Ex parte* Robertson, 27 Tex. App. 628; *Ex parte* Wilson 73 Cal. 97; *Re* Burrus, 136 U. S. 586 (34: 500); Langenberg v. Decker, 131 Ind. 471, 16 L. R. A. 108; Com. v. Bell, 145 Pa. 374; *Ex parte* Brown, 97 Cal. 83; *Re* Whetstone, 9 Utah, 156; *Re* Taylor, 8 Misc. 159; *Re* McMaster, 2 Okla. 435; *Ex parte* Wright, 32 N. B. 54; *Re* Pfirman, 1 Ohio N. P. 127; *Re* Rosenberg, 90 Wis. 581; *Ex parte* Lennon, 22 U. S. App. 561, 64 Fed. Rep. 320, 12 C. C. A. 134; *Ex parte* O'Brien, 127 Mo. 477.

The question of error in an order consolidating indictments cannot be re-examined by writ of habeas corpus, as error in that respect would not make the judgment and sentence void as without jurisdiction and authority. Howard v. United States, 43 U. S. App. 678, 75 Fed. Rep. 986, 21 C. C. A. 586, 34 L. R. A. 509.

After a decision of a state court of competent jurisdiction when it is still contended that the Federal Constitution has been violated, a Federal court has the power, and it is its duty, to interfere by habeas corpus for the protection of the rights violated, but not unless there is a plain case requiring it. *Re* Krug, 79 Fed. Rep. 308.

An executive warrant for the arrest of a fugitive from justice will be upheld on habeas corpus when the foreign indictment or affidavit on which it is based is properly authenticated and charges an offense committed within the foreign state with reasonable fullness and accuracy, and will not be pronounced void because of some technical defect in the foreign indictment or affidavit, if the offense is substantially alleged or described. Webb v. York, 49 U. S. App. 163, 79 Fed. Rep. 616.

An excess or abuse in the mode of detention of an accused person does not, except in a very grave and unusual case, entitle him to a discharge, by a writ of habeas corpus, from all confinement, and the rule applies where the arrest is under military law. Closson v. United States, Armes, 7 App. D. C. 460.

A letter from the commissioner of internal revenue to a collector, stating that a state court has no right to compel the production of the records of the officers, and that the communications of taxpayers are privileged, is not a regulation having the force of a statute which will entitle a Federal court to review on habeas corpus the imprisonment of a collector for refusal to produce such records in compliance with the order of a state court. *Re* Hirsch, 74 Fed. Rep. 928.

One held under process legally issued by the courts of a state is not entitled to discharge upon habeas corpus because of illegal or fraudulent extradition proceedings by which he was brought into the jurisdiction. *Re* Moore, 75 Fed. Rep. 821.

Habeas corpus cannot be extended so as to enable the Federal court to assume the functions of an appellate tribunal to review the decisions of state courts, because the petitioner is poor and unable to bear the expense incident to a hearing in the appellate courts of the state. *Re* Nelson, 69 Fed. Rep. 712.

The decision of a state court denying a writ of error to a person convicted of crime or refusing to make it effectual cannot be revised by habeas corpus proceedings in a Federal court. Kohl v. Lehlback, 160 U. S. 293 (40: 432).

The insufficiency of an indictment in a state court will not be a ground for interposition by the courts of the United States by writ of habeas corpus. Whitten v. Tomlinson, 160 U. S. 231 (40: 406).

Habeas corpus will lie in a Federal court to review the commitment by a state court of a deputy collector of internal revenue for contempt in refusing to disclose communications made to him by an applicant for a retail liquor dealer's tax stamp, for the purpose of making the office records of the application. *Re* Huttman, 70 Fed. Rep. 699.

A dispute in regard to the true boundary between the state of California and the territory of Arizona cannot be created or determined upon a petition for a writ of habeas corpus in behalf of one convicted and sentenced and imprisoned by the territorial government in a

rights of action as the corporation had, or as he was clothed with by statute.

Re Schuyler's Steam Tow Boat Co. 130 N. Y. 169, 20 L. R. A. 391; *Connecticut River Bkg. Co.* v. *Rockbridge Co.* 73 Fed. Rep. 709; *Storm* v. *Waddell,* 2 Sandf. Ch. 494; *Re Muehlfeld,* 12 App. Div. 492.

A complete departure from the prescribed formalities, even though the parties were actually present in court, would devest the court of jurisdiction to render any judgment.

Ex parte Lange, 18 Wall. 163 (21: 872); *Ex parte Bain,* 121 U. S. 1 (30: 849); *Hopt* v. *Utah,* 110 U. S. 574 (28: 262); *Edrington* v. *Pridham,* 65 Tex. 617.

The petition in the United States circuit court contained the averment that petitioner had not then and never had possession or control, since the application for the receivership was made, of certain of the notes mentioned in the judgment. This averment was not controverted and it must be taken as true in this court.

Kohl v. Lehlback, 160 U. S. 296 (40:432); *Whitten* v. *Tomlinson,* 160 U. S. 231 (40: 406).

In effect, the appellant was sentenced to an indefinite imprisonment. An order of that character was beyond the power of the court to make.

Ex parte Kearby, 35 Tex. Crim. Rep. 531; *Edrington* v. *Pridham,* 65 Tex. 617; *Ex parte Robinson,* 19 Wall. 505 (22: 205); *State* v. *Kaiser,* 20 Or. 50, 8 L. R. A. 584.

The court anticipated the default and committed the appellant in anticipation of the disobedience. The commitment was therefore void. A man cannot be convicted of an offense in anticipation of its being committed.

Re Chiles, 22 Wall. 157–169 (22: 819–823); *Brinkley* v. *Brinkley,* 47 N. Y. 40, 46; *Rice* v. *Ehele,* 55 N. Y. 518; *First Nat. Bank* v. *Fitzpatrick,* 80 Hun, 75; *Fromme* v. *Jarecky,* 19 Misc. 483.

The sentence imposed being without authority of law, it was void, and the prisoner was entitled to be discharged on habeas corpus.

Re Bonner, 151 U. S. 242 (38: 149): *Re Mills,* 135 U. S. 263, 270 (34: 107, 110); *People* v. *Carter,* 48 Hun, 166; *People, Tweed,* v. *Liscomb,* 60 N. Y. 559, 19 Am. Rep. 211; *Com.* v. *Newton,* 1 Grant, Cas. 453; *Ex parte Degener,* 30 Tex. App. 566.

---

prison claimed to stand within the boundaries of such state. *Re* Chavez, 72 Fed. Rep. 1006.

A habeas corpus is properly granted in the case of an army officer arrested for selling liquor on a military reservation in violation of a state statute, involving the question whether such statute is operative within the limits of the reservation. *Re* Ladd, 74 Fed. Rep. 31.

Persons held for deportation as alien immigrants coming into the country in violation of the contract labor laws will be released on habeas corpus, where the warrant of deportation does not contain their names or any name or names *idem sonans,* and there is no evidence tending to identify them with any name or names recited in the warrant. United States v. Amor, 30 U. S. App. 302, 68 Fed. Rep. 885, 16 C. C. A. 60.

The circuit court of the United States should not, except in cases of urgency, discharge upon habeas corpus, from custody under warrants issued by a state court, one charged with the offense, committed while president of a national bank, of forgery by making false entries in the books of the bank with intent to defraud, where he is not indicted in any court of the United States for such offense. New York v. Eno, 155 U. S. 89 (39: 80).

The United States district court should not sustain a writ of habeas corpus to discharge a person convicted in a state court, where the validity of the sentence can be tested by the supreme court of the state, or a writ of error from the Supreme Court of the United States may be applied for. Pepke v. Cronan, 155 U. S. 100 (39: 84).

A dismissal by a state court of a petition for a writ of habeas corpus to release a person from a lunatic asylum, although incidentally accompanied by a direction that he should remain in the asylum, will not preclude a Federal court from taking jurisdiction of a subsequent petition for the same purpose. King v. McLean Asylum, 21 U. S. App. 481, 64 Fed. Rep. 331, 12 C. C. A. 145, 26 L. R. A. 784.

A writ of habeas corpus will not be granted to release a prisoner under indictment in the District of Columbia, until his case has reached a final determination in the district court. *Re* Chapman, 156 U. S. 211 (39: 401).

A Federal marshal and his deputies, when arrested under process from a state court because to save their own lives they killed a person whom they were lawfully attempting to arrest under process of a Federal court, will be released by the latter court on habeas corpus. Kelly v. Georgia, 68 Fed. Rep. 652.

The repugnancy of a state statute to the state Constitution does not authorize a writ of habeas corpus from a court of the United States. Andrews v. Swartz, 156 U. S. 272 (39: 422).

A defect in an indictment under state statutes which are not repugnant to the Federal Constitution does not give jurisdiction to a Federal court to interfere with the execution of the sentence of a state court by writ of habeas corpus. Bergemann v. Backer, 157 U. S. 655 (39: 845).

The violation of a provision in a state Constitution, limiting the time for reprieves, does not make an execution of the death sentence on a governor's warrant and after the time named in the sentence a violation of the prisoner's right to due process of law, or a deprivation of any right, privilege, or immunity granted by the Constitution of the United States, which will authorize interference by habeas corpus from a Federal court. Lambert v. Barrett, 157 U. S. 697 (39: 865).

A prisoner is not entitled to discharge upon habeas corpus because he is a negro and citizens of his race were not summoned for qualification as grand jurors, where the state law directs the selection of jurors impartially from the citizens having the requisite qualifications as voters, and does not discriminate against men of the African race. *Ex parte* Murray, 66 Fed. Rep. 297.

A denial in a state court of the right to show that persons of the race of the accused were arbitrarily excluded by the sheriff from the panel of grand and petit juries solely because of their race does not defeat the jurisdiction of that court so as to warrant a writ of habeas corpus. Andrews v. Swartz, 156 U. S. 272 (39: 422).

While the decision of an inspecting officer touching the right of alien immigrants to land, when adverse to such right, is made final by United States statute, the court upon habeas corpus may determine whether the person excluded is or is not an alien immigrant. *Re* Maiola, 67 Fed. Rep. 114.

Habeas corpus will not lie to review proceedings by which an alien immigrant is excluded as likely to become a public charge, as Congress has constitutionally vested in the commissioner of immigration, exclusive of the courts, the final authority to determine whether an alien shall be excluded from admission to this country. United States, Goldstein, v. Rogers, 65 Fed. Rep. 787.

The question whether one extradited from one state to another was a fugitive from justice is not so exclusively a Federal question that a Federal court will discharge him on habeas corpus, where the question has not been raised in the state court. *Ex parte* Whitten, 67 Fed. Rep. 230.

The order and commitment being void, the appellant was deprived of his liberty by the state without due process of law, and was entitled to his discharge on habeas corpus.

Ex parte Virginia, 100 U. S. 339 (25: 676); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Gibson* v. *Mississippi*, 162 U. S. 565 (40: 1075); *Scott* v. *McNeal*, 154 U. S. 34 (38: 896).

Messrs. **Presley K. Ewing** and *Henry F. Ring*, for appellee and defendant in error:

In respect to the cause on error to the highest court of the state, this court appears to be without any jurisdictional right of review, since no Federal right was specially set up or claimed in the state court, the general averment of want of due process of law amounting to nothing.

Kohl v. *Lehlback*, 160 U. S. 293 (40: 432); *Whitten* v. *Tomlinson*, 160 U. S. 231 (40: 406); *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 (41: 1149); *Leeper* v. *Texas*, 139 U. S. 462 (35: 225).

In respect to the appeal cause, the circuit court properly exercised its discretion in refusing to interfere with the state court's process, and in leaving the relator to his remedy in the state courts, and thence on error to this court.

Ex parte Royall, 117 U. S. 241 (29: 868); *Re Frederich*, 149 U. S. 70 (37: 653); *Cook* v. *Hart*, 146 U. S. 183 (36: 934); *Re Wood*, 140 U. S. 278 (35: 505); *Whitten* v. *Tomlinson*, 160 U. S. 231 (40: 406); *Pepke* v. *Cronan*, 155 U. S. 100 (39: 84).

The claim of denial of due process of law appears utterly untenable.

Davis v. *Beason*, 133 U. S. 333 (33: 637); *Lennon* v. *Lake Shore & M. S. Ry. Co.* 22 U. S. App. 561, 565, 64 Fed. Rep. 320, 12 C. C. A. 134.

A jury trial is not necessary to due process of law in a contempt inquiry.

Eilenbecker v. *Plymouth County Dist. Ct.* 134 U. S. 31 (33: 801); *Walker* v. *Saurinet*, 92 U. S. 90 (23: 678).

The claim of denial of equal protection of the law is without merit.

Walston v. *Nevin*, 128 U. S. 578 (32: 544); *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 209 (32: 109).

Matters of fact adjudicated by the committing court cannot be tried anew on habeas corpus.

Lennon v. *Lake Shore & M. S. R. Co.* 22 U. S. App. 565, 64 Fed. Rep. 320, 12 C. C. A. 134; *Davis* v. *Beason*, 133 U. S. 333 (33: 637).

The claim by relator that he cannot comply as to part of the notes, if true, is conclusively met by his contumacious refusal to comply with the order, as far as he admits his ability to do so, the rule being well settled that until the relator does this, and then seeks in the committing court modification of the order in other respects, he cannot be relieved on habeas corpus.

Re Swan, 150 U. S. 637 (37: 1207).

*Mr. Chief Justice **Fuller** delivered the opinion of the court: **[102]**

The object of both these proceedings is to obtain the discharge of Thomas Tinsley from imprisonment under an order committing him for contempt, under the following circumstances:

On April 23, 1896, upon a petition for the appointment of a receiver of the Houston Cemetery Company, a corporation of Texas, filed against the corporation, and against Tinsley, who was its president, and the other officers of the corporation, both as such officers and individually, by some in behalf of all, of the owner of lots in the cemetery, the district court of the county of Harris in the state of Texas made an order appointing a receiver of all the property of the corporation, and requiring each of its officers, upon demand of the receiver, to deliver to him any books, papers, money, or property, or vouchers for property, within their control, to which the corporation was entitled. Upon appeal by Tinsley and the other defendants from that order it was affirmed, on May 21, 1896, by the court of civil appeals of the state. 36 S. W. 802.

On February 2, 1897, the receiver made a motion to the district court to commit Tinsley for contempt in refusing to deliver to the receiver of a minute book, promissory notes of the amount of $1,440.50, and a trust fund, amounting to $492.52, belonging to the corporation. A rule to show cause was issued, in answer to which Tinsley averred that the notes and the minute book had been delivered by the corporation to him as collateral security for money advanced by him to the corporation, and that he had made, at the expense to himself of $7.70, an investment of the trust fund in securities which he had offered, and was still ready, to deliver to the receiver upon payment of this sum.

On February 6, 1897, the district court, after taking evidence and hearing the parties, adjudged that Tinsley was guilty of a contempt in disobeying its former order by not delivering to the receiver the minute book, notes, and trust fund, *being the property of **[103]**
the corporation and in his control; and ordered him to pay to the sheriff a fine of $100, and to deliver to the receiver the property aforesaid, and to be committed until he should pay the fine and should (being allowed by the sheriff reasonable opportunity to do so if he should so desire) deliver the property to the receiver, or until he should be discharged by further order of the court. And upon the same day he was accordingly committed to the county jail. On March 17, 1897, he presented to the judge of the district court a petition for a writ of habeas corpus, setting forth the above proceedings, and alleging that the judgment and commitment for contempt were void, and his detention under them illegal for these reasons: That his claim to the notes, minute book, and trust fund was made in good faith, and that he had the right thereto until deprived thereof by due course of law, and that the proceedings on said motion and said

judgment are not due process of law, and that he ought not and cannot be by such proceedings imprisoned or compelled to turn over said property and things, for that thereby he is deprived of a trial by due course of law; that the judgment and commitment were uncertain and indefinite, and did not limit the time of his confinement under them; that the statute of the state provided that the district court should not have the power to imprison any person for a longer period than three days for a contempt; and that the matters set up in said motion and judgment did not and could not constitute a contempt. This petition for a writ of habeas corpus was denied by the judge of the district court, but on April 2, 1897, was granted by the presiding judge of the court of criminal appeals of the state of Texas, and a writ of habeas corpus issued, addressed to the sheriff, who, on April 8, returned that he held the prisoner under the commitment for contempt.

After full arguments by both parties, the court of criminal appeals entered judgment, dismissing the writ of habeas corpus, and remanding him to the custody of the sheriff, on the ground that the order of commitment for contempt was within the power of the district court, at least so far as concerned the notes and minute book, because Tinsley was
[104] a *party to the suit in which the receiver was appointed, and claimed no title, other than by way of lien, in the notes and minute book, and such lien, if genuine, would be preserved to him against the property in the hands of the receiver. 40 S. W. 306.

On April 26, 1897, Tinsley filed a motion to set aside that judgment and for a rehearing, which, after further written arguments in his behalf, was overruled on May 12, 1897.

On May 15, 1897, upon a petition alleging that by the order of commitment he "is deprived of his liberty, and will be, if he submits to the order, of his property, without due process of law, in violation of the Constitution of the United States," he obtained from the circuit court of the United States for the eastern district of Texas a writ of habeas corpus to the sheriff, which, after a hearing, was by the judgment of that court dismissed and the prisoner remanded to custody; and on January 21, 1898, he appealed from that judgment to this court.

On January 31, 1898, he sued out a writ of error from this court to review the judgment of the court of criminal appeals of the state of Texas, and filed in that court an assignment of errors, one of which was that by the proceedings in that court "he was deprived of his liberty, and, if he submitted to the order of the trial court, would be deprived of his property, without due process of law, in violation of the Constitution of the United States and the 5th and 14th Amendments thereto."

The two cases now before us are the appeal from the judgment of the circuit court of the United States, and the writ of error to the court of criminal appeals of the state of Texas.

The dismissal by the circuit court of the United States of its own writ of habeas corpus was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, a law or a treaty *of the [105]
United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. *Ex parte Royall*, 117 U. S. 241 [29: 868]; *Ex parte Fonda*, 117 U. S. 516 [29: 994]; *Re Frederich*, 149 U. S. 70 [37: 653]; *Pepke* v. *Cronan*, 155 U. S. 100 [39: 84]; *Bergemann* v. *Backer*, 157 U. S. 655 [39: 845]; *Whitten* v. *Tomlinson*, 160 U. S. 231 [40: 406]; *Baker* v. *Grice*, 169 U. S. 284 [42 L. ed. 748]. This case shows no such circumstances as to require departure from this rule.

It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this court; citing the statement in *Chetwood's Case*, 165 U. S. 443, 462 [41: 782, 788], that "judgments in proceedings in contempt are not reviewable here on appeal or error. *Hayes* v. *Fischer*, 102 U. S. 121 [26: 95]; *Re Debs*, 158 U. S. 564, 573 [39: 1092, 1095], and 159 U. S. 251 [mem.]" But that statement was made in regard to such judgments in independent proceedings for contempt in the circuit courts of the United States, and the reason is, as stated in cases referred to in *Hayes* v. *Fischer*, above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts. *Ex parte Kearney*, 7 Wheat. 38, 42 [5: 391, 392]; *New Orleans* v. *New York Mail Steamship Company*, 20 Wall. 387, 392 [22: 354, 357].

But the appellate jurisdiction of this court from the state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a state where a decision in the suit could be had, against a title, right, privilege, or immunity, specially set up and claimed under the Constitution or a treaty or statute of the United States. Rev. Stat. § 709. Consequently, if the order of the court of criminal appeals of the state of Texas, being the highest court of the state having jurisdiction of the case, dismissing the writ of habeas corpus issued by one of its judges, and remanding the prisoner to custody, denied to him any right specially set up and claimed by him under the Constitution, laws, or treaties of the United States, it is doubtless reviewable by this court on writ of *error. *Newport Light Company* v. *New-* [106]
port, 151 U. S. 527, 542 [38: 259, 264]; *Pepke* v. *Cronan*, 155 U. S. 100, 101 [39: 84, 85].

We perceive no reason for holding that any such rights were denied by the judgment of the court of criminal appeals, in view of the

facts appearing in the record and the grounds on which that court proceeded as disclosed by its opinion.

Counsel asserts that the rights claimed under the Constitution of the United States were the right to due process of law, and the right to the equal protection of the laws.

The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure which was applied to Tinsley would have been applied to any other person in the state of Texas, under similar circumstances and conditions: and there is nothing in the record on which to base an inference to the contrary.

Was the right to due process of law denied? If the committing court had jurisdiction of the subject-matter and of the person and power to make the order for disobedience to which the judgment in contempt was rendered, and to render that judgment, then the court of criminal appeals could not do otherwise than discharge the writ of habeas corpus and remand the petitioner. The writ cannot be availed of as a writ of error or an appeal, and if the commitment was not void petitioner was not deprived of his liberty without due process of law.

The district court of Harris county, Texas, was a court of general jurisdiction, and had jurisdiction in the suit against the Cemetery Company and its officers, including Tinsley, who was not a stranger, but a party, to the litigation, after hearing had on due notice and appearance by the defendants, to enter the order appointing a receiver and directing the company's officers to deliver to him, on his demand therefor, the company's property in their custody, including the books, notes, and moneys on hand, and to determine on the facts that Tinsley was in contempt in refusing to deliver such property, and assuredly to adjudge this as to so much of the property as he conceded belonged to the company, but
107 the possession of which *he claimed the right to retain only in order to enforce an alleged lien.

The court of criminal appeals held that, as Tinsley did not claim the legal title in the notes and in the minute book, but merely an equity or lien thereon to secure his debt; as the order to turn over the property to the receiver was by no means an adjudication as to his lien, which if it was a genuine lien would be preserved to him in the hands of the receiver; and as the effect of the order was merely to place the articles in the hands of the receiver for administration under the orders of the court,—the district court unquestionably had the power to make the order as to these articles, and did not exceed its jurisdiction in so doing. So that even though the $492.52 was not a trust fund in his hands, as the district court had decided, but a mere debt due from him, because, as he alleged, that sum had been taken by another, and he had simply agreed to make it good, the adjudication of the district court was nevertheless sustainable apart from that item.

We concur in the view that it was undoubtedly competent for the district court to compel the surrender of the minute book and notes in Tinsley's possession, and that he could not be discharged on habeas corpus until he had performed or offered to perform so much of the order as it was within the power of the district court to impose, even though it may have been in some part invalid. *Re Swan*, 150 U. S. 637 [37: 1207].

The other objections suggested require no special consideration. It is said that the imprisonment for contempt was limited by the state statute to three days (art. 1101, Tex. Rev. Stat.), but the state court held that that statute had reference to a quasi-criminal contempt as a punishment, and not to a civil contempt, where the authority of the court is exercised by way of compelling obedience. Rapalje, Contempt, § 21. This is not a Federal question, and we accept the ruling of the state court in its construction of the statute. It is urged that the order of commitment imposed an uncertain and indefinite term of imprisonment; but the order was that Tinsley should be confined until he complied, and the addition, "or *until he shall be discharged by the further order of the court," was merely intended to retain the power to discharge him if the court should thereafter conclude to do so, it being within his own power to obtain his discharge at any time by obeying the order. Nor is there any force in the objection that no trial by jury was awarded, for such trial was not demanded, and a jury trial is not necessary to due process of law on an inquiry for contempt. *Walker* v. *Sauvinet*, 92 U. S. 90 [23: 678]; *Eilenbecker* v. *Plymouth County District Court*, 134 U. S. 31 [33: 801]; Rapalje, Contempt, § 112.

The judgments of the Circuit Court and of the Court of Criminal Appeals are severally affirmed.

CENTRAL NATIONAL BANK OF BOSTON *et al.*

v.

AARON R. STEVENS *et al.*

(See S. C. Reporter's ed. 108, 109.)

Motion to amend mandate.

Where the motion to amend the mandate of this court proceeds on a misconception of the meaning of the judgment and mandate, the motion will be denied.

[No. 38.]

Submitted May 9, 1898. Decided May 31, 1898.

IN ERROR to the Court of Appeals of the State of New York. On motion to amend the mandate in this cause (reported in 169 U. S. 432, 42 L. ed. 807) so as to command that the judgment be reversed only in the particulars described in the opinion of this court. *Motion denied.*

See same case below, 144 N. Y. 50.

Mr. **Edward Winslow Paige,** for the defendants in error, in favor of motion:

The opinion of the court seems to show that the court intended to reverse the judgment in the two particulars only which are described in it. The mandate, however. commands the reversal of the whole judgment.

The defendants in error move to amend the mandate so that it conform to the opinion.

It is the opinion of the counsel who signs this brief that it is decidedly for the interest of the defendants in error that the motion be denied.

And for the following reasons:—

The whole judgment being reversed, there must inevitably, under the laws of New York, be a new trial of the whole action. As the defendants in error might succeed in the new trial in all matters except those described in the opinion of the court—as to be reversed—there would be a general judgment in favor of the defendants in error like the present judgment, except that it would omit the injunction and the provision about the plaintiffs in error proving their certificates. Under that judgment there would of course be a new sale and the bondholders could then buy through the medium of a trustee other than Mr. Foster, thus relieving the case from the difficulty described in the opinion of the court.

It would also relieve the defendants in error from paying the costs of the court, since there is not any way under the laws of New York by which a successful plaintiff can be made to pay costs to the defendant.

And they can also show, although as we submit the present record shows, that not any of the proceeds of the certificates went into the property. Nevertheless we make the motion.

Mr. **Charles E. Patterson** for plaintiffs in error, in opposition to motion.

Per Curiam: The motion to amend the mandate in the above case seems to proceed on a misconception of the meaning of the judgment and mandate.

The judgment of this court does not undertake to affect or reverse the judgment of the supreme court of the state of New York, except in so far as that judgment sought to restrain the Central National Bank of Boston and the other plaintiffs in error from proceeding under and in accordance with the decree of the circuit court of the United States for the northern district of New York, and to compel them to again try in the supreme court of New York matters tried and determined in the circuit court. As between the other parties the judgment of the supreme court of New York was, of course, left undisturbed, and it is not perceived that the terms of the mandate signify anything else, or imply the consequences suggested by counsel.

The motion is denied.

NORTH AMERICAN COMMERCIAL COMPANY, *Plff. in Err.*, **[110]**

v.

UNITED STATES.

(See S. C. Reporter's ed. 110-137.)

Lease by the government of the exclusive right to take fur seals—maximum number of seals—reduction of rental—Secretary of the Treasury—damages.

1. No reduction of the per capita amount to be paid for each sealskin taken and shipped by a lessee of the government can be made on account of the limitation by the Secretary of the Treasury of the number of seals that may be killed, although by U. S. Rev. Stat. § 1962, a proportionate reduction of the rents reserved may be made, where the lease provides for an annual rental of $60,000 and in addition thereto for a certain sum for each skin taken and shipped, as this is in the nature of a bonus or addition to the stated consideration.
2. The original provision for a maximum number of seals to be taken by a lessee and a proportionate reduction of the fixed rental in case of a limitation, made by the act of Congress of 1870, is not done away with by implication by the act of May 24, 1874, which removes the restrictions imposed by U. S. Rev. Stat. §§ 1960, 1962, concerning the months during which seals may be taken and the number to be taken on or about each island respectively.
3. Assuming that the lessee took all the risk of a catch of seals reduced by natural causes, yet when the number that might be killed was limited by the act of the government or its agent, the Secretary of the Treasury, the lessee was entitled to a reduction of the rental reserved in the same proportion as the number of skins permitted bore to the maximum.
4. In reducing the number of seals which may be taken by a lessee of the government in the Pribiloff islands, in the exercise of the power reserved to him, it is immaterial whether the Secretary of the Treasury acts on his own judgment, or in compliance with the will of the government as expressed by the treaty with Great Britain.
5. The right to take fur seals under a so-called lease from the government, which is expressly subject to such regulations of the business as the United States may make, does not entitle the lessee to any damages for a reduction of the catch allowed by the regulations, for which a reduction of rentals is provided.

[No. 431.]

Argued April 18, 19, 1898. Decided May 31, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit in an action brought by the United States in the Circuit Court of the United States for the Southern District of New York against the North American Commercial Company, to recover for rent under a lease made by the Secretary of the Treasury to the company of the right to engage in the

NOTE.—*As to right of fishery; subordinate to that of navigation,*—see note to Wright v. Mulvaney (Wis.) 9 L. R. A. 807.

As to prescriptive rights of fishery; in public navigable waters; in private waters,—see note to Turner v. Hebron (Conn.) 14 L. R. A. 386.

business of taking fur seals on the islands of St. George and St. Paul, in the territory of Alaska, and for royalties upon the seals taken, and for the revenue tax on the skins, the judgment of the Circuit Court being in favor of the United States for $94,687.50, with interest and costs amounting to $107,257.29. *Judgment of Circuit Court reversed,* and cause remanded with direction to enter judgment in favor of the United States for $76,687.50 with interest from April 1, 1894, etc.

See same case below, 74 Fed. Rep. 145.

Statement by Mr. Chief Justice **Fuller:**

This was an action brought by the United States against the North American Commercial Company to recover the sum of $132,187.50, with interest, for rent reserved for the year ending April 1, 1894, under a so-called lease, bearing date March 12, 1890, made by the Secretary of the Treasury to the company, and royalties upon 7,500 fur-seal skins taken and shipped by the company that year in virtue of that instrument, and for
[111] the revenue tax of $2 on *each skin. The claim of the government consisted of these items:

Annual rental.	$60,000 00
Revenue tax on 7,500 skins at $2. . .	15,000 00
Per capita at $7.62½ on 7,500 skins.	57,187 50
Total.	$132,187 50

And interest thereon from April 1, 1894.

The case was tried by the circuit court without a jury. The court found for the United States in the sum of $94,687.50, with interest, and judgment was entered in their favor for $107,257.29, principal, interest, and costs. 74 Fed. Rep. 145.

The company having taken a writ of error to the circuit court of appeals for the second circuit, that court certified a certain question arising in the cause concerning which it desired the instructions of this court for its proper decision, whereupon this court ordered that the whole record and cause be sent up for consideration. A counterclaim of the company against the United States for breach of the lease was disallowed and dismissed by the circuit court, but not on the merits, and without prejudice to the right of the company to enforce the same by any other proper legal proceeding.

The agreement of lease out of which the cause of action arose is as follows:

"This indenture, made in duplicate this twelfth day of March, 1890, by and between William Windom, Secretary of the Treasury of the United States, in pursuance of chapter 3 of title 23, Revised Statutes, and the North American Commercial Company, a corporation duly established under the laws of the state of California, and acting by I. Liebes, its president, in accordance with a resolution of said corporation adopted at a meeting of its board of directors held January 4, 1890, witnesseth: That the said Secretary of the Treasury, in consideration of the agreements hereinafter stated, hereby leases to the said North American Commercial Company for a term of twenty years from the first day of
[112] May, 1890, the exclusive *right to engage in the business of taking fur seals on the Islands of St. George and St. Paul, in the territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals.

"The said North American Commercial Company, in consideration of the rights secured to it under this lease above stated, on its part covenants and agrees to do the things following, that is to say:

"To pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars laid upon each fur seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur seal skin taken and shipped from said islands, and also to pay the sum of fifty cents per gallon for each gallon of oil sold by it made from seals that may be taken on said islands during the said period of twenty years, and to secure the prompt payment of the sixty thousand dollars rental above referred to the said company agrees to deposit with the Secretary of the Treasury bonds of the United States to the amount of fifty thousand dollars, face value, to be held as a guarantee for the annual payment of said sixty thousand dollars rental, the interest thereon when due to be collected and paid to the North American Commercial Company, provided the said company is not in default of payment of any part of the said sixty thousand dollars rental.

"That it will furnish to the native inhabitants of said islands of St. George and St. Paul annually such quantity or number of dried salmon and such quantity of salt and such number of salt barrels for preserving their necessary supply of meat as the Secretary of the Treasury shall from time to time determine.

"That it will also furnish to the said inhabitants eighty tons of coal annually and a sufficient number of comfortable dwellings in which said native inhabitants may reside, and will keep *said dwellings in proper repair, and [113]
will also provide and keep in repair such suitable school-houses as may be necessary, and will establish and maintain during eight months of each year proper schools for the education of the children on said islands, the same to be taught by competent teachers, who shall be paid by the company a fair compensation, all to the satisfaction of the Secretary of the Treasury, and will also provide and maintain a suitable house for religious worship, and will also provide a competent physician or physicians and necessary and proper medicines and medical supplies, and will also provide the necessaries of life for the widows and orphans and aged and infirm inhabitants of said islands who are unable to provide for themselves; all of which foregoing agreements will be done and performed by the said company free of all costs and charges to said native inhabitants of said islands or to the United States.

"The annual rental, together with all other payments to the United States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891.

"The said company further agrees to employ the native inhabitants of said islands to perform such labor upon the islands as they are fitted to perform, and to pay therefor a fair and just compensation, such as may be fixed by the Secretary of the Treasury; and also agrees to contribute, as far as in its power, all reasonable efforts to secure the comfort, health, education, and promote the morals and civilization of said native inhabitants.

"The said company also agrees faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that
[114] the Secretary *of the Treasury shall judge necessary, under the law for the preservation of the seal fisheries of the United States; and it agrees that it will not kill or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury.

"The said company further agrees that it will not permit any of its agents to keep, sell, give, or dispose of any distilled spirits or spirituous liquors or opium on either of said islands or the waters adjacent thereto to any of the native inhabitants of said islands, such person not being a physician and furnishing the same for use as a medicine.

"It is understood and agreed that the number of fur seals to be taken and killed for their skins upon said islands by the North American Commercial Company during the year ending May 1, 1891, shall not exceed sixty thousand.

"The Secretary of the Treasury reserves the right to terminate this lease and all rights of the North American Commercial Company under the same at any time on full and satisfactory proof that the said company has violated any of the provisions and agreements of this lease, or in any of the laws of the United States, or any Treasury regulation respecting the taking of fur seals or concerning the islands of St. George and St. Paul or the inhabitants thereof."

The circuit court made eighteen findings, including the following:

"Sixth. The said islands of St. George and St. Paul in the territory of Alaska are the breeding ground of a herd of seals which in the early spring moves northward to Behring Sea, and are the habitat of that herd during the summer and fall of each year; that the seals land in great numbers upon the said islands and divide into families, each consisting of one male or bull and many females or cows; that the young or male seals, or bachelors as they are called, are not admitted to the breeding ground, but are driven off by the older males and oftentimes destroyed by them; that until such bachelor seals arrive at the age of three or four years they occupy other portions of the islands and can be driven away from the breeding ground and
killed without disturbing the seals *on the [115]
breeding grounds; that a large proportion of these young bachelor seals may be so killed without diminishing the birth rate of the herd, and their skins are a valuable article of commerce and are more valuable than the skins of the females or older males; that by protecting the females and restricting the capture to the bachelors the fisheries are capable of a permanent and annual supply of skins which would afford a valuable source of revenue.

"Seventh. That after the making of the said lease by the said plaintiff and the said defendant, the said defendant entered upon the enjoyment of the right thereby granted it; but on account of the enforcement by the said plaintiff of the provisions of a convention or agreement made and entered into by the said plaintiff with the government of Great Britain it prohibited and prevented the said defendant, during the years 1890, 1891, and 1892, from taking on the said islands as many seals as might have been taken without diminution of the herd, and far less in each year than the number mentioned in the said lease for the first year; the numbers taken in those years being in 1890, 20,995; in 1891, 13,482; and in 1892, 7,547.

"Eighth. That for the said years of 1890, 1891, and 1892, it was agreed between the Secretary of the Treasury and the said defendant that the said defendant should pay to the said plaintiff for the seal skins taken by it on the said islands the tax and such proportionate part of the rental of $60,000 and the per capita sum of seven dollars sixty-two and one half cents, as the number of seals taken bore to one hundred thousand, except that for 1890 the per capita of seven dollars sixty-two and one half cents was not so reduced.

"Ninth. That by a convention or agreement with the government of Great Britain, commonly called the *modus vivendi*, the United States promised, during the pendency of the arbitration between those two governments relating to the Behring Sea controversy and the preservation of the seals resorting to those waters, to prohibit seal killing on the said islands in excess of 7,500 to be taken from the islands for the subsistence of the natives, and to use promptly its best efforts to insure the enforcement of the prohibition.

*"Tenth. That pursuant to such agreement [116]
the United States prohibited and prevented the said defendant from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease.

"Eleventh. That the Secretary of the Treasury did not exercise the discretion conferred

upon him by section 1962 of the Revised Statutes to limit the right of killing seals when necessary for the preservation of such seals, and did not so limit or restrict the right of the said defendant to take seals under its said lease for the year 1893, and that during that year it was not necessary or even desirable for the preservation of such seals to limit the killing of the seals upon the said islands to the said number of 7,500 specified in the said *modus vivendi.*

"Twelfth. That in the year 1893 the United States government itself, through the agents of the Treasury Department, took up on the said islands 7,500 seals; that the said defendant was permitted to co-operate in selecting the seals so killed, and to take, and it did take and retain the skins of those seals, and in this way, and in this way only, the defendant received those 7,500 skins.

"In accordance with the power reserved to him in said contract, the Secretary of the Treasury at the commencement of the seal-killing season for the year ending April 1, 1894, fixed the compensation of the natives upon the islands of St. Paul and St. George to be paid to them by the defendant for killing the seals, sorting the skins, and loading them on board the defendant's steamer, at 50 cents for each skin taken from the islands during the said season; and defendant paid to the natives said compensation, to wit, the sum of $3,750.

"Thirteenth. That 20,000 bachelor seals could have been killed upon the said islands during the year 1893 in the customary way, without injury to or diminution of the herd, and the said defendant would have taken that number had it been permitted so to do.

"Fourteenth. That if the said defendant had been allowed to and had taken in the year 1893, under its said lease, 20,000 seal
[117]*skins, there would have been due to the said plaintiff the $60,000 rental and for the per capita of seven dollars and sixty-two and one half cents and the revenue tax of two dollars per skin, the sum of $192,500, making together the sum of $252,500—that is, twelve dollars and sixty-two and one half cents for each seal skin taken; that for the 7,500 received by the said defendant, as above set forth, it owes to the said plaintiff the said sum of twelve dollars and sixty-two and one half cents apiece, amounting to the sum of $94,687.50.

"Fifteenth. The defendant could have sold 12,500 more seal skins if it had been allowed to take the same on the said islands during the year 1893, at the average market price of twenty-four dollars for each skin; which for the said number of 12,500 which it might have taken, but was prevented from taking by the act of the government of the United States, would amount to $300,000; that for such 12,500 seal skins the said defendant would have been liable to pay, according to the terms of its lease if it had taken 20,000 seal skins during that year, the sum of twelve dollars and sixty-two and one half cents each, amounting to $157,812.50, which, being deducted from the price at which such skins could have been sold, namely, $300,000, leaves as the net loss sustained by the said defendant in consequence of the breach of its said lease by the said plaintiff, the sum of $142,187.50, which is due and owing to the said defendant by the said plaintiff; and that its claim therefor would be a proper matter of counterclaim or credit in this action, if the conditions prescribed by § 951 of the United States Revised Statutes had been complied with by the said defendant."

"Eighteenth. The defendant did not present to the accounting officers of the Treasury for their examination any claim for damages by reason of the losses alleged to have been incurred by the defendant by reason of the action of the United States in entering into the said convention or *modus vivendi* with Great Britain and limiting the catch of seals upon the said islands to 7,500; and such claim was not disallowed by the accounting officers of the Treasury in whole or in part, and it was not proved *to the satisfaction of [118]
the court that the defendant was at the time of the trial of this action in possession of vouchers not before in its power to procure, or that the defendant was prevented from exhibiting its said alleged claim at the Treasury by absence from the United States or by unavoidable accident."

The circuit court made these conclusions of law:

"First. That the said defendant, having received the said 7,500 seal skins taken from the said islands during the year 1893, is liable to pay the said plaintiff therefor the said sum of $94,687.50, with interest thereon from the first day of April, 1894; and the said plaintiff is entitled to recover in this action said sum, with interest as aforesaid, from the said defendant.

"Second. That by reason of the breach of the said lease by the said plaintiff, prohibiting the said defendant from taking any seal skins during the year 1893, the said plaintiff is liable to the said defendant for the said sum of $142,187.50, with interest thereon from the first day of December, 1894.

"That on account of the same claim of the said defendant against the said plaintiff for damages for breach of the said lease not having been presented to and disallowed by the accounting officers of the Treasury, it cannot be allowed as a counterclaim or credit in this action, and the said counterclaim is therefore dismissed, but not on the merits thereof, and without prejudice to the right of the said defendant to enforce the same by any other proper legal proceeding."

Mr. **James C. Carter** for plaintiff in error.

Mr. **John W. Griggs,** Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the act of July 27, 1868 (15 Stat. at L. 240, chap. 273), the laws of the United States relating to customs, commerce, and navigation were extended over all the mainland, is-

[119] lands, and waters *of the territory ceded to the United States by the Emperor of Russia, March 30, 1867, so far as applicable, and by § 6 of that act it was made unlawful for any person or persons to kill any otter, mink, marten, sable, or fur seal, or other fur-bearing animal within the limits of said territory, or in the waters thereof; provided that the Secretary of the Treasury might authorize the killing of any such fur-bearing animal, except fur seals, under such regulations as he might prescribe, and it was made his duty to prevent the killing of any fur seal, and to provide for the execution of the provisions of the section until otherwise provided by law. On the 3d of March. 1869, a resolution was approved (15 Stat. at L. 348, No. 22), entitled "A Resolution More Efficiently to Protect the Fur Seal in Alaska," declaring the islands of St. Paul and St. George in Alaska "a special reservation for government purposes," and that, until otherwise provided by law, it should be unlawful for any person to land or remain on either of said islands, except by the authority of the Secretary of the Treasury.

July 1, 1870, an act entitled "An Act to Prevent the Extermination of Fur-bearing Animals in Alaska" was approved. 16 Stat. at L. 180, chap. 189. By the 1st section it was made unlawful to kill any fur seal upon the islands of St. Paul and St. George or in the waters adjacent thereto, except during the months of June, July, September, and October in each year, or to kill such seals at any time by the use of firearms, or to use other means tending to drive the seals away from said islands. Provided, that the natives should have the privilege of killing such young seals as might be necessary for their own food and clothing during other months, and also such old seals as might be required for their own clothing and for the manufacture of boats for their own use, which killing should be limited and controlled by such regulations as should be prescribed by the Secretary of the Treasury.

By § 2 it was made unlawful to kill any female seal, or any seal less than one year old, at any season of the year, except as above provided; and also to kill any seal in the waters adjacent to the islands, or on the beaches, cliffs, or rocks where they haul up from the sea to remain.

[120] *The 3d section read as follows:

"Sec. 3. That for the period of twenty years from and after the passage of this act the number of fur seals which may be killed for their skins upon the island of St. Paul is hereby limited and restricted to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is hereby limited and restricted to twenty-five thousand per annum: Provided, That the Secretary of the Treasury may restrict and limit the right of killing if it shall become necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as shall be right and proper; and if any person shall knowingly violate either of the provisions of this section, he shall, upon due conviction thereof, be punished in the same way as provided herein for a violation of the provisions of the first and second sections of this act."

The 4th section provided that immediately after the passage of the act the Secretary of the Treasury should lease for the rental mentioned in the 6th section of the act, to the best advantage of the United States, having due regard for the interests of the government, the native inhabitants, parties theretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the 1st day of May, 1870, "the right to engage in the business of taking fur seals on the islands of St. Paul and St. George, and to send a vessel or vessels to said islands for the skins of such seals," giving a lease duly executed, and not transferable, and taking from the lessee or lessees a bond, conditioned "for the faithful observance of all the laws and requirements of Congress and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith; and in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur trade of said islands, and the comfort, maintenance, and education of the natives thereof."

The 5th section read:

*"Sec. 5. That at the expiration of said term [121]
of twenty years, or on surrender or forfeiture of any lease, other leases may be made in manner as aforesaid, for other terms of twenty years; . . and any person who shall kill any fur seal on either of said islands, or in the waters adjacent thereto, without authority of the lessees thereof, and any person who shall molest, disturb, or interfere with said lessees, or either of them, or their agents or employees in the lawful prosecution of their business, under the provisions of this act, shall be deemed guilty of a misdemeanor, and shall for each offense, on conviction thereof, be punished in the same way and by like penalties as prescribed in the second section of this act; and all vessels, their tackle, apparel, appurtenances, and cargo, whose crews shall be found engaged in any violation of either of the provisions of this section, shall be forfeited to the United States; and if any person or company, under any lease herein authorized, shall knowingly kill, or permit to be killed, any number of seals exceeding the number for each island in this act prescribed, such person or company shall, in addition to the penalties and forfeitures aforesaid, also forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then said person or company shall forfeit the value of the same. . . ."

By the 6th section it was provided that "the annual rental to be reserved by said lease shall not be less than fifty thousand dollars per annum, . . . and in addition thereto, a revenue tax or duty of two dollars is hereby laid upon each fur-seal skin taken and shipped from said islands during the con-

tinuance of such lease to be paid into the Treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same, for the comfort, maintenance, education, and protection of the natives of said islands, and also for carrying into full effect all the provisions of this act."

These provisions as well as others from the prior legislation were carried forward into the
[122]Revised Statutes, approved *June 22, 1874, §§ 1954 to 1976 constituting chapter 3 of title 23, relating to the territory of Alaska, and §§ 1956 to 1976 thereof to the subject under consideration.

By § 1960 the killing of any fur seals upon the islands or their adjacent waters was forbidden, except during June, July, September, and October in each year, etc., with the same proviso as in the 1st section of the act of 1870.

Sections 1962, 1963, 1968, 1969, 1972, and 1973 were as follows:

"Sec. 1962. For the period of twenty years from the first of July, eighteen hundred and seventy, the number of fur seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum; but the Secretary of the Treasury may limit the right of killing, if it becomes necessary for the preservation of such seals, with such proportionate reduction of the rents reserved to the government as may be proper; and every person who knowingly violates either of the provisions of this section shall be punished as provided in the preceding section.

"Sec. 1963. When the lease heretofore made by the Secretary of the Treasury to 'The Alaska Commercial Company,' of the right to engage in taking fur seals on the islands of Saint Paul and Saint George, pursuant to the act of July 1, 1870, chapter 189, or when any future similar lease expires, or is surrendered, forfeited, or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals for the term of twenty years, at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and se-
[123]cured by a deposit of United *States bonds to that amount, and every such lease shall be duly executed in duplicate, and shall not be transferable."

"Sec. 1968. If any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed, such person or company shall, in addition to the penalties and forfeitures herein provided, forfeit the whole number of the skins of seals killed in that year, or, in case the same have been disposed of, then such person or company shall forfeit the value of the same.

"Sec. 1969. In addition to the annual rental required to be reserved in every lease, as provided in section nineteen hundred and sixty-three, a revenue tax or duty of two dollars is laid upon each fur-seal skin taken and shipped from the islands of Saint Paul and Saint George, during the continuance of any lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is empowered to make all needful regulations for the collection and payment of the same, and to secure the comfort, maintenance, education, and protection of the natives of those islands, and also to carry into full effect all the provisions of this chapter except as otherwise prescribed."

"Sec. 1972. Congress may at any time hereafter alter, amend, or repeal sections from nineteen hundred and sixty to nineteen hundred and seventy-one, both inclusive, of this chapter.

"Sec. 1973. The Secretary of the Treasury is authorized to appoint one agent and three assistant agents who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury."

Pending the adoption of the Revised Statutes, and on March 24, 1874 (18 Stat. at L. 24, chap. 64), the act of July 1, 1870, was amended so as to authorize the Secretary of the Treasury to designate the months in which fur seals "may be taken for their skins on the islands of St. Paul and St. George, in Alaska, and in the waters adjacent thereto, and the number to be taken on or about the islands respectively." Thus the Revised Statutes *were in effect amended so that [124]
whereas by § 1960 the months of June, July, September, and October had been designated as the months in which fur seals might be taken on the islands and in the waters adjacent thereto, for their skins, and by § 1962 the maximum number which might be killed on the island of St. Paul was limited to 75,000, and on the island of St. George to 25,000, per annum, the Secretary of the Treasury was authorized by the amendatory act to designate the months in which fur seals might be taken, and the number to be taken on or about each island respectively. The times of killing and the number to be killed were left to the judgment of the Secretary of the Treasury.

Manifestly the object the government had in view throughout this legislation was the preservation by proper regulations of the fur-bearing animals of Alaska, including, and particularly, the fur seals.

The first twenty years being about to expire the Secretary of the Treasury on December 24, 1889, advertised for proposals "for the exclusive right to take fur seals upon the islands of St. Paul and St. George, Alaska,

for the term of twenty (20) years from the first day of May, 1890, agreeably to the provisions of the statutes of the United States." Among other things, the advertisement stated: "The number of seals to be taken for their skins upon said islands during the year ending May 1, 1891, will be limited to sixty thousand (60,000), and for the succeeding years the number will be determined by the Secretary of the Treasury, in accordance with the provisions of law."

There were twelve proposals or bids, of which the North American Commercial Company put in three, numbered 10, 11, and 12, each of which offered a gross sum as rental, and, in addition to that and the revenue tax, a royalty per capitem. The three bids set forth the advertisement at length. No. 10 contained a proviso that the proposal was made on the express condition that the United States should not through the Secretary of the Treasury, or otherwise, limit the skins to be taken to any number less than 100,000
[125] skins per annum *after the first year of the lease; and No. 12 made the express condition that the United States should protect the exclusive right of the fur-seal fisheries in and within the islands and the waters known as the "Behring Sea." No. 11 contained no such express conditions, and it was this bid which was accepted by the government. The lease in question was thereupon entered into "in pursuance of chapter 3 of title 23, Revised Statutes," as it recites.

By its terms, the company undertook, in consideration of the lease for twenty years of "the exclusive right to engage in the business of taking fur seals on the islands of St. George and St. Paul, in the territory of Alaska, and to send a vessel or vessels to said islands for the skins of such seals," "to pay to the Treasurer of the United States each year during the said term of twenty years, as annual rental, the sum of sixty thousand dollars, and in addition thereto agrees to pay the revenue tax or duty of two dollars upon each fur-seal skin taken and shipped by it from the islands of St. George and St. Paul, and also to pay to said Treasurer the further sum of seven dollars sixty-two and one half cents apiece for each and every fur-seal skin taken and shipped from said islands, . . . and to secure the sixty thousand dollars rental above referred to" to deposit United States bonds of the face value of fifty thousand dollars; and further "faithfully to obey and abide by all rules and regulations that the Secretary of the Treasury has heretofore or may hereafter establish or make in pursuance of law concerning the taking of seals on said islands, and concerning the comfort, morals, and other interests of said inhabitants, and all matters pertaining to said islands and the taking of seals within the possession of the United States. It also agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall adjudge necessary, under the law, for the preservation of the seal fisheries of the United States; and it agrees that it will not kill, or permit to be killed, so far as it can prevent, in any year a greater number of seals than is authorized by the Secretary of the Treasury."

It was also agreed that "the annual rental, together with *all other payments to the Unit- [126]
ed States provided for in this lease, shall be made and paid on or before the first day of April of each and every year during the existence of this lease, beginning with the first day of April, 1891." The lease also provided that the number of fur seals to be taken and killed for their skins during the year ending May 1, 1891, should not exceed 60,000.

1. It is contended on behalf of the company that, conceding that the right of killing in 1893 had been duly limited to 7,500 seals, and that it took and received that number of skins as full performance of the covenants of the lease on the part of the government, it is entitled under § 1962 of the Revised Statutes to a proportionate reduction of the rent reserved, that is, in the proportion that 7,500 bears to 100,000; and that this reduction applies to the per capita of \$7.62½ for each fur-seal skin taken and shipped by it, as well as to the \$60,000 annual rental. On this theory, the company tendered to the United States, before action brought, the sum of \$23,789.50, being \$15,000 for the tax on 7,500 skins; \$4,500, three fortieths of the annual rental; and \$4,289.50, three fortieths of the full royalty on the skins.

The latter branch of this contention may be dismissed at once as untenable. By the terms of the lease, the per capita of \$7.62½ for each and every skin was not a part of the annual rental. The lease is explicit that the annual rental is the sum of \$60,000, and that in addition the lessee shall pay the revenue duty of \$2 per skin, and also pay the further sum of this royalty on each and every skin. United States bonds were to be deposited "to secure the prompt payment of the sixty thousand dollars rental above referred to," and "the annual rental, together with all other payments to the United States provided for in this lease," was to be paid on or before the 1st of April of each and every year.

We think the rent reserved as such was this specified annual rental, and that the per capita payment was in the nature of a bonus in the sense of an addition to the stated consideration.

*The Secretary was to lease to the best ad- [127]
vantage to the United States, and that included the right to accept an offer of this kind; and while the per capita was a part of the return to the government, it does not follow that the provision for reduction had reference to anything else than the specified rental, nor is any other construction compelled by the fact that the per capita might exceed the rental. Natural causes might diminish the catch so that this would not be so, and, at all events, the construction of the words of the statute and contract cannot be controlled by the amount of the reduction in one view rather than the other. Of course at the time the lease was made it is evident

that it was supposed that 60,000 seals might be taken annually, and on that basis the per capita royalty would be the principal compensation of the government. This made it directly to the interest of the government to allow the largest possible catch, which was undoubtedly a reason for the offer of the lessee in that form, as it tended to induce great circumspection in prescribing any limitation.

On the other hand, it may be that each seal would cost more as the number taken was less, and that, if the price of skins did not keep up, the company might be subjected to a loss, no matter how many it took, and the loss might be greater the more it took. But that was a risk the company assumed, and no reason is perceived for relieving it from the consequences.

The reduction of what the company agreed to pay, so far as the per capita was concerned, regulated itself. The smaller the number of skins, the less the company would pay, the larger the number, the more. We conclude that there is no adequate ground for holding that there should be any reduction on the per capita, which necessarily had to be paid.

By § 1962 of the Revised Statutes it was provided, as it had been by § 3 of the act of 1870, that for the period of twenty years from July 1, 1870, the number of fur seals which might be killed for their skins on the island of St. Paul was limited to 75,000 per annum, and the number which might be killed on the island of St. George to 25,000;
[128]but *the Secretary of the Treasury might limit the right of killing if it became necessary for the preservation of such seals, "with such proportionate reduction of the rents reserved to the government as may be proper."

By § 5 of the act of 1870, that at the expiration of the first term of twenty years, or its termination by surrender or forfeiture, other leases might be made "in manner as aforesaid, for other terms of twenty years;" and by § 1963 of the Revised Statutes, that, when the first lease, or any future similar lease, expired, or was surrendered, forfeited, or terminated the Secretary should again lease for the term of twenty years.

It is argued with great force on behalf of the government that whether reference be had to the act of 1870, or to the Revised Statutes, the limitation of the maximum number was expressly made only for a period of twenty years from July 1, 1870; that that limitation determined with the expiration of that period, and that consequently the provision for a proportionate reduction of rental in case of a limitation by the Secretary did not afterwards apply. But, taking the entire legislation into consideration, as we may, and indeed must, in accordance with well-settled rules of construction, when interpretation results in fairly differing meanings (*United States* v. *Lacher*, 134 U. S. 624, 626 [33: 1080, 1082]; *Barrett* v. *United States*, 169 U. S. 218, 227 [42: 723, 726]), we are not persuaded that this position is correct.

In giving authority to make the first lease, by § 4 of the act of 1870 the character of the lease was described, and a provision for further leases was made in § 5, which referred back to the description in § 4 by saying that other leases might be made, "in manner as aforesaid, for other terms of twenty years." When, however, the statutes were revised, the first lease had been executed and was running, and the words "in manner as aforesaid" were eliminated. The provision for succeeding leases was made the subject of § 1963, and, in declaring what they should be, the same language was used as that employed in the original act, whereby the character of future leases was indicated.

*And § 1968, taken from the latter part of [129]
§ 5 of the act of 1870, provided for the forfeiture of all the skins "if any person or company, under any lease herein authorized, knowingly kills, or permits to be killed, any number of seals exceeding the number for each island in this chapter prescribed."

It is said that the words "under any lease herein authorized," were intended to apply to the then pending lease, and that the purpose of the section was to provide for a forfeiture against any new lessee who might come in under a lease made on the happening of either of the contingencies mentioned in § 1963, as applied to the first lease, but we think the operation of the section was not intended to be thus restrained, and that it referred to any lease authorized under the chapter, and applied the forfeiture to the killing of seals in excess of the maximum number prescribed, which was to remain, if, when the time arrived for a new bidding, no change had been made by Congress.

The revision of the statutes was approved June 22, 1874, but by the last section, §5601, provision was made that legislation between December 1, 1873, and the date of enactment should take effect as if passed subsequently.

Accordingly the act of May 24, 1874, operated by way of amendment, and by authorizing the Secretary to designate the months during which seals might be taken and the number to be taken on or about each island respectively, removed the restrictions imposed by §§ 1960 and 1962 in those regards. The next day after the approval of the act, the then Secretary availed himself of it by entering into an agreement with the company that the lease of 1870 should be amended so as to provide that not more than 90,000 seals should be killed per annum on the island of St. Paul, and not more than 10,000 on the island of St. George, and that no seals should be killed in any other month except the months of June, July, August to the 15th, September, and October. It seems to us reasonably clear that the specific restriction as to number, which, with the other restriction as to the months, it was the object of the act to remove, had relation to the distribution *as between the two islands "respective- [130]
ly," and if it were proper to resort to what passed in Congress no doubt could be entertained on the subject. When the bill was reported from the committee on commerce no written report was made, but its purpose and

scope were explained on behalf of that committee in each house, and those explanations declared the object to be as above indicated.

Although the authority conferred as to the times of killing and the number to be killed was continuing and discretionary, and although the company in the present lease covenanted that it would not kill in any year a greater number than was authorized by the Secretary, yet we think it would be going much too far to hold that the original provision for a maximum number, and a proportionate reduction of the fixed rental in case of a limitation, was done away with by implication.

Repeals where the intention to do so is not expressed are not favored, and moreover, here the mischiefs sought to be remedied are quite obvious. One was that it was evidently thought that seals might properly be taken during the first half of August, and the existing statute forbade this; the other was, that the maximum was fixed for each island, whereas it had probably been ascertained that the distribution was erroneous, or that the numbers that might be safely taken on one or the other might vary, and consequently that greater elasticity was desirable. The language by which these objects were attained was entirely reconcilable with the prior law so far as it did not purport to change it.

The legislation from the beginning was directed to the preservation of the fur seals, and the act of 1870 recognized that it might be necessary to such preservation that the number to be killed in the different years should be varied, and the discretion to do this was vested in the Secretary, but while this authority was made more comprehensive by the act of 1874, and a redistribution as between the two islands authorized, we cannot accept the view that it was the intention by that act to wholly change the scheme of leasing by making the discretion of the Secretary purely arbitrary, and dispensing with any maximum or reduction.

[131] *It should be added that the action of the Treasury Department in the matter of the abatement of rent for 1890, 1891, and 1892 does not impress us as amounting to such departmental construction as entitles it to any particular weight, and the views of the Department of Justice were conflicting.

Reference is made to article 5 of the treaty of 1892 extending the *modus vivendi* and the action taken under it before the tribunal of arbitration, as if amounting to an estoppel, or an admission against interest, or at the least as having some considerable bearing on the construction of the lease and the statutes. That article provided, among other things, that "if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens and lessees) for this agreement to limit the island catch to 7,500 a season, upon the basis of the difference between this number and such larger catch as in the opinion of the arbitrators might have been taken without an undue diminution of the seal herds." And it appears that the United States originally presented as part of its case a claim for the recovery of the damages which it and its lessee had sustained by reason of the limitation to 7,500, but this claim was certainly not presented as a claim which the company could maintain against the United States under the lease, and it involved no question of the power of the Secretary in respect of the lessee under the covenants of that instrument. There was no element of estoppel about the transaction, and counsel had no authority to bind the government for any other purpose than the pending cause.

Moreover, counsel for the United States were constrained to expressly admit that the evidence failed to establish that an additional take over and above the 7,500 could have been safely allowed. In the argument on behalf of the United States, Judge Blodgett, one of the counsel, and all the counsel concurred, made this statement: "Frankness requires us, as we think, to say that the proofs which appear in the counter case of the United States as to the condition of the seal herd on the Pribiloff islands show that the United *States could not have allowed its lessees to have much, if any, exceeded the number of skins allowed by the *modus vivendi* of 1892 without an undue diminution of the seal herd, and upon this branch of the case we simply call the attention of the tribunal to the proofs, and submit the question to its decision." And later, counsel announced that the United States would not ask the tribunal for any finding for damages upon and under article 5. [132]

Our opinion is, that, assuming that the lessee took all the risk of a catch, reduced by natural causes, yet that when the number that might be killed was limited by the act of the government or its agent, the Secretary, the company was entitled to such reduction on the rental reserved as might be proper, and that the rule to be observed in that regard would be a reduction in the same proportion as the number of skins permitted to be taken bore to the maximum. This would reduce the annual rental for the year under consideration from $60,000 to $4,500; the tax due would be $15,000, and the per capita $57,187.50, making a total of $76,687.50.

2. Laying out of view the concession under the first proposition, the company further contended that the prohibition by the United States, by agreement with Great Britain, of seal killing in excess of 7,500, to be taken on the islands for the subsistence of the natives, relieved the company from its covenants for the payment of rent and royalty, and that no action could be maintained therefor on the lease.

The evidence disclosed that prior to 1890 the number of seals annually resorting to these islands was rapidly diminishing. This was attributed to the open sea or pelagic sealing, whereby the seals, especially the females, who were exempt from slaughter under the laws of the United States, were interrupted in

their passage to the islands by the crews of foreign vessels and were killed in great numbers while in the water. For several years the United States, asserting that it had territorial jurisdiction over Behring sea, had been striving to prevent vessels of foreign nations from seal hunting on the open waters thereof. Great Britain denied the territorial jurisdiction of the United States and denied that the
[133]United States *had a right of property in the fur seals while on the high seas during their progress to or from the islands of St. Paul and St. George, and it became necessary to resort to international regulation to prevent the extermination of the seals. Indeed, it appears that the Treasury agent in charge made a report to the Secretary of the Treasury after the season of 1890, in which he strenuously urged the necessity of stopping sealing for a number of years absolutely upon the islands as a necessary measure for the preservation of the seals. On the 15th of June, 1891, an agreement for a *modus vivendi* was concluded between the government of the United States and the government of Her Britannic Majesty "in relation to the fur seal fisheries in Behring sea" (27 Stat. at L. 980), whereby with a view to promote the friendly settlement of the questions between the two governments touching their respective rights in Behring sea, "and for the preservation of the seal species," it was agreed that seal killing should be prohibited until the following May, altogether by Great Britain, and by the United States "in excess of seventy-five hundred, to be taken on the islands for the subsistence and care of the natives." This was followed by a convention submitting to arbitration the questions concerning the jurisdictional rights of the United States in Behring sea; "the preservation of the fur seal in, or habitually resorting to, the said sea," and the right to take such seals, which was proclaimed May 9, 1892 (27 Stat. at L. 947).

And under the same date the *modus vivendi* was renewed during the pendency of the arbitration. 27 Stat. at L. 952.

The arbitral tribunal sat in Paris in 1892-93, and the prohibition covered the killing period for which recovery is sought in this case.

The learned circuit judge held that the limitation under the *modus vivendi* was not a designation by the Secretary, but was a prohibition by the government; and, consequently, that if the lessees had not received any skins the action could not have been maintained. But he held that as the 7,500 skins were received by the lessees they must make compensation for them; that a proper
[134]way to determine *this was to ascertain what the fair product of the year, which might safely be taken, was, and compute what each skin would have cost the company, assuming they had taken that number; and by this mode of computation, having found that 20,000 might properly have been taken, he reached the sum of $94,687.50 as the amount due to the government.

The circuit court found that the United States, pursuant to the *modus vivendi*. "prohibited and prevented the said company from taking any seals whatever from the said islands during the year 1893, and thus deprived the said defendant of the benefit of its said lease." We think this so far partakes of a conclusion of law that we are not shut up to treating it as a finding of fact. The power to regulate the seal fisheries in the interest of the preservation of the species was a sovereign protective power, subject to which the lease was taken, and if the government found it necessary to exercise that power to the extent which this finding asserts, and if we assume that the company might thereupon have treated this contract as rescinded, it is sufficient to say that it took no such position, but accepted the performance involved in the delivery of the 7,500 skins. The company did not wish to rescind or abandon, and it could not but recognize that, as the *modus* was entered into in an effort to save the seal race from extermination, and thereby to preserve something for the future years of the lease, the prohibition was so far for its benefit.

Again, although the government acted in making the lease by the hand of the Secretary, it was the real contracting party, exercising the power of regulation through the Secretary, so that it was immaterial whether the Secretary on his own judgment or in compliance with the will of the government confined the number of seals taken in the year 1893 to 7,500. Undoubtedly the government could have directed the Secretary by law to restrict the killing to 7,500 seals, and the treaty was nothing more.

The company could not object that the Secretary was constrained to impose the limitation, for the Secretary was bound to obey the instructions of his principal, and the company *could not make it the subject of a con- [135]
test *in pais* as to whether the preservation of the herd in fact required the limitation. The whole business of taking seals was conducted under the supervision of the government, and by § 1973 the Secretary was authorized to appoint agents, who were charged with the management of the seal fisheries.

The record shows that instructions were issued to the government supervising agent on April 26, 1893, and a copy delivered to the superintendent of the company before the commencement of the season of that year. These instructions directed the number of seals to be taken during the season of 1893 to be limited to 7,500. It was stated by the Secretary that it was believed "that if the killing be confined between the first of June and the tenth of August, a better quality of skins would be obtained and less injury would be done to the rookeries;" and he added: "This matter is, however, left, as above stated, to your discretion, and in reference thereto you will confer fully with the representative of the company, its interests and those of the government in the preservation of the fur seals being identical."

In the letter of the attorney of the company of November 15, 1893, he said: "During the present year this company, in strict com-

pliance with the orders of the Treasury Department, restricted its catch to 7,500." In other words, it appears that both parties regarded the Secretary of the Treasury as authorizing the taking of 7,500 skins in the year 1893.

Under the law of 1870 and the various sections of the Revised Statutes the power was expressly reserved to the government to make whatever restrictions of the business it might see fit to make; the lease recognized this to the full extent; and it was, moreover, expressly stipulated that the company was not to kill or permit to be killed a greater number than the Secretary might authorize. The company was offered 7,500 skins for 1893; took them; paid the amount fixed by the Secretary under the lease for compensation to the natives for taking and loading the skins, and subsequently tendered the sum of $23,789.50 as, according to its computation, the full amount due under the lease. These
[136]particular seals *were killed by the government agent, but notice of the killing, from time to time, was given to the company, and the company requested to select the skins it desired, which it did. The government did not regard the lease as broken, but proceeded under it, and delivered the 7,500 skins as full performance of the covenant on its part, for the privilege of taking the seals was subject to such limitation on the number as the government believed it necessary to impose; and the company acquiesced in that view by taking the 7,500 skins without dissent.

It was after this that the question arose, not of breach of contract, but as to what sum, if any, was due from the company under the lease more than it had tendered. Was the company entitled to a reduction on what it had agreed to pay, and, if so, how much?

3. Finally, the company claims that the United States are liable to it in damages to the extent of $287,725 for skins it could have taken during the season of 1893, without unreasonable injury to or diminution of the seal herd, and which the United States prevented it from doing; and that it can avail itself of this claim in this suit by way of recoupment and counterclaim.

The circuit court rejected this counterclaim on the ground that the claim had not been presented and disallowed by the accounting officers of the Treasury, and dismissed it, not on the merits, but without prejudice. The company prosecuted its writ of error from the circuit court of appeals for the second circuit, and assigned as errors, among others, that the circuit court erred in adjudging that its claim for damages was not duly presented; that the court did not allow its counterclaim; and that judgment was not directed in favor of the company. From what we have already said it will have been seen that we are of opinion that the company cannot maintain this claim for damages, and that, assuming that the claim had been duly presented and disallowed, and that, if meritorious, it might be availed of by way of recoupment in this action, the circuit court erred in its disposition of the counterclaim.[137]

*The seal fisheries of the Pribiloff islands were a branch of commerce and their regulation involved the exercise of power as a sovereign and not as a mere proprietor. Such governmental powers cannot be contracted away, and it is absurd to argue that in this instance there was any attempt to do so, or any sheer oppression or wrong inflicted on the lessee by the government in the effort to protect the fur seal from extinction.

The privilege leased was the exclusive right to take fur seal, but it was subject, and expressly subjected, from the beginning, to whatever regulations of the business the United States might make. If those regulations reduced the catch, the company was protected by a reduction of the rental, and paid taxes and per capita only on the number taken. The other expenses to which it bound itself were part of the risk of the venture. The catch for 1893 was lawfully limited to 7,500 and the company accepted and disposed of the skins. It cannot now be heard to insist that that limitation was in breach of the obligations of the government, for which, though still claiming the contract to be outstanding, it is entitled to recover damages.

The judgment of the Circuit Court is reversed, and the cause remanded with a direction to enter judgment in favor of the United States for $76,687.50, with interest from the first day of April, 1894; and to enter judgment in favor of the United States on the counterclaim.

PULLMAN'S PALACE CAR COMPANY,[138]
Appt.,
v.
CENTRAL TRANSPORTATION COMPANY.

(See S. C. Reporter's ed. 138-161.)

The right to appeal—when a complainant in equity may dismiss his suit—prejudice to defendant—review of motion to discontinue—when leave to discontinue may be denied—cross bill for affirmative relief—property transferred under illegal contract—right to recover—measure of value—value of contracts and patents transferred—earnings of the property—loss by breaking up of business.

1. The right to appeal directly to this court from the circuit court because of a constitu-

NOTE.—*As to what acts and contracts of a corporation are ultra vires; contracts in violation of statute or public policy; executed contracts; instances; estoppel or ratification of transactions ultra vires,*—see note to Central Transp. Co. v. Pullman's Palace Car Co. 35 : 55.

As to what laws are void as impairing obligation of contracts,—see note to State, Ranger, v. New Orleans, 26 : 132.

As to what remedy at law will prevent remedy in equity,—see note to Tyler v. Savage, 36 : 83.

As to account stated; bar to bill in equity; defenses must be made in original action,—see note to Chappedelaine v. Dechenaux, 2 : 629.

tional question is not waived by taking an appeal also to the circuit court of appeals.

2. A complainant in an equity suit may generally dismiss his bill at any time before the hearing; but leave to dismiss a bill is not granted where, beyond the annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant.

3. Legal prejudice to defendant to authorize a denial of a motion by plaintiff to discontinue must be other than the mere prospect of future litigation.

4. The decision of a motion for leave to discontinue will not be reviewed in this court except for abuse of the discretion of the court, or an obvious violation of a fundamental rule of a court of equity.

5. Leave to discontinue a suit in equity to restrain bringing suits for rent, alleging an election to terminate the lease by virtue of its provisions and that the lease was *ultra vires*, and offering to do what is equitable and right for the property demised, and asking the court to decree the compensation or relief to be made, is properly denied after the lease has been held void in another case, and after an injunction has been granted against recovering rent and testimony has been taken on the issues involved in the suit, when defendant opposes such discontinuance and asks leave to file a cross bill to avail itself of the tenders made in the original bill.

6. A cross bill for affirmative relief is properly allowed to be filed by defendant for the return of property delivered under an illegal lease and to determine the liability of the complainant, where he has alleged an election to terminate the lease, and also alleged its invalidity and offered to do what the court should decree to be just.

7. The right to a recovery of property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it.

8. The right to recover property delivered under an illegal contract rests upon a disaffirmance of the contract, and is permitted only to do justice to the party who has thus delivered it.

9. The market value of the stock of a corporation is not a proper measure of the value of its property transferred by an *ultra vires* lease, and which must be returned or paid for.

10. The value of contracts with third parties, or of patents owned by a company when it transfers its property under an *ultra vires* lease, and which have expired when the obligation to restore the property or make compensation therefor is enforced, cannot be considered in determining the value of such property, when payment for the use of such patents and contracts for the time they were used was included in the rent paid, and they had become valueless at the time of their expiration.

11. The earnings of property transferred under an *ultra vires* lease cannot be included in the compensation to be paid the lessor in lieu of the property on disaffirmance of the contract.

12. The loss sustained by the lessor in an *ultra vires* lease on account of the breaking up of its business and the loss of contracts with third persons when the lease is repudiated cannot be recovered as part of its relief, on recovering compensation for the property transferred and not restored.

[Nos. 141, 496.]

Argued March 24, 25, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania and also on certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of the Circuit Court in favor of the Central Transportation Company against the Pullman's Palace Car Company, for the sum of $4,235,044, for the value of certain property which was leased by the Central Transportation Company to the Palace Car Company by an *ultra vires* lease, and which was to be returned or paid for by the latter company. *Reversed*, and case remitted to the United States Circuit Court for the Eastern District of Pennsylvania with directions to enter a judgment for the Central Transportation Company in accordance with the opinion.

See same case, 139 U. S. 24 [35: 55], also same case below, 39 U. S. App. 307, 76 Fed. Rep. 401, 22 C. C. A. 246.

Statement by Mr. Justice **Peckham:**

The record in this case shows that in 1870 the Central Transportation Company, hereafter called the Central Company, was a corporation which had been in 1862 incorporated under the general manufacturing laws of the state of Pennsylvania. It was engaged in the business of operating railway sleeping cars and of hiring them to railroad companies under written contracts by which the cars were to be used by the railroad companies for the purpose of furnishing sleeping conveniences to travelers. The corporation at this time had contracts with a number of different railroad companies in the east, principally, but not exclusively, with what is known as the Pennsylvania Railroad system, and it had been engaged in its business with those companies for some time prior to 1870. In the year last named the Pullman's Palace Car Company, hereafter called the Pullman Company, was a corporation which had been incorporated under the laws of the state of Illinois. It was doing the same general kind of business in the west that the Central Company was doing in the east. For reasons not material to detail, the two companies entered into an agreement of lease, which was executed February 17, 1870.

By its terms the Central Company leased to the Pullman Company its entire plant and personal property, together with its contracts which it had with railroad companies for the use of its sleeping cars on their roads, and also the patents belonging to it. The lease was to run for ninety-nine years, which was the duration of the charter of the Central Company.

It was also agreed that the Central Company would not engage in the business of manufacturing, using, or hiring sleeping cars while the contract remained in force.

In consideration of these various obliga-

tions, the Pullman Company agreed to pay annually the sum of $264,000 during the entire term of ninety-nine years, in quarterly payments, the first quarter's payment to be made on the 1st of April, 1870.

[140] *From the time of the execution of the contract its terms were carried out, and no particular trouble occurred between the companies for about fifteen years. During this time and up to the 27th day of January, 1885, the Pullman Company paid to the Central Company, as rent under the contract, the sum of $3,960,000, without any computation of interest. About or just prior to January, 1885, differences arose between the companies. The Pullman Company claimed the right to terminate the contract under the eighth clause thereof, or else to pay a much smaller rent. The merits of the controversy are not material.

The two companies not agreeing, and the Pullman Company refusing to pay the rent stipulated for in the lease, the Central Company brought successive actions to recover the instalments of rent accruing. In one of them the Pullman Company pleaded the illegality of the lease, as being *ultra vires* the charter of the Central Company. The plea prevailed in the trial court, and upon writ of error the judgment upholding this defense was, in March, 1891, sustained in this court. *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S. 24 [35: 55].

After the bringing of several actions for instalments of rents by the Central Company and before the question of *ultra vires* had been argued in this court, the Pullman Company on the 25th day of January, 1887, commenced this suit by the filing of its bill against the Central Company in the circuit court of the United States for the eastern district of Pennsylvania. The bill asked for an injunction to restrain the bringing of more suits for rent. It gave a general history of the transactions between the companies from the execution of the contract between them in February, 1870, down to the time of the filing of the bill, and it alleged the election of the Pullman Company to terminate the lease under the provisions of the eighth clause thereof, and the willingness of the company to pay what should be found by the court to be equitable and right to the Central Company on account of the property which had been transferred by that company to it, and to this end it prayed the aid of the court. The bill also contained the following allegation:

[141] *"And your orator shows that in said lease it is recited that the said contract of lease is made on the part of the defendant, the said Central Transportation Company, under an act of the general assembly of the commonwealth of Pennsylvania therein named, approved the 9th day of February, A. D. 1870, a copy whereof is hereto attached, marked Exhibit G, and referred to as part of this bill; but your orator is advised, and therefore submits it to the court, that the said lease being a grant, assignment, and transfer of all the property, contracts, and rights of the said defendant, the Central Transportation Company, and including a covenant on the part of said defendant corporation not to transact during the existence of said lease any of the business for the transaction of which it was incorporated, was never legally valid between the parties thereto, but was void for the want of authority and corporate power on the part of the defendant to make the said contract of lease, and because the same was in violation of the charter conferring the corporate powers of said defendant, and of the purpose of its incorporation, as by the said charter, to which, for greater certainty, reference is made, your orator is advised it will appear; that the said contract of lease was never susceptible of being enforced in law by your orator against said defendant, and cannot therefore be construed and held to continue in force and obligatory upon your orator; and that your orator can be under no other legal obligation or equitable duty to the defendant than to return such of the property assumed to be demised as is capable of being returned, and to make just compensation for such other of the said property as under the said contract of lease it ought to make compensation for, which it is willing and now offers to do."

In the prayer for relief it was also asked—

"That the court may consider and decree whether said contract of lease was not made without authority of law on the part of the defendant and in excess of its corporate powers and in violation of its corporate duties, so as not to be enforceable against your orator beyond the obligation of your orator to make return of or just compensation for the property *demised; and that an account [142]
may be taken between your orator and defendant, and that the amount may be ascertained that should be paid by your orator to the defendant on any account whatever; . . . and that an accounting may be had between your orator and defendant as to all the matters and things set out in this bill."

The Central Company answered the bill, denying many of the material allegations therein contained. It denied that the Pullman Company had ever elected to terminate the lease under the provisions of the eighth clause thereof, and it alleged that the lease was still in existence, and that it had the right to recover from the Pullman Company the amount of the rent named in the lease, and that no valid agreement had ever been made between the companies in any way altering the lease or reducing the amount of the rent payable thereunder. It denied that the lease was illegal, and it alleged that even if it were, the illegality did not justify the complainant in applying for any equitable relief whatever. Upon application on the part of the Pullman Company the court granted an injunction restraining the bringing of suits for the collection of rent accruing after July, 1886, but it declined to enjoin those already pending for rent accruing before that date.

After considerable proof had been taken

upon the issues involved in this suit and after the decision of the other case in this court, in March, 1891, holding the lease illegal and void, the complainant herein, on the 25th of April, 1891, applied to the court for leave to dismiss its bill at its own cost. This application was opposed by the defendant, who, on the same day, moved for leave to file a cross bill, in which it said it would avail itself of the tenders of relief made by the complainant in its bill, and that it would pray such relief in its cross bill as might be pertinent to the case made by the bill. In December, 1891, complainant's motion for leave to dismiss its bill was denied, and the defendant's motion for leave to file a cross bill was granted. Thereupon the cross bill was filed, in which the Central Company acknowledging, under the decision of this court, that the lease in question was void,
[143]*claimed to avail itself of the tenders made in complainant's bill upon the subject of the return of its property and compensation for that which it was impossible to return, and claimed, among other things, that the Pullman Company should account for all the profits which it had derived since the making of the lease by the use of the property transferred to it under the agreement, and that the amount found due should be paid to the Central Company, and that the Pullman Company should be adjudged to be a trustee for the Central Company of all the contracts for transportation, whether original, new or renewals, held by the Pullman Company with railroad companies with which there were contracts of transportation with the Central Company at the time of the making of the lease in February, 1870, and that the Pullman Company should be adjudged to pay the Central Company all such sums as should be due to it by the Pullman Company as such trustee, and that defendant should in the future from time to time account for the sums which should be due by reason of future operations under those contracts. It also prayed for a discovery and an accounting by the Pullman Company of its use and disposition of the property turned over to it by the Central Company.

To this cross bill the Pullman Company filled three demurrers, the first being a general demurrer on the ground that the cross bill was filed contrary to the practice of the court, and also that it appeared that the court had no jurisdiction of the case; the second demurrer related to the portions of the cross bill praying that the cross defendant might be regarded as a trustee and decreed to account accordingly; the third demurrer related to that part of the cross bill which asked for an account of profits since the making of the lease and for future profits.

The demurrers were overruled with leave to present the questions on final hearing, and the Pullman Company then answered the cross bill. Among other things it set up that the agreement in question was void, "and that being null and void between the parties hereto because of such character of the agreement, it cannot be made the lawful foundation of any action* or application for [144]
any relief whatever between the parties thereto. And this respondent submits that the rule which precludes the granting of relief by any court of either equity or law, upon a contract void for contravention of public policy, forbade this circuit court to allow such affirmative relief upon this cross bill which asserts no claim of right not founded directly upon the express undertakings of this contract of lease, held void by this court itself and by the supreme court for the reasons aforesaid." The Pullman Company therefore denied that it owed any duty to the cross complainant which was enforceable at law or equity to return to the Central Company the property assigned under the lease or to account for any profits derived under and by reason of any property delivered to it under the agreement.

Testimony was taken under these pleadings, and the case came before the circuit court for final hearing, and that court held that the cross complainant made out a case for an accounting by the cross defendant for the value of the property when received, together with its earnings since, less the amount paid as rent. The court therefore referred it to a master for the purpose of ascertaining the facts, with directions to report within the time named in the order of reference. Under this order testimony was taken and the master reported in favor of the Central Company, and the exceptions filed having been overruled, judgment was entered in favor of the Central Company for the sum of $4,235,044, together with costs. From this judgment the Pullman Company appealed directly to this court. It also appealed to the circuit court of appeals. The case was there argued upon a motion to dismiss the appeal, and the motion denied, and the further argument was postponed until some disposition was made of the appeal taken directly to this court. 39 U. S. App. 307. A motion has also been made to this court to dismiss the appeal, and thereupon an application was made to us for a writ of certiorari to the circuit court of appeals for the third circuit, and on account of the peculiar circumstances it was granted, and the record has been returned to this court by virtue of that writ.

Messrs. **Edward S. Isham, Joseph H. Choate,** *A. H. Wintersteen,* and *Robert T. Lincoln* for appellant.

Messrs. **Frank P. Prichard** and **John G. Johnson** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

The motion to dismiss the appeal in this case is now before the court.

Counsel for the Pullman Company took the appeal directly from the circuit court to this court on the theory that the case involved the construction or application of the Constitution of the United States, because of the holding of the court below that the cause of action alleged by the Central

Company in its cross bill was under the circumstances a proper subject of equitable cognizance, and counsel claimed it was really nothing but a legal cause of action in regard to which the cross defendant was entitled to a trial by jury under the Constitution of the United States. There being room for doubt in regard to the soundness of such contention, the counsel also took an appeal to the circuit court of appeals, and we think that by this action he did not waive any right of appeal which he would otherwise have had. Whichever route may be the correct one, either directly from the circuit court or through the circuit court of appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by the writ of certiorari; and we therefore proceed to determine it upon the merits.

The Pullman Company, complainant in the original suit, insists that it had the right to discontinue that suit at its own cost before any decree was obtained therein, and the refusal of the court below to grant an order of discontinuance upon its application is the first ground of objection to the decree herein.

The general proposition is true that a com-
[146] plainant in an equity *suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *City of Detroit* v. *Detroit City Railway Company*, in an opinion by the circuit judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in *Chicago & Alton Railroad Company* v. *Union Rolling Mill Company*, 109 U. S. 702 [27: 1081].

From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue; such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. *Stevens* v. *The Railroads*, 4 Fed. Rep. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.

Upon an examination of the facts relating to the motion, we think the circuit court was right, in the exercise of its discretion, in denying the same. The original bill was framed really on two theories: One, that by reason of an election made under the eighth clause in the lease, the Pullman Company had terminated the lease, and it was therefore bound under its provisions to return the property which it had received from the Central Company. It stated in its bill the impossibility of returning a large portion of the property which it had received; it announced its willingness to make substantial performance of its contract contained in the lease, and it asked the court to aid it therein by decreeing exactly what it should do for the purpose of carrying out equitably and fairly its obligations incident to its termination of the lease under the clause above mentioned. The other theory rested upon what was *a substantial allegation of the invalidity [147]
of the lease as having been made without authority of law, and therefore in violation of the corporate duties of the Central Company, and on that account not enforceable against the Pullman Company beyond the obligation of the latter company to make return of just compensation for the property demised. Upon that theory the bill asked, not that the court should set aside or cancel the lease, but that it should aid the parties by decreeing just what relief should be given by the complainant to the lessor in the execution of its duty to make some compensation for the property it received and which it stated its willingness to make, and to that end, that an accounting might be had and the amount ascertained that should be paid to the Central Company in discharge of the obligations of the complainant in that behalf. Thus the Pullman Company came into a court of equity and in substance alleged that the lease had been terminated by it under the eighth clause, and it also alleged that the lease was void as *ultra vires*, and in either event it tendered such relief as the court might think was proper and fair under the circumstances.

A large amount of proof had been taken under the issues made in this original bill and the answer thereto, and before the case was concluded the decision of this court was made in which the lease was declared to be void. The only obligation left under the original bill of complainant after the decision of this court was the obligation to return such portion of the property received by it as the court should determine to be right, or to make some compensation to the Central Company for the same. And this obligation it had offered in the original bill to carry out.

The Pullman Company had also obtained an injunction in the original suit, restraining the Central Company from commencing further legal proceedings to recover rent under the lease, and after obtaining this injunction and taking the testimony relating to the subject-matter of the original bill, the complainant should not be permitted under these circumstances to dismiss that bill and thus withdraw the whole case from the jurisdiction of the court, and thereby blot out its *tenders of [148]
relief contained in its original bill grounded, among others, upon the allegation that the lease was void, and asking the aid of the court to decree the precise terms upon which its obligations to the Central Company might be fulfilled.

The denial of the motion was made in connection with the application of the Central Company to file a cross bill in which it would

seek to avail itself of the tenders made by the Pullman Company in the original bill. Such an application for leave to file a cross bill seeking affirmative relief, while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for the exercise of the discretion of the court in refusing to grant the application for leave to discontinue. We think there was no error committed by the court below in refusing the leave asked for.

The further objection is made by the counsel for the Pullman Company that it was error to allow the cross bill to be filed in this case. Counsel for the Pullman Company assert that the cause of action for a return of the property is a purely legal one of which a court of equity has no jurisdiction, and that it can acquire none simply by the filing of a cross bill. Whatever may be the original character of the liability of the Pullman Company to return or make compensation for the property, we are of opinion that under the facts above set forth it cannot object to the filing of the cross bill, or to the determination of the amount of its liability by a court of equity. It had itself voluntarily appealed to the jurisdiction of such a court for the purpose of obtaining its aid in decreeing the terms upon which its obligations to the Central Company might be fulfilled and the lease terminated, either under the eighth clause in the lease or because of its invalidity as being *ultra vires*. Having thus appealed to equity for its aid and the lease having been conclusively determined to have been void, we think it was within the fair discretion of the court to retain jurisdiction of the cause and of the original complainant, and to permit the filing of a cross bill in which the cross complainant might seek affirmative relief, and at the same
[149]time avail *itself of the tenders made by the complainant in its original bill.

The facts which were set up in the cross bill closely affected one of the theories upon which the original bill was filed, *viz.*, the invalidity of the lease. They were relevant to the matters in issue in the original suit, and in seeking affirmative relief the cross complainant is but amplifying and making clearer the foundations for the intervention of equity which had been appealed to by the Pullman Company, and the continued intervention of which would greatly speed a final termination of all matters for litigation between the parties. The court below did not err in permitting the cross bill to be filed.

This brings us to a discussion of the principles upon which a recovery in this case should be founded. The so-called lease mentioned in this case has been already pronounced illegal and void by this court. 139 U. S. 24 [35:55]. The contract or lease was held to be unlawful and void, because it was beyond the powers conferred upon the Central Company by the legislature, and because it involved an abandonment by that company of its duty to the public. It was added that there was strong ground also for holding that the contract between the parties was void because in unreasonable restraint of trade, and therefore contrary to public policy. In making the lease the lessor was certainly as much in fault as the lessee. It was argued on the part of the Central Company that even if the contract sued on were void, yet that having been fully performed on the part of the lessor and the benefits of it received by the lessee for the period covered by the declaration in that case, the defendant should be estopped from setting up the invalidity of the contract as a defense to the action to recover compensation for that period. But it was answered that this argument, though sustained by the decisions in some of the states, finds no support in the judgments of this court, and cases in this court were cited in which such recoveries were denied.

It is true that courts in different states have allowed a recovery in such cases, among the latest of which is the case of *Bath Gas Light Company* v. *Claffy*, 151 N. Y. 24 [36 L. R. A. 664], where Chief *Judge Andrews of [150]
the court of appeals examines the various cases, and that court concurred with him in permitting a recovery of rent upon a void lease where the lessee had enjoyed the benefits of the possession of the property of the lessor during the time for which the recovery of rent was sought.

But in the case of this lease, now before the court, a recovery of the rent due thereunder was denied the lessor, although the lessee had enjoyed the possession of the property in accordance with the terms of the lease. It was said (page 60 of the report in 139 U. S. [35:69]): "The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or failing to do that, to make compensation for the property or money which it had no right to retain. To maintain such an action was not to affirm, but disaffirm, the unlawful contract." And the opinion of the court ended with the statement that, "Whether this plaintiff could maintain any action against this defendant, in the nature of a quantum meruit, or otherwise, independently of the contract, need not be considered, because it is not presented by this record and has not been argued. This action, according to the declaration and evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above stated, the defendant was not liable for."

The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mans-

field in *Holman* v. *Johnson*, 1 Cowp. 341, decided in 1775, that "the objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is
[151] not for his sake, however, that the *objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it, but the matter of controversy in this case is as to the extent to which the doctrine should be applied to the facts herein. Many of the cases are referred to and commented upon in the opinion delivered in the case in 139 U. S. 24 [35: 55], already cited. The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it. For illustrations of the general doctrine as applied to particular facts we refer in the margin to a few of the multitude of cases upon the subject.†

They are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts
[152] will not in such endeavor permit *any recovery which will weaken the rule founded upon the principles of public policy already noticed.

We may now examine the record herein and learn the grounds for the recovery which has been permitted, and determine therefrom whether the judgment in favor of the Central Company should be in all things affirmed or if not, then how far the liability of the cross defendant extends, and, if possible, what should be the amount of the judgment against it.

In referring the case to the master for the purpose of taking the account between the parties the learned district judge stated the principle upon which the liability of the cross defendant rested. He said:

"The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value the annual rental may be considered, but it does not afford a conclusive nor an entirely safe measure of value because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business, and its earnings at the time they passed into plaintiff's hands and subsequently. It is not their value to the plaintiff we want, but to the defendant: in effect, what is lost by parting with them. The value of both property and earnings may have been worth more to the plaintiff with the business united, but this cannot be considered."

Acting under these directions of the court, the master in his opinion said:

"Passing to the consideration of the main question raised in the present reference, *viz.*, what the Central Transportation Company lost by the transfer of its property to the
Pullman *Company, the measure of damages [153]
as determined by the court requires the master to ascertain:

"(1) What was the value to the Central Transportation Company in 1870 of the property transferred?

"(2) What was earned by the Pullman Company between January 1, 1870, and January 1, 1885, from the use of the property transferred?

"(3) The difference between the amount so received by the Pullman Company and the rental paid by it to the Central Transportation Company for the above period.

"(4) The total amount to be paid by the Pullman Company, as of January 1, 1885, deduced as above, together with interest thereon from January 1, 1885, to date of final decree."

The master proceeded to determine the value in 1870 of the property then transferred. In ascertaining it he said:

"The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the master, supported as it is by the best independent estimate that the evidence affords,

†Coppell v. Hall, 7 Wall. 542 [19:244]; Congress & E. Spring Company v. Knowlton, 103 U. S. 49 [26:347]; Logan County Nat. Bank v. Townsend, 139 U. S. 67 [35:107]; St. Louis, V. & T. H. Railroad Company v. Terre Haute & I. Railroad Company, 145 U. S. 393, at 408, 409 [36:748, 754, 755]; Manchester & L. Railroad Company v. Concord Railroad Corp. 66 N. H. 100 [9 L. R. A. 689, 3 Inters. Com. Rep. 319]; White v. Franklin Bank, 22 Pick. 181: Utica Insurance Company v. Caldwell, 3 Wend. 296; Atcheson v. Mallon, 43 N. Y. 147 [3 Am. Rep. 678]; Leonard v. Poole, 114 N. Y. 371 [4 L. R. A. 728]; Snell v. Dwight, 120 Mass. 9; Davis v. Old Colony Railroad Co. 131 Mass. 258 [41 Am. Rep. 221]; Holt v. Green, 73 Pa. 198 [13 Am. Rep. 737]; Johnson v. Hulings, 103 Pa. 498 [49 Am. Rep. 131]; Thomson v. Thomson, 7 Ves. Jr. 470; Sykes v. Beadon, L. R. 11 Ch. Div. 170; Brooks v. Martin, 2 Wall. 70 [17:732].

it should be accepted as the fairest criterion of value."

He accordingly reported the value of the property when received as $58 a share (the par value being $50 per share or a total par value of $2,200,000) making the total market value of the shares $2,552,000, which sum he reported as the value of the property transferred.

When the report came before the court, exceptions having been taken, among other things, to the findings of the value of the property when delivered, the court said:

"It is the value of the property at the time it should have been returned that the Pullman Company should be charged with. Inasmuch as this value would be difficult of ascertainment by the transportation company except by reference to the value in 1870, it was considered proper to direct the inquiry to the latter date. Presumably the value increased; the evidence fully justifies the presumption. If it decreased, the Pullman Company could and should have shown
[154] it. The master's *valuation in 1870 is therefore to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement, treating the value of the use and the rents paid prior to that date as balancing each other. A decree may be prepared accordingly, dismissing the exceptions and confirming the report."

Judgment based upon the value of the property at $2,552,000 on the 1st of January, 1885, with interest from that time, was therefore entered, and it amounted, as stated, to the sum of $4,235,044.

We are of opinion that the court erred in the manner of ascertaining the value of the property transferred by the Central Company. The market value of its stock was not a proper measure of the value of the property, and such error resulted in largely increasing the supposed value of the property which the cross defendant was under liability to account for.

The capital stock of this corporation had been increased from an original amount of $200,000 in 1862 to $2,200,000 in 1870. During this time it had been doing an increasing and a profitable business, and it was supposed that such business might increase in the future. The market price of the shares of stock in a manufacturing corporation includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross defendant. Whatever that something may be it is not that kind of property which was delivered or that can be returned or compensation made in lieu of its return. It is not property at all within the meaning of the word as understood in such a case as this. The value of the franchise for one thing enters into the computation of market value. This was, of course, not assigned to the Pullman Company, nor were the shares of the capital stock of the Central Company, all of which remained in the hands of its original owners. The probable prospective capacity for earnings also enters largely *into mar- [155]
ket value, and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself. They are matters of opinion upon which persons selling and buying the stock may have different views. A liability to return or make compensation for property received cannot be properly extended so as to include other considerations than those of the actual value of that property.

In this particular case a consideration entering into the market value of the shares must have been the probability or possibility of renewals of the contracts owned by the company for the use of its cars upon the railroads of the companies with which it had such contracts and the possibility of extending its business in the future under contracts with other railroads. These considerations, while they affect more or less the value in the market of the shares of a corporation, do not constitute the value of the property which a party impliedly promises to pay for upon the agreement being determined void under which the property was received. The faith which a purchaser of stock in such a company has in the ability with which the company will be managed, and in the capacity of the company to make future earnings, may be well or ill-founded. It is but matter of opinion which in itself is not property. While the value of the property is one of the material factors going to make up the market value of the stock, yet it is plainly not the sole one. Mere speculation has not uncommonly been known to exercise a potent influence on the market price of stock. The capacity to make any future earnings in this case by the lessee arose out of the transfer of the property to it and grew out of the lease itself, and that capacity would therefore be partly founded upon the illegal contract and could not otherwise exist.

As the market value of the shares of this stock was made up to some extent, at least, of certain factors which the lessee cannot, under the rules of law, be held responsible for in this case, it follows that such value cannot furnish a safe guide in measuring *the respon- [156]
sibility of the lessee in an utterly void lease. The court therefore erred in taking the market value of the shares of this stock as a proper or just measure of the value of the property transferred.

We must therefore take the property that actually was transferred and determine its value in some other way than by this resort to the market price of the stock. The property transferred consisted (a) of cars, bedding, etc.; (b) contracts which the Central Company owned with railroad companies for the use of its cars on their roads; (c) patents

covering the construction and use of sleeping cars owned by the Central Company and by it transferred under the lease to the Pullman Company; and (d) $17,000 in cash. It seems to us these values must be taken separately, because, for reasons hereafter suggested, the value of the contracts and patents does not enter into the problem.

As to the value of the cars. We agree with the court below that it is now impossible to decree their return, for the reasons stated. They have substantially disappeared. The property has become incorporated with the business and property of the Pullman Company. Compensation therefore must be made. The master found that the value of the cars as vehicles, together with their equipment, at the time of the transfer, was $710,846.50. This is probably a pretty high figure judging from the whole evidence in the case upon that subject, yet still we are inclined to think that the master was justified in arriving at that sum. We take this value for the reason that the Pullman Company agreed in the lease to keep the cars in good order and repair, and renewed and reconstructed as often as might be needful during the whole term of the lease. During the fifteen years elapsing from 1870 up to January, 1885, no violation of the terms of the lease by either party is complained of, and we think the whole transaction between the parties during those fifteen years must be treated as closed, so that no examination should be made in regard to anything that happened within that time. We must assume the provisions of the lease were fully carried out by both parties, particularly as no complaints were made of nonperform-
[157] ance. *We therefore assume the cars were kept in good order, and when necessary were reconstructed and renewed up to January, 1885. The value at that time may be taken to be as great as the master found it to be for 1870. It is very probable the assumption is not in accordance with the fact, and that the property had greatly depreciated. But as we refuse to look into the transactions between the parties during that period, we will hold the value in 1885 to have been the same as in 1870, on the presumption that the Pullman Company fulfilled its obligations between those dates. What rule of compensation should be deduced from such finding will be alluded to hereafter.

We next come to consider the various contracts. They were entered into with different railroad companies for certain definite periods, and their time of expiration was stated in the contracts themselves. They were valuable only as they were used by the lessee, and its right to use them sprang from and was determined by the lease itself. They were assigned to the lessee for the purpose of enabling it to avail itself of the rights therein created and to use the cars with the consent of the railroads to which the contracts applied. Whether any use was made of these contracts or not they became daily less valuable as they daily neared their termination. The use made of them did not impair their value. The passage of time did that. The rental that was paid by the lessee included compensation for use, and to that extent the transaction was closed and the compensation paid up to the time when the contracts themselves had expired, which was prior to the time when the lease was declared void and payment of rent ceased. There is no principle with which we are familiar that will permit the value of those contracts when assigned to the Pullman Company to enter into and form a part of the value of the property for which the company is to make compensation, when from the nature of the thing itself, its value necessarily, and from the simple passage of time, decreased daily, and upon the arrival of the date named for the expiration of the contract it ceased to have any value.

We think the contracts were not extended
by the legislative *extension of the charter of [158]
the Central Company by the act of 1870. Some of these contracts were to last during the corporate life of the Central Company. At the time they were made the charter of the company would expire in twenty years from December 30, 1862, or on December 30, 1882. We do not think the contracts meant that they were to cover any further time to which the legislature might thereafter extend the charter of the company. Some language to that effect would have been contained in the contracts if such had been the meaning of the parties. All the contracts had therefore expired by the end of 1882.

Now upon what principle can it be urged that the lessee should compensate the lessor for the value of these contracts when delivered to it when it had paid for the use, and the property was of such a nature that it became valueless by mere limitation of time? In 1885 they had gone out of existence, and, of course, had no value. The basis for a recovery of property or compensation for its value, in cases of illegal agreements, rests upon the implied contract to return it or pay for it, because there is no right in the party in possession to retain it. If at the time when otherwise it would or ought to be returned it has ceased to exist by virtue of the termination of its legal existence, how can it be returned? How can a promise to return or make compensation therefor be implied in the case of a contract having but a limited time to run, and the value of which diminishes daily until the contract itself and its value are wholly extinguished by expiration of time, and where the use of this intangible right during its existence was fully paid for by the party to whom it was assigned? There is no implication of a promise to make any further compensation for such a species of property than is made by paying for its use while it remained in legal existence. When that time expired the value was gone, and while it lived it had been paid for.

We have been able to find no case where any principle was laid down which would authorize or justify a recovery of the value of property at the time of delivery, which, before its return became proper, had passed out
of existence by limitation of *time, and the [159]
use of which was paid for during its lifetime.

What other contracts may have been made by the Pullman Company with railroad companies would form no factor in the value of the contracts assigned. If others were obtained, they had never been the property of the Central Company, and the latter could only make a pretense of a claim in regard to then by virtue of and through the illegal contract. A resort to the illegal instrument cannot be permitted for the purpose of sustaining any recovery.

The same may be said of the patents which the Central Company also undertook to transfer, as they had all expired before January, 1885. They simply protected the use of the cars which had been constructed under them, and they diminished in value as each day brought them nearer to their expiration, and when that time arrived they were absolutely valueless. During all that time they were included in the consideration for the payment of rent made by the Pullman Company under the terms of the lease. The contracts and the patents must be eliminated from the value of the property.

Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the very use which the lease provided. It had the right while both parties acquiesced to so use the property.

There is no question of trustee in the case. *Root* v. *Lake Shore & M. S. Railroad Company*, 105 U. S. 189, 215 [26:975, 984].

The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us. Although the title did not pass and was not intended to pass, the lessee did nothing with the property other than was justified by the lease. His liability is based only upon an implied promise to return or make compensation therefor. This implication of a promise would not arise until one or the other party chose to terminate the lease, for the law implies such promise in order only that justice, so far as possible may be done. So long as neither party
[160] takes any *objection to the agreement, and both carry it out, there is no room for any differences, and no promise to return the property or make compensation is necessary, and none is therefore implied. The use of the property is lawful as between the parties, so long as the lease was not repudiated by either, and the rent compensates for the use. After the repudiation the promise is then implied, and it is fulfilled by the payment of the value of the property at the time the promise is implied and interest thereon from that time.

As to the claim of the lessor that its business has been broken up, its contracts with railroads terminated and the corporation left in a condition of inability to again take up its former plans, and that all this should be regarded in the measure of the relief to which it should be entitled, the same considerations which we have already adverted to must be entertained. These are results of the illegality of the contract entered into between these parties, and its subsequent repudiation on that ground, and in regard to such illegality the Central Company is certainly as much in the wrong as the cross defendant herein. The former knew the extent of its obligations under its charter as well as the latter did, and the illegal provisions of the lease were quite as much its doings as they were those of the cross defendant. To grant relief based upon these facts would be so clearly to grant relief to one of the parties to an illegal contract, based upon the contract itself or upon alleged damages arising out of its nonfulfilment, that nothing more need be said upon that branch of the subject. It is emphatically an application of the rule that in such a case the position of the defendant is the better.

We conclude that the cross defendant is not liable for the contracts and patents transferred, nor for the possible damage the Central Company may have sustained, as above stated. It is liable for the value of the cars, furniture, etc., transferred. It is a liberal estimate of the value of this property to say that it amounted in 1885 to as much as it did in 1870, yet we are disposed to deal in as liberal a manner with the cross complainant as we fairly may, while not violating any settled principle of law, in order to give to it such measure of relief *as the circumstances [161]
of the case seem to justify. We therefore take the value of the property in the cars, etc., in 1885 at the sum of $710,846.50. To that, we think, should be added the $17,000 cash received from the Central Company, making a total of $727,846.50 and interest from January 1, 1885, for which the cross defendant is liable, together with costs.

Although the Central Company may have been injured by the result of this lease, yet that is a misfortune which has overtaken it by reason of the rule of law which declares void a lease of such a nature, and while the company may not have incurred any moral guilt it has nevertheless violated the law by making an illegal contract and one which was against public policy, and it must take such consequences as result therefrom.

The judgment appealed from must be reversed, and the case remitted to the circuit court for the eastern district of Pennsylvania, with directions to enter a judgment for the Central Transportation Company in accordance with this opinion.

Mr. Justice **Harlan** dissented; Mr. Justice **White** dissented on the ground that the judgment appealed from was for the correct amount and should not be reduced.

DISTRICT OF COLUMBIA, *Plff. in Err.*,
v.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased.

ELIZABETH L. W. BAILEY, Admrx., etc.,
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 161–179.)

Agreement to arbitrate—power of commissioners of District of Columbia—appointment of referee.

1. An agreement to arbitrate, not under rule of court or within the terms of a statute enacted for such purpose, is a contract.
2. The commissioners of the District of Columbia had not the power to bind the District by a common-law submission of a pending suit for breach of contract, to a referee, under the act of June 11, 1878, which provides that they shall make no contract and incur no obligation which is not therein provided for and approved by Congress.
3. The mere statement of the appointment of a referee, on the minutes of the commissioners of the District of Columbia, without any signature thereto by the commissioners, is insufficient to constitute a contract by them under the act of Congress of June 11, 1878, requiring all contracts to be copied in a book kept for that purpose, and to be signed by the commissioners.

[Nos. 390, 420.]

Submitted January 10, 1898. Decided May 31, 1898.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming a judgment in favor of the plaintiff, Elizabeth W. Bailey, as administratrix of Davis W. Bailey, deceased,

NOTE.—*As to contracts; their interpretation and validity*,—see note to Bell v. Bruen, 11 : 89.

As to agreements to arbitrate; specific performance of; remedy at law for breach of; as a bar to actions,—see note to Kinney v. Baltimore & O. Employees' Asso. (W. Va.) 15 L. R. A. 142.

As to submission to arbitration; effect of; revocation of; judgment on award,—see note to People, Union Ins. Co., v. Nash (N. Y.) 2 L. R. A. 180.

As to setting aside arbritration and award; relief from mistake in award; validity of award,—see note to Hartford F. Ins. Co. v. Bonner Mercantile Co. (C. C. D. Mont.) 11 L. R. A. 623.

Arbritration; submission to; when may be revoked; when reviewed, or set aside, or void; when binding; effect of; death of arbitrator; notice of hearing; selecting umpire; costs.

When submission to arbitration is revocable. Paulsen v. Manske, 126 Ill. 72; Oregon & W. Sav. Bank v. American Mortg Co. 35 Fed. Rep. 22; People, Union Ins. Co., v. Nash, 111 N. Y. 310, 2 L. R. A. 180; Gregory v. Boston Safe Deposit & T. Co. 36 Fed. Rep. 408; Sidlinger v. Kerkow, 82 Cal. 42; Farel v. Roberts, 1 Pa. Dist. R. 743; Minneapolis & St. L. R. Co. v. Cooper, 59 Minn. 290 .

A party to an arbitration agreement provid ing for a written award may revoke the same after the arbitrators have individually communicated to strangers their respective views, but before they have signed any award. Butler v. Greene, 49 Neb. 280.

The right to revoke a submission to arbitration at common law must be exercised before the publication of the award. Otherwise it will be considered waived. Connecticut F. Ins. Co. v. O'Fallon, 49 Neb. 740.

An agreement to submit a matter to two arbitrators, by whom an umpire is to be chosen to act only on matters of difference between the arbitrators, does not authorize one arbitrator and such umpire to return an award without a showing of difference between the arbitrators. Manufacturers' & B. F. Ins. Co. v. Mullen, 48 Neb. 620.

An award of arbitrators is too uncertain to be conclusive upon the parties where it leaves the amount due from one party to the other to be determined by a reference to books of account involving more than a mere computation. Mather v. Day, 106 Mich. 371.

The method provided by Neb. Code Civ. Proc. tit. 28, for settling differences by arbitration, is not exclusive of the right to arbitrate which existed at common law. Burkland v. Johnson, 50 Neb. 858.

Effect upon common-law arbitration of statutory provisions for arbitration. New York Lumber & Wood Working Co. v. Schnieder, 119 N. Y. 475; Ehrman v. Stanfield, 80 Ala. 118; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93.

Agreement of parties to submit controversy to arbitrators, who were to return their award to a specified court, is binding as to the court to which the award shall be returned, even to the extent of vesting such court with jurisdiction over the parties which it otherwise would not have had. McMillan v. Allen, 98 Ga. 405.

Agreement to submit to arbitrators all disputes relating to performance of agreement, whose decision, not only as to the damages, but also as to the fact of a violation of the agreement shall be final, is void. Miles v. Schmidt, 168 Mass. 339.

Arbitrators are not required to decide any matter before them according to law. Henry v. Hilliard, 120 N. C. 479.

Occurrence of vacancy by death or otherwise, in a board of arbitration, revokes the submission, where it makes no provision for filling vacancies. Wolf v. Augustine, 181 Pa. 576.

The hearing of testimony by arbitrators in the absence and without notice to a party is fatal to an award against such party. Rand v. Peel, 74 Miss. 305.

Necessity of notice of hearing. The Warwick, L. R. 15 Prob. Div. 189; Vessel Owners' Towing Co. v. Taylor, 126 Ill. 250; Citizens Ins. Co. v. Hamilton, 48 Ill. App. 593; Dormoy v. Knower, 55 Iowa, 722; Curtis v. Sacramento, 64 Cal. 102; McFarland v. Mathis, 10 Ark. 560; Hills v. Home Ins. Co. 129 Mass. 345; Conrad v. Massasoit Ins. Co. 4 Allen, 20; Wood v. Helme, 14 R. I. 325; Dreyfous v. Hart, 36 La. Ann. 929; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93; Lutz v. Linthicum, 8 Pet. 178 (8 : 909); Emery v. Owings, 7 Gill, 488, 48 Am. Dec. 580; Warren v. Tinsley, 2 U. S. App. 507, 53 Fed. Rep. 689, 3 C. C. A. 613.

Award is null and void where arbitrators appointed by the parties, without the consent of one of the parties, called in a third arbitrator before they had failed to agree, in violation of the submission which stipulated that a third arbitrator might be called in if the original arbitrators failed to agree. Christenson v. Carleton, 69 Vt. 91.

Power to select umpire. Hart v. Kennedy, 47 N. J. Eq. 51; Bryan v. Jeffreys, 104 N. C. 242; McMahan v. Spinning, 51 Ind. 187; Royse v. McCall, 5 Bush, 695; Sharp v. Lipsey, 2 Bail. L. 113; Daniel v. Daniel, 6 Dana, 98.

Award of arbitrators appointed in action will not be set aside because the board of arbitrators did not commence work, nor finish the work and file the award, within the time provided in the agreement of submission, where the delay was only a few days and could not affect the rights of the parties. Eifert v. Wolf, 19 Ky. L. Rep. 507.

An award will not be set aside on the ground of error in the findings in the absence of fraud, undue influence, or improper conduct on the part of the arbitrators. Henry v. Hilliard, 120 N. C. 479.

against the District of Columbia, in the Supreme Court of that District upon an award for a breach of contract for resurfacing with asphaltum certain streets in the city of Washington, and in favor of the defendant in another action. *Reversed*, and cases remanded with directions to dismiss one action and to grant a new trial in the other.

See same case below, 9 App. D. C. 360.

Statement by Mr. Justice **White**.

On July 30, 1879, a contract for resurfacing with asphaltum certain streets in the city [162]of Washington was awarded to the *Bailey-French Paving Company. The agreement was embodied in a writing signed on the one part by Davis W. Bailey as general agent of the company just named, and on the other part signed and sealed by the commissioners of the District of Columbia. The price specified for the work aggregated a little less than $41,000. On February 12, 1880, when about three fourths of the work to be done under this contract had been completed and about $36,000 earned therefor, including $5,784.14 allowed for extra work, the commissioners notified Bailey that no more work could be performed under the contract, because of the fact that the appropriation made by Congress for the work in question was exhausted. Subsequently, on February 24, 1883, Davis W. Bailey, claiming that he was in fact the Bailey-French Paving Company, instituted an action at law in the supreme court of the District of Columbia against the District of Columbia to recover $25,000 as damages, averred to have been sustained by the cessation of the work under the contract. The District, on April 4, 1883, filed pleas, claiming a set-off of $1,312.30 for damages alleged to have been sustained by improper performance of the work of resurfacing; averring the termination of the contract by reason of the appropriation having been exhausted;

Arbitrators, unless restricted by the agreement to submit, are not, as to matters of law, bound in all cases to follow the strict rules of law governing the courts, but may decide in accordance with their views of the equitable rights of the parties. School Dist. No. 5 v. Sage, 13 Wash. 352.

An award by arbitrators under the Washington statutes, if fairly and honestly made upon due consideration of all the evidence before them, is conclusive and binding upon the parties. School Dist. No. 5 v. Sage, 13 Wash. 352.

The conclusions of arbitrators on facts submitted to them, which are such as may be determined differently by fair minded and honest people, are final, and not subject to review. Witz v. Tregallas, 82 Md. 351.

A suit cannot be maintained upon an original cause of action which has been submitted to arbitrators, where the plaintiff retains the fruits of the award. Orvis v. Wells, F. & Co. 38 U. S. App. 471, 73 Fed. Rep. 110, 19 C. C. A. 382.

An award by arbitrators will not be set aside upon a doubtful point of law or upon a complaint of error which is not plain, even where the arbitrators are required to decide according to the strict rules of law. School Dist. No. 5 v. Sage, 13 Wash. 352.

An agreement of arbitration forced by a threat of prosecution for perjury is void. Laferriere v. Cadieux, 11 Manitoba L. R. 175.

Failure to insert the names of the arbitrators in a written submission to arbitrate does not invalidate such submission. Reeves v. McGlochlin, 65 Mo. App. 537.

An award made in pursuance of a submission under Ala. Code, § 3222, of partnership transactions carried on in two states by partners who reside in two different states, is not vitiated as an Alabama award by the fact that the sitting of the arbitrators occurred in a store, the property of the parties across the state line. Edmundson v. Wilson, 108 Ala. 118.

A submission to arbitration requiring the arbitrators to make a written award and deliver a copy thereof to the parties is not complied with by one of the arbitrators notifying a party on meeting him on the street that the arbitrators had come to a decision, with a statement as to what their finding was. Anderson v. Miller, 108 Ala. 171.

The decisions of arbitrators, under Ala. Code, § 3222, are to be liberally construed, and every reasonable intendment is made to support them. Edmundson v. Wilson, 108 Ala. 118.

A motion to vacate or modify an award is properly denied when filed during the second term after publication of the award, under the Missouri statute requiring such an application to be made at the next term after such publication. Reeves v. McGlochlin, 65 Mo. App. 537.

An award of arbitrators will not be vacated or modified under Mo. Rev. Stat. 1889, §§ 405, 406, for alleged mistakes which do not appear on the face of the record. Reeves v. McGlochlin, 65 Mo. App. 537.

That an agreement for arbitration does not comply with the mode prescribed by the Texas Revised Statutes does not invalidate it, in view of the provision that nothing therein shall be construed as affecting the right of parties to arbitrate their differences in such other mode as they may select. Salinas v. Stillman, 30 U. S. App. 40, 66 Fed. Rep. 677, 14 C. C. A. 50.

An agreement without action pending, to submit all matters in variance between the parties to designated arbitrators, written down by a justice in his docket, is a common-law submission to arbitration. Climenson v. Climenson, 163 Pa. 451.

Costs and expenses incurred in preparing for an arbitration, under an agreement that the compensation of the arbitrators and their expenses and those of the witnesses shall be borne and paid by the parties in a designated proportion, may be recovered in full from a party who revokes the agreement, under N. Y. Code Civ. Proc. § 2384. Union Ins. Co. v. Central Trust Co. 24 N. Y. Civ. Proc. Rep. 219, Affirmed in 87 Hun, 140.

A provision in a submission of a controversy to arbitrators, that the arbitrators shall proceed on the principles of equity, it being the desire that the matters in dispute shall be equitably settled so that each shall have from the other all that is his equitable due,—means equity in the sense of "fair dealing" and "justice." *Re* Curtis, 64 Conn. 501.

An agreement by a client and his attorney to submit the amount of the latter's compensation to the determination of a person upon a sworn itemized and explanatory statement of the services rendered and expenses incurred and of the moneys received, the arbitrator to allow only such sum as he believes proper and necessary for preparing the defense in the suit in which such services were rendered, constitutes in effect a common-law arbitration, which is still recognized and enforced by the courts of New York. Box v. Costello, 6 Misc. 415.

The award of arbitrators to whom a case is submitted by mutual consent of the parties is conclusive upon them, although the agreement of submission is by parol and the parties do not assent to the award after it is made. Wentz v. Bealor, 14 Pa. Co. Ct. 337.

The power of awarding the costs of arbitration is necessarily incident to the authority conferred on the arbitrators of determining the case, although such costs are not provided for in the terms of submission. Stewart v. Grier, 7 Houst. (Del.) 378.

The fact that one has been previously in the employ of one of the parties to an arbitration does not disqualify him from acting as clerk for the arbitrators. Wilson v. Wilson, 18 Colo. 615.

The necessity for filing an award of arbitrators with the clerk as required by the Colorado

and alleging that the time within which the contractor had stipulated to complete the work had expired long prior to the cancelation of the contract. The plaintiff joined issue and filed a replication on April 18, 1883.

On June 19, 1883, Bailey died. His widow was appointed administratrix, and the action against the District was revived in her name.

On September 16, 1891, the attorney for the claimant addressed a letter, on behalf of the administratrix, to the commissioners of the District of Columbia, calling attention to the pending case, stating that "the ground of said suit is for breach of contract," reciting the facts as to the making of the contract and the mode by which it was terminated, and claiming that, at the time of such cancelation, Bailey had expended for machinery necessary to the performance of the contract $10,180; that he had at the time stock on
[163]hand, $7,000; that *the profit on the unexecuted balance of the work would have been $8,000; that there was due under the contract for an extra one half inch of surfacing $5,000. These items were stated in the letter to amount to $31,180, but only aggregate $30,180. Without calling the attention of the commissioners to the fact that the item of $5,000 for an extra half inch of resurfacing was not asserted in the declaration in the pending suit, the attorney for the administratrix proceeded to refer to the defenses interposed in such suit on behalf of the District, and next stated the claim made by the contractor in his replication, that the delay in the work was the fault of the District. The conclusion of the letter, omitting references to immaterial matters, was as follows:

"Now, having stated the principal facts which bear upon this case, that you may have sufficient knowledge to act in the premises, I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much litigated case."

This communication was referred by the commissioners to the attorney for the District, who indorsed thereon under date of October 17, 1891:

"This is a case which has been pending in the court for a long time and it ought to be disposed of. If it could be referred to some first-class referee, who will give us a full hearing, it would be a very good way of disposing of it, and I should favor such a reference, as we can then attend to it at our convenience."

A memorandum was also sent by one of the commissioners to the assistant attorney for the District, which read as follows:

"Thomas: Think of some good names for a referee, and talk with us about this case.

"October 27, 1891. J. W. D."

A memorandum in pencil, evidently having reference to the foregoing, is as follows:

*"Ans. Mr. Douglass. Comm'rs think this [164]
case should be settled in court."

On October 28, 1891, Assistant Attorney Thomas sent the following letter:

To the Hon. Commissioners, etc., etc.

Gentlemen: I return to you herewith a communication from W. Preston Williamson, Esq., relative to the case of Bailey v. The District of Columbia, referred to me with the request that I give you the name of someone who would make a good referee.

I would suggest either Mr. A. B. Duvall or Mr. J. H. Lichliter, both members of the bar and well qualified to decide the issues in that case. Very respectfully,

S. T. Thomas, Ass't Att'y, D. C.

---

statute is obviated by the payment of the award. Wilson v. Wilson, 18 Colo. 615.

Failure of an umpire chosen to render a decision upon an arbitration after the authority of the original arbitrators has ceased, to rehear the testimony taken before the arbitrators, is fatal to the award. *Re* Grenіng, 74 Hun, 62.

Omission to administer oaths to arbitrators and witnesses is not a ground of objection to the award made by the arbitrators where the contending parties expressly agreed that no oaths should be administered to the arbitrators, and that the testimony of witnesses unsworn should be received. Russell v. Seery, 52 Kan. 736.

Failure of an arbitrator to be sworn is not a jurisdictional defect, but at most an irregularity which can be availed of only by motion to set aside the award, or by raising it in the answer in a suit to enforce the award. Box v. Costello, 6 Misc. 415.

A waiver by an assignor of a claim which, by agreement of the assignor, assignee, and debtor, is submitted to arbitration, of the oath of arbitrators required by N. Y. Code Civ. Proc. § 2369, unless waived, is not binding upon his assignee. *Re* Grening, 74 Hun. 62.

An award of arbitrators is void where they have attempted to award what they have no power to award, and have failed to find what they were empowered to determine. Fortune v. Killebrew, 86 Tex. 172.

Error of judgment by arbitrators as to the effect or weight of evidence is not a ground for setting aside the award. Russell v. Seery, 52 Kan. 736.

An award of arbitrators will not be set aside for fraud, accident, or mistake unless the fraud was practised upon the arbitrators or the accident or mistake deceived and misled them. A mistake of arbitrators in weighing the facts placed before them, or their adoption of erroneous rules of law, is not sufficient. Wilson v. Wilson, 18 Colo. 615.

An award of arbitrators, arrived at in pursuance of the terms of the agreement voluntarily adopted by the parties, will not be reviewed on the question of damages, unless there was corruption or partiality of the arbitrators, misconduct during the hearing, or fraud in the opposite party. Hartford F. Ins. Co. v. Bonner Mercantile Co. 15 U. S. App. 134, 56 Fed. Rep. 378, 5 C. C. A. 524.

An award under a common-law arbitration is conclusive upon the parties, merges the original right, and alone furnishes the basis upon which the rights of the parties are to be determined. Box v. Costello, 6 Misc 415.

A judgment entered upon an award by arbitrators is void where some of the necessary parties did not properly join in the submission, and the arbitrators failed to determine the issues and decided matters not submitted to their determination. Fortune v. Killebrew, 86 Tex. 172.

An application to set aside an award of arbitrators for purely technical reasons will be denied where no apparent injustice has been done or is contemplated, and defendant voluntarily submitted all matters in dispute, and the amount of the award has been collected. Woelfel v. Hammer, 159 Pa. 448.

The next document referring to the matter is the following:

Office of the
Commissioners of the District of Columbia.
Washington, January 11, 1892.

Ordered, that J. J. Johnson is hereby appointed referee in the matter of the suit of *Bailey*, Administratrix of Bailey, Deceased, v. *District of Columbia.*
Official copy furnished Mr. J. J. Johnson.
By order: W. Tindall, Secretary.

Under this appointment, on February 17, 1892, the attorneys for the respective parties appeared before Mr. Johnson. It was claimed by witnesses for the plaintiff at the trial of the action subsequently brought to enforce the finding of the referee, that at the commencement of the hearing the latter gentleman, as well as the attorney for the administratrix, raised the question whether or not under the order of appointment the decision of the referee was to be final, and were assured by the attorney for the District that the decision of Mr. Johnson was to be a final
[165] determination of the case. *Such witnesses also testified that subsequently, when a question arose with respect to permitting an amended declaration to be filed, setting up a claim for an extra half inch of resurfacing, the referee and attorneys discussed as to whether the decision of the referee "was to wind up finally the whole matter," and an affirmative conclusion was arrived at. No attempt, however, was made to obtain from the commissioners of the District any modification or amplification of the writing of January 11, 1892.

The hearing before the referee was concluded on July 18, 1892, when Mr. Johnson placed on the files of the supreme court of the District of Columbia in action numbered 24,279 his report as referee. The report did not refer to the mode by which its author had become referee. It was entitled in the cause, purported to contain a synopsis of the pleadings, the plaintiff's claim, a statement of the facts and the findings of "J. J. Johnson, referee." The report concluded as follows:

"Upon the evidence and the law I have allowed the plaintiff for the unexecuted balance of 11,385 square yards, $4,440.15, being the profit between the cost of resurfacing the streets at fifty cents per square yard and eighty-nine cents, the price received, and for the extra one-half inch I have allowed the plaintiff $6,079.05 at the contract price, aggregating the sum of $10,519.20. I do therefore find that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs."

The referee also fixed his fee at $550, which was paid by the administratrix.

On September 23, 1892, exceptions were filed on behalf of the District to this report. Upon the exceptions, the attorney for the plaintiff made the following indorsement: "I consent that these exceptions be filed *nunc pro tunc.*" On March 10, 1893, a motion for judgment was filed on behalf of the plaintiff.

Without action being had on the exceptions and motions referred to, the administratrix of Bailey, on August 8, 1893, instituted an action at law, numbered 34,564, in the supreme court *of the District of Colum- [166]
bia, seeking to recover from the District the sum of $10,519.20, basing the right to such recovery upon the claim that the finding of Mr. Johnson was, in fact, a final decision and award. In the affidavit filed with the declaration, as authorized by the rules of practice of the court, what purports to be a copy of the resolution appointing Mr. Johnson referee is set out, but the words "of the suit" are omitted from before the words "of Bailey, administratrix." On September 2, 1893, pleas were filed on behalf of the District, denying that it had agreed to submit the matters of difference referred to in the declaration to the award and arbitrament of Johnson, and averring that Johnson had not made an award concerning the same. The various steps in the original action (No. 24,279) were stated, and it was alleged that motions to set aside award and for judgment were still pending. It was also averred that the alleged award was not under seal and was never delivered to the defendant; that the defendant never undertook and promised in the manner and form as alleged, and that the District was not indebted as alleged. The plaintiff joined issue. On October 8, 1895, on motion of the plaintiff, the two causes were consolidated. While the motion to consolidate was opposed by the District, no exceptions were taken to the entry of the order of consolidation.

The consolidated action came on for trial January 13, 1896. At the trial W. Preston Williamson, a witness for the plaintiff, testified that he had sent to the commissioners the communication of September 16, 1891. Under objection and exception he was permitted to testify to conversations had separately with two of the commissioners, which tended to show that in the event of the appointment of an arbitrator or referee, it was the intention of the commissioners to submit to the individual selected as referee or arbitrator the final determination of the entire controversy referred to in Williamson's letter. Also under objection and exception, the witness testified that after the order appointing Mr. Johnson referee was made by the commissioners, he and the attorney for the District, in the presence of the referee, discussed the scope of the submission,
*and agreed that the decision of the referee [167]
was intended by the parties to the controversy to be a final disposition of the whole matter. The indorsements on the letter of Mr. Williamson, the letter of the assistant attorney of the District, and other memoranda heretofore set out were put in evidence on behalf of the plaintiff. Mr. Hazleton, a former attorney for the District, also testified for the plaintiff, in substance, under objection and exception, that it was the inten-

tion of the commissioners, as he knew from oral statements made to him by two of the commissioners, that the appointment of a referee would be for the purpose of ending the whole controversy, and that nothing occurred between the time of the appointment of the referee and the making of the report to change that understanding. He also testified as to the filing of the amended declaration before the referee, setting up the claim for an extra half inch of resurfacing, which was not embraced in the pending suit at the time the referee or arbitrator was appointed.

J. J. Johnson also testified on behalf of the plaintiff, under objection and exception, as to the understanding had with him at the hearing before him as referee, by the counsel for the respective parties, regarding the finality of any decision made by him, and as to the filing of the amended declaration for the extra half inch of resurfacing. He testified that he filed the report made by him in court of his own motion, and averred that certain written matter filed with his report was not a part of the report, and that it did not contain all the evidence, though it contained all the oral testimony given before him.

The report was next put in evidence, objections being first separately interposed to its introduction on the grounds: 1, that the papers and evidence attached thereto should also be put in evidence; and, 2, that the referee was without authority to make an award. To the overruling of each objection the defendant duly excepted.

John W. Douglass, one of the commissioners for the district in office at the time of the appointment of the referee, testified on behalf of the plaintiff that the intention of the
[168] *commissioners was to make the reference final. The evidence for the plaintiff was closed with the testimony of the plaintiff, who stated, in effect, that the letter of September 16, 1891, had been sent to the commissioners with her approval, and that nothing had been paid her on account of the award. For the defendant, John W. Ross, who was a commissioner at the time of the appointment of Mr. Johnson, testified that he was an attorney at law, knew the difference between an arbitration and order of reference for a report, and that his understanding when the appointment of Mr. Johnson as referee was made was that the appointment was not of an arbitrator, but was simply one of reference. He further testified "there was no record of the appointment of the referee, except the one in evidence, unless the pencil memorandum may be taken as a record." The witness denied that he made statements attributed to him by the witness for the plaintiff, to the effect that it was the intention of the commissioners that the decision of Mr. Johnson should be final.

After Mr. Ross had concluded his testimony, the record and proceedings in action No. 24,279 were introduced in evidence on behalf of the defendant. On the settlement of the bill of exceptions a dispute arose as to whether the papers attached to the report of the referee had been put in evidence by the offer made, but it is unnecessary to notice the action taken by the trial court with respect to that controversy.

In rebuttal, Mr. Williamson reiterated statements as to alleged declarations of Mr. Ross regarding the finality of the decision of the referee. On cross-examination he said:

"That he wrote the letter of September 16, 1891, at his office, 912 F street; that he did not know why the District filed exceptions, as it was understood that the report was to be final; that witness filed the motion to confirm the award because he thought it the best thing, the only thing, that could then be done, and that he thought it would be simply a matter of form, and he would have confirmation at once of the award, and that the money would be paid; but the District, instead of doing that, violated its agreement; that witness *did not remember ever consenting to the [169]
filing of exceptions to the award. Now that counsel shows him the paper which is the exception to the award, witness remembers that he signed the paper consenting that the exceptions should be filed *nunc pro tunc*. Mr. Richardson came to him and asked him if he would make any special objection to the exceptions being filed; that it ought to be filed, so that the District might make their objections, and for that purpose he did it, and did not consent to it because he thought it was not final; that there was not a copy of the award served by him on the commissioners; that Mr. Johnson was their arbitrator, and it was not for witness to serve them with a copy."

The evidence was then closed. The trial judge granted a request of the defendant that the jury be instructed to render a verdict for the defendant in the first action, and an exception was duly noted on behalf of the administratrix. The trial judge also granted a request of counsel for the plaintiff, in substance that the jury be instructed to find for the plaintiff if they found from the evidence that the commissioners accepted the proposition contained in Mr. Williamson's letter, that in pursuance of such acceptance the commissioners made the order of January 11, 1892, and that the hearing before Mr Johnson was proceeded with under such appointment, and the declaration amended at the hearing by consent of counsel. An exception was taken to the granting of this instruction.

The following requests for instructions were then asked on behalf of the defendant, which being overruled, separate exceptions were noted:

"2. The jury are instructed, on the whole evidence in cause No. 34,564, they are to render a verdict for the defendant.

"3. The jury are instructed that the commissioners of the District of Columbia were without authority to agree to submit the matters in controversy in the case of *Bailey, Adm'r, v. The District of Columbia,* at law, No. 24,279, to the final award of an arbitrator, but that said commissioners had authority to agree to refer the case for the award and report of a referee, subject to the approval of the court."

"5. The jury are instructed that the plain-[170]tiff, as administratrix* of the estate of her deceased husband, was without authority to agree to refer the claim of the estate to arbitration without the previous direction of the supreme court of the District of Columbia, holding a special term for orphans' court business."

The bill of exception also states that exceptions were taken on behalf of the District to portions of the general charge of the court contained in brackets, but no portion of the charge, as contained in the printed record, is so marked.

A verdict was returned finding in favor of the defendant in action No. 24,279, and in favor of the plaintiff for $10,519.20 and interest in action No. 24,564. Judgment was subsequently entered upon the verdict, and both parties prosecuted error. The court of appeals of the District having affirmed the judgment (9 App. D. C. 360), each party obtained the allowance of a writ of error from the court and the consolidated cause is now here for review.

Messrs. **Sidney T. Thomas** and **Andrew B. Duvall** for District of Columbia:

A written submission cannot be varied by parol evidence. Neither is it competent to show by parol evidence what the written submission in fact was.

Efner v. *Shaw*, 2 Wend. 567; *McNear* v. *Bailey*, 18 Me. 251; *DeLong* v. *Stanton*, 9 Johns. 38.

A memorandum of an agreement to refer is wholly superseded by a subsequent complete reference of submission. And the verbal agreement made prior to, or contemporaneously with, a written submission is merged in the latter.

Morse, Arbitration & Award, 63; *Billington* v. *Sprague*, 22 Me. 34; *Loring* v. *Alden*, 3 Met. 576; *Symonds* v. *Mayo*, 10 Cush. 39; *Palmer* v. *Green*, 6 Conn. 14.

A case submitted to arbitration *pendente lite* will in no case be considered discontinued where the terms of the submission show the intention of the parties not to discontinue.

Jacoby v. *Johnston*, 1 Hun. 242; *Hearne* v. *Brown*, 67 Me. 156; *Ensign* v. *St. Louis & S. F. R. Co.* 62 How. Pr. 123.

The practical interpretation put upon the agreement by the parties was that the referee was to make a report only. This controls. *Chicago* v. *Sheldon*, 9 Wall. 54 (19: 597).

The plaintiff sues as an administratrix; as such, she was without power to submit alleged differences to arbitration. *Clark* v. *Hogle*, 52 Ill. 427.

If an arbitrator discloses in his award the ground of his decision the same is reviewable, and, if contrary to law, may be set aside. *State, Calvert*, v. *Williams*, 9 Gill, 172; *Oliver* v. *Heap*, 2 Harr. & M'H. 477; *Hewitt* v. *State, Brown*, 6 Harr. & J. 97; *Goldsmith* v. *Tilly*, 1 Harr. & J. 361; *Tillard* v. *Fisher*, 3 Harr & M'H. 118; *Woods* v. *Matchett*, 47 Md. 390; *Kent* v. *Elstof*, 3 East, 18; *Knox* v. *Walton*, 2 Wash. C. C. 507; *Kelly* v. *Johnson*, 3 Wash. C. C. 47; *Conger* v. *James*, 2 Swan, 215; Billings, Awards, p. 61.

A submission under a statute which requires the court to "approve" the award gives the court power to inquire into the decision of the arbitrators as regards matters of law.

Allen v. *Miles*, 4 Harr. 234.

The court is bound to set aside an award which is manifestly against the law and facts.

Allen v. *Miles*, 4 Harr. (Del.) 236; *Hurst* v. *Hurst*, 1 Wash. C. C. 60; *Williams* v. *Craig*, 1 Dall. 315 (1: 153); *Govett* v. *Reed*, 4 Yeates, 461.

Mr. **A. S. Worthington**, for Elizabeth L. W. Bailey, Administratrix.

This is a case in which a part only of the contract was in writing. That being so, the whole matter was open to oral evidence to show what was the real agreement between the parties.

Hays v. *Hays*, 23 Wend. 263.

It must be presumed that there was evidence to sustain the award.

United States v. *Farragut*, 22 Wall. 415 (22: 879).

An administrator has power to submit a claim, and especially one that is already in litigation, to arbitration.

3 Wms. Exrs. bottom page 1801, note i; 2 Woerner, Am. Law of Administration, § 327; *Lyle* v. *Rodgers*, 5 Wheat. 406 (5: 117); Morse, Arbitration & Award, 19, and cases cited.

The commissioners of the District are also authorized to submit to arbitration a claim against the municipality which they represent, especially when an action is pending to enforce the claim.

1 Dill. Mun. Corp. § 478; *Belmont* v. *Washington & G. R. Co.* 3 Mackey, 357.

If the award is within the submission and contains the honest decision of the arbitrators after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or in fact.

Burchell v. *Marsh*, 17 How. 349 (15: 99); *Smith* v. *Morse*, 9 Wall. 82 (19: 599).

Courts of justice in their latest decisions have manifested a disposition to treat awards with more liberality than formerly. Everything is to be intended in favor of an award.

Ebert v. *Ebert*, 5 Md. 359; *Roloson* v. *Carson*, 8 Md. 220; *Garitee* v. *Carter*, 16 Md. 309; *Maryland & D. R. Co.* v. *Porter*, 19 Md. 458; *Willard* v. *Horsey*, 22 Md. 89.

Several cases are cited in the opposing brief in support of their proposition that the submission to arbitration of a pending action at law will not necessarily of itself work a discontinuance of the action. On the other hand, it has been frequently held that the effect of such reference is to discontinue the pending suit.

Miller v. *Vaughan*, 1 Johns. 315; *Johnson* v. *Parmely*, 17 Johns. 129; *Camp* v. *Root*, 18 Johns. 22; *Dodge* v. *Waterbury*, 8 Cow. 136; *Rathbone* v. *Lownsbury*, 2 Wend. 595; *Towns*

v. *Wilcox*, 12 Wend. 503; *Green* v. *Patchen*, 13 Wend. 293; *Mooers* v. *Allen*, 35 Me. 276, 58 Am. Dec. 700; *Crooker* v. *Buck*, 41 Me. 355; *Eddings* v. *Gillespie*, 12 Heisk. 548; *Jewell* v. *Blankenship*, 10 Yerg. 439; *Muckey* v. *Pierce*, 3 Wis. 307; *Cunningham* v. *Craig*, 53 Ill. 252.

Mr. Justice **White** delivered the opinion of the court:

The decision of this controversy involves two propositions. Did the commissioners of the District of Columbia have the power to agree to submit the claim in issue to the award of an arbitrator? And if they did have the power, did they lawfully exercise it? To answer either of these questions it becomes essential to ascertain whether an agreement to submit to arbitration involves the power to contract. Both of the matters above stated depend upon this last inquiry, because both the claim that the District of Columbia did not in valid form exercise the power to submit to arbitration, and the assertion that if they so did they were not authorized to that end, rest on the claim that the submis-
[171]sion was not made in the form *required by law to constitute a contract, and even if the alleged award was in legal form, nevertheless the District commissioners were without power to contract for that purpose.

In determining whether an agreement to arbitrate involves the power to contract we eliminate at once from consideration consents to arbitrate made under a rule of court, by consent, in a pending suit, and shall consider only whether an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose is or is not a contract. We do this, because there is no pretense in the case at bar that the submission to arbitration was under a rule of court or equivalent thereto. Indeed, the courts below held that the submission of the claim in question to arbitration was a purely common-law one and not made under a statute or rule of court; and in consequence of these views the courts held it to be their duty to make the award executory by rendering a judgment thereon, on the assumption that the parties, having agreed to a common-law submission, were bound by reason thereof to abide by the award of the arbitrator.

The general rule is, "that everyone who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting." Kyd, p. 35; Russell, Arbitrators, p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: "A submission is a contract." And again, at p. 50: "The submission is the agreement of the parties to refer. It is therefore a contract, and will in general be governed by the law concerning contracts." In *Witcher* v. *Witcher*, 49 N. H. 176, the supreme court of New Hampshire said (p. 180): "A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed." It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be the act *of the corporate body [172]
(Russell, Arbitrators, 5th ed. p. 20); which act was of necessity required to be evidenced in a particular manner.

It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. *Wheatley* v. *Martin*, 6 Leigh, 64; *Wamsley* v. *Wamsley*, 26 W. Va. 46; *Wood* v. *Tunnicun*, 74 N. Y. 43. Whilst, however, the agreement of the executor to a common-law submission was binding upon him, such a consent on his part did not protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was a voluntary act of the executor and was not the equivalent of a judicial finding. 3 Wms. Exrs. p. 326, and authorities cited. So, also, the power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (Mun. Corp. 4th ed. § 478):

"As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities."

In the early case of *Brady* v. *Mayor, etc. of Brooklyn*, 1 Barb. 584, 589, the power of a municipal corporation to submit to arbitration was ascribed to the capacity to contract, with a liability to pay, and it was held that corporations have all the powers of ordinary parties as respects their contracts, except when they are restricted expressly, or by necessary implication. In the *case [173]
of minor public officials or corporations, such as selectmen and school districts, the power to arbitrate has been clearly rested upon the existence of the right to adjust and settle claims of the particular character which had been submitted to arbitration. *Dix* v. *Town of Dummerston*, 19 Vt. 262; *District Township of Walnut* v. *Rankin*, 70 Iowa, 65. Indeed, the proposition that an independent agreement to submit to an award must depend for its validity upon the existence of the right to contract is so elementary that further cita-

tion of authority to support it is unnecessary.

Examining, then, the questions we have stated in their inverse order, we proceed to inquire whether the commissioners of the District of Columbia had the power to enter into a contract of the nature of that under consideration. The solution of this inquiry requires a brief examination of the statutes, from which alone the powers of the commissioners of the District are derived.

By chapter 337, act of June 20, 1874, "An Act for the Government of the District of Columbia, and Other Purposes" (18 Stat. at L. 116), the commission provided for in § 2 was vested with the power and authority of the then governor or board of public works of the District, except as thereinafter limited, and it was provided that "said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation, other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts and to the protection or preservation of improvements existing, or commenced and not completed, at the time of the passage of this act."

By chapter 180, act of June 11, 1878, "An Act Providing a Permanent Form of Government for the District of Columbia" (20 Stat. at L. 102), the District and the property and persons therein were made subject to the provisions of the act, "and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act." The commissioners provided for in the act were, by § 3, vested with all the pow-
[174]ers,*rights,duties,and privileges lawfully exercised by, and all property, estate, and effects vested in, the commissioners appointed under the provisions of the act of June 20, 1874, and were given power, subject to the limitations and provisions contained in the act, to apply the taxes or other revenues of the District to the payment of the current expenses thereof, to the support of the public schools, the fire department, and the police. It was expressly enacted, however, in the same section, that the commissioners in the exercise of the duties, powers, and authority vested in them "shall make no contract, nor incur any obligation, other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress." In the same section it was further provided that the commissioners should annually submit to the Secretary of the Treasury, for his examination and approval and transmission by him to Congress, a statement "showing in detail the work proposed to be undertaken by the commissioners during the fiscal year next ensuing, and the estimated cost thereof; also the cost of constructing, repairing and maintaining all bridges authorized by law across the Potomac river within the District of Columbia, and also all other streams in said District; the cost of maintaining all public institutions of charity, reformatories, and prisons belonging or controlled wholly or in part by the District of Columbia, and which are now by law supported wholly or in part by the United States or District of Columbia; and also the expenses of the Washington aqueduct and its appurtenances; and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year." Of the estimates as finally approved by Congress, the act provided that 50 per cent should be appropriated for by Congress, and the remaining 50 per cent assessed upon the taxable property and privileges in the District other than the property of the United States and of the District of Columbia. In the 5th section of the act provision was made for the letting by contract, after due advertisement, of all work of repair on streets, etc., where the cost would exceed $1,000, and *it was also in said section [175]
stipulated that "all contracts for the construction, improvement, alteration, or repairs of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature shall be made and entered into only by and with the official unanimous consent of the commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said commissioners, and no contract involving an expenditure of more than $100 shall be valid until recorded and signed as aforesaid."

By § 37 of chap. 62, act of February 21, 1871 (16 Stat. at L. 427), it was provided as follows:

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District, and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

This section is deemed to be applicable to the present commissioners. Comp. Stat. D. C. §§ 30, 31, pp. 201, 202. So, also, by § 15 of the act of 1871 (16 Stat. at L. 423, chap. 62), it was provided that the legislative assembly should not "authorize the payment of any claim or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void."

Section 13 of the act of June 1, 1878, embodies the 2d section of the joint resolution approved March 14, 1876 (19 Stat. at L. 211, § 2), which made it a misdemeanor for any officer or person to increase or aid or abet in increasing the total indebtedness of the District.

Under the statutes of 1874 and 1878, above referred to, it has been held that the District of Columbia still continued to be a municipal corporation, and that it was subject to the operation of a statute of limitations (*Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1 [33: 231]), and was also liable for

[176]*damages caused by a neglect to repair the streets within the District (*District of Columbia* v. *Woodbury,* 136 U. S. 450 [34:472]). But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia are neither vested in nor exercised by the District commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the commissioners of the District discharge the functions of administrative officials.

There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common-law submission. And this being true, with how much less reason can it be contended that the administrative officers of the District have such power without the consent of Congress, when the acts defining the powers of the commissioners, by clear and necessary implication, contain an express prohibition to the contrary?

[177] *Nor is it in reason sound to say that because the District commissioners have the power to sue and be sued, they have therefore the authority to enter into a contract to submit a claim preferred against the District to arbitration, and thus to oust the courts of jurisdiction, when no authority is conferred upon the commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation had been made by Congress for the payment of any such claim. It cannot be said that because Congress had appropriated for the improvement of streets, and therefore authorized a contract for such improvement to the extent of the appropriation, that it had also authorized and appropriated for a claim in damages asserted to have arisen from the fact that work had been stopped because the appropriation made by Congress had been exhausted. The appropriation of money to improve streets was in no sense the appropriation of money to pay a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from the refusal to permit the performance of work and labor and the furnishing of materials.

Aside from the prohibition imposed on the commissioners of the District by the acts of Congress against entering into contracts for the payment of money for any claim not specifically appropriated for, an agreement to submit the claim in question to the arbitrament of a single individual was, if valid, a contract binding the District to pay any sum of money which the arbitrator might award. It cannot be doubted that if the District commissioners themselves had seen fit to pass a resolution reciting that the appropriation by Congress for the improvement of the streets had been exhausted, and that a given sum of money was set aside to pay a claim for damages preferred against the District for having contracted when there was no appropriation, such action would have been, under the statutes, *ultra vires.* But if the express action of the commissioners to this end would have been void, how can it be contended that by indirection, that is, by entering into an agreement to submit to an award, the commissioners had the power to delegate to a third person an authority which *they [178] themselves did not possess? Whilst the fundamental want of power in the District commissioners to agree to a common-law submission is decisive, there is another view which is equally so. By the express terms of the statute the commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the form in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of $100 cannot take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *Forma dat esse rei.* That the mere statement of the appointment of a referee on the minutes without the signature of any of the commissioners did not comply with the requirements referred to, is too clear for discussion. The attempt to give effect to such entry as a contract without regard to the requirements of the law illustrates the wisdom of the statute and the evil of disregarding it, for on the trial two of the three commissioners testified, one on behalf of the plaintiff and the other on behalf of the defendant, and swore to directly opposite views as to

whether or not there had been a common-law submission by the Commissioners.

We have considered what has been referred to by counsel as the order of the commissioners, according to its terms, which embraced only the matters contained in the action then pending, and have not regarded the parol evidence which sought to vary and contradict the writing by establishing that it was intended thereby to embrace a claim which had not been asserted in the action. The views we have advanced being decisive against the legality of the alleged award, it follows that the judgment in favor of the administratrix based thereon must be reversed. As, however, the consolidation of the action
[179] *upon the award with the original action for damages for breach of the contract for the resurfacing, and the trial of such consolidated cause, proceeded upon the hypothesis that a valid agreement to arbitrate had been entered into, the ends of justice will be subserved by also reversing the judgment in favor of the District entered in the original action. *It is therefore ordered that the judgments be reversed*, and the cases remanded, with directions to dismiss the action No. 34,564 founded upon the alleged award, and to grant a new trial in action No. 24,279.

ADELIA YOUNG *et al.*, *Appts.*,
v.
JENNIE AMY.

(See S. C. Reporter's ed. 179-187.)

Appeal from territorial court—jurisdiction of this court.

1. On appeal from the supreme court of a territory this court is without power to re-examine the facts, and can only determine whether the court below erred in the conclusions of law deduced by it from the facts by it found, and review errors in admitting or rejecting evideuce, duly excepted to.
2. Alleged errors in the admission or rejection of evidence cannot be passed upon by this court on appeal from a territorial court, where this cannot be done without examining the weight of the evidence and disregarding the facts as found.

[No. 242.]

Submitted April 27, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Supreme Court of the Territory of Utah reversing the decree of the District Court of the Third Judicial District of that Territory which affirmed the decree of the Probate Court of Summit County, Territory of Utah, in favor of Adelia Young *et al.*, claimants to the estate of Oscar A. Amy, deceased. *Affirmed.*

See same case below, 12 Utah, 278.

Mr. **Le Grand Young** for appellants.
Messrs. **Charles S. Varian,** *W. H. Dickson*, and *S. P. Armstrong* for appellee.

Mr. Justice **White** delivered the opinion of the court:

By § 17 of the act of Congress providing for the admission of Utah into the Union (28 Stat. at L. 107, chap. 138) *power was con- [180]
ferred upon the convention called for the purpose of framing a Constitution for the contemplated state, to provide for a transfer of causes which might be pending in the territorial courts, at the time of the admission of Utah into the Union, to the courts of the state which were to be established. The statute moreover provided that "from all judgments and decrees of the supreme court of the territory mentioned in this act, in any case arising within the limits of the proposed state prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said state into the Union."

This cause comes here for review in virtue of the foregoing provisions of law. It originated in the probate court of Summit county, Utah territory, and involved a dispute over the distribution of the estate of Oscar A. Amy, who died intestate in the county of Summit, in Utah territory, on the 26th day of May, 1891. There were three classes of claimants to the estate. First, Adelia Young, Cedina C. Young, and Delecto Maston, who were maternal aunts of the decedent, they being the appellants on this record. Second, Royal D. Amy, Francis R. Jackson, and others, half-blood brothers and sisters of the deceased. Third, Jennie Amy, who is the appellee claiming to be the wife of the deceased. Each of these different classes of claimants asserted that they were solely entitled to take distribution of the estate to the entire exclusion of the others. In the probate court a decree was rendered in favor of the first-mentioned persons, the maternal aunts. From this decree an appeal was taken to the district court of the third judicial district of the territory of Utah, where after a trial *de novo* the decree of the probate court was affirmed. From this decree further appeal was prosecuted to the supreme court of the territory, and that court reversed the decree of the district court, rejected the claims of those firstly and secondly mentioned; that is, the maternal aunts and the brothers and sisters of the half blood, the court deciding that the wife of the deceased, Jennie Amy, was solely entitled to the entire *estate. The [181]
decree of the supreme court of the territory

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see note to Parks v. Turner, 13 : 883.

In equity cases admission of illegal evidence not, of itself, ground of reversal or bill of exception,—see note to Field v. United States, 9 : 94.

As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,—see note to Miners' Bank v. Iowa, 13 : 867.

was entered on December 21, 1895. 12 Utah, 278. On the same day the maternal aunts, who were embraced in the first class, applied for and were allowed an appeal to this court, and on December 21, 1895, a bond for costs was filed in the supreme court of the territory, and was approved by the chief justice thereof. The citation on appeal, however, was not issued until about six months thereafter, September 21, 1896. As, in the meanwhile, the state of Utah had been admitted into the Union this citation was approved by the chief justice of the state of Utah, and on the same day findings of fact and conclusions of law were made by the supreme court. These findings, as the record certifies, were prepared by the late chief justice of the territorial court, and were adopted by the supreme court of the state of Utah as its own. From the findings thus made we have ascertained the facts above stated, and the findings moreover show that the controversy involved two issues. First, whether the brothers and sisters of the half blood were entitled to a distribution of the property left by the deceased in preference to the maternal aunts; and, second, whether Jennie Amy, the appellee, was the wife of the decedent, it being conceded that if she was his wife under the laws of Utah, she inherited the property left for distribution to the exclusion of his maternal aunts. The first question, that is, the right to distribution asserted in favor of the brothers and sisters of the half blood, may be at once dismissed from view, as the decree of the supreme court rejected their claim, and they have not appealed. The second question, that is, whether Jennie Amy, the appellee, was the wife of the deceased, depended upon the validity of a judgment of divorce against a former husband which had been rendered in her favor in 1879 in the probate court of Washington county, Utah, the marriage having been contracted in Utah and the ground for the divorce being the abandonment of the wife by the husband. After this judgment of divorce Mrs. Amy, on the 4th of August, 1886, was married to Oscar A. Amy, the deceased. The controversy, then, between the parties now before us turned upon a claim
[182] advanced by the maternal aunts, *that the judgment of divorce rendered between Mrs. Amy and her former husband was void; that she hence did not enter in a lawful marriage with the deceased, and was not entitled, therefore, as his wife to his estate.

The record contains, as we have stated, findings of fact made by the supreme court of the state and the conclusions of law, which the supreme court held to be decisive of the issues which the case involved, and to which we shall have occasion hereafter to refer. The findings of fact and conclusions of law are immediately followed in the record by this recital: "The foregoing is a statement of the facts found upon the evidence in the case, and the following are the rulings of the court on the admission and rejection of the evidence, which were duly excepted to by counsel for Adelia Young, Cedina C. Young, and Delecto Maston." This is followed by a note of evidence, showing what took place during the trial in the district court, which is also supplemented by the oral and documentary evidence offered in the trial of the cause. It appears that Mrs. Amy offered the decree of divorce between herself and her husband and the complaint filed in the suit in which the judgment of divorce was entered. This was objected to on the ground that the documents were irrelevant, inasmuch as without the summons issued in the cause they proved nothing. The counsel tendering the proof thereupon declared that although the decree on its face recited the fact that the summons had been regularly issued and served, it was absent from the record, and he proposed by further evidence to show that the summons was regularly issued and due notice thereof had been given to the defendant as the law required.

The court received the evidence subject to the objection. That is to say, it declared that it would pass on the objection when all the evidence in the case had been offered, thus treating the objection as in a measure going to the effect. Mrs. Amy and her former husband, the defendant in the divorce proceedings, were then called, and testimony was given by both tending to show that the summons had been issued in conformity to law and the defendant in the divorce suit
*was personally cognizant of the suit, as he [183]
received and had in his possession the copies of the newspaper containing the published summons, and that due service thereof, in the manner required by law, had been made. All this testimony was objected to, and the court likewise received it subject to objection, no exception being taken to such action. In the course of the testimony of these witnesses various exhibits were offered tending to show the preparation of the summons in compliance with law, the publication in the newspaper of the summons in conformity to legal requirements, its service on the defendant, and that he had both legal and actual notice of the suit, all of which was objected to, and this, like the other objections, was reserved to be considered when the evidence was all in. The counsel of Royal D. Amy and others, the sisters and brothers of the half blood, offered in evidence what they designated as the judgment roll of the divorce proceeding. This was also objected to by the counsel for the maternal aunts on the ground that the record was not complete and did not show compliance with the legal requisites, and was objected to by Mrs. Amy because it contained matters asserted not to be properly a part of the judgment roll, and which were therefore not admissible. The court also reserved the objection to this evidence.

At the conclusion of the trial the court sustained all the objections to the evidence and the testimony, and decided the case against Mrs. Amy and in favor of the maternal aunts. To the rulings of the court rejecting the documentary and oral evidence, Mrs. Amy excepted, and upon the record as thus made the

...se was taken to the supreme court of the territory. In that court, as we have seen, the action of the trial court was reversed and a decree rendered in favor of Mrs. Amy.

The assignments of error are twenty-four in number, and the argument by which their correctness is sought to be maintained has taken a much wider range than the condition of the record justifies. It is settled that on error or appeal to the supreme court of a territory this court is without power to re-examine the facts, and is confined to deter-
[184] mining* whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this regard has been duly excepted to, and the right to attack the same preserved on the record. *Harrison* v. *Perea*, 168 U. S. 311 [42: 478], and authorities there cited.

The findings of fact and conclusions of law of the supreme court are as follows:

"Eleventh. The court further finds that the said Jennie Amy was married to one Elliot Butterworth in 1875.

"That on the third day of September, 1879, the probate court of Washington county made and entered a decree of divorce, dissolving the bonds of matrimony theretofore existing between the said Jennie Amy and the said Elliot Butterworth, and absolutely releasing the said Jennie Amy and the said Elliot Butterworth from all the obligations of said marriage; that the said probate court so granting said decree of divorce was a court of competent jurisdiction and had jurisdiction of the subject-matter of said divorce action and of both the parties thereto.

"That the said defendant therein, Elliot Butterworth, had knowledge at the time of the said divorce proceedings and was duly served with process in said action.

"That the said Elliot Butterworth married a second wife on the 11th day of October, 1880, being the year after said decree of divorce was rendered; that his second wife is still living, and she and the said Elliot Butterworth are still husband and wife; that as the issue of said second marriage the said Elliot Butterworth and his present wife have seven children, ranging from two years to fifteen years old.

"That afterwards, to wit, on April 4, 1886, the said Jennie Amy, the claimant in this proceeding to the estate of the said Oscar A. Amy, deceased, was duly and lawfully married to the said Oscar A. Amy, and continued to be and was his lawful wife at the time of his death."

From these findings it deduced the following legal conclusion:
[185] *"That the said Jennie Amy is now the widow of said Oscar A. Amy, deceased, and as such widow she is the successor to the whole of his estate, consisting of the property hereinabove described."

We will consider the assignments in their logical order. The first to the eleventh, inclusive, and the nineteenth complain of errors which it is alleged the supreme court committed in admitting certain evidence. But all the evidence objected to was received by the trial court subject to the objection, and the question of its admissibility turned on that of its irrelevancy or the quantum of proof which it would establish if considered. The ultimate action of the trial court in rejecting the evidence which it had received, subject to objection, amounted, in effect, to a decision that the evidence did not establish that the judgment in the divorce proceedings had been rendered after due publication of summons in accordance with the laws of the territory, and therefore the evidence was insufficient. But the express finding from all the evidence by the supreme court of the state is that the summons in the divorce suit was duly issued and published according to law, and that the defendant had, besides, personal notice of the pendency of the suit. This conclusion, being binding on us, establishes that the evidence was relevant and material, and that there was no ground to reject it. We cannot, therefore, say that the evidence should have been disregarded because it did not establish the facts, which we are bound to conclude it did fully prove. If specific findings of each item of evidence and the conclusions deduced from the separate items had been made, as in *Checly* v. *Clayton*, 110 U. S. 702 [28: 298], the case would present a different aspect. Considering, however, the state of the record and the nature of the findings of fact certified, we cannot determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded. The same reasoning is applicable to the other assignments of error. Thus, the thirteenth, fourteenth, seventeenth, and eighteenth assert that the court erred in holding,*as to the bur- [186]
den of proof, that it erroneously treated the denial of the validity of the judgment of divorce by the maternal aunts as a collateral attack by them on such judgment. But there are no findings which raise these questions. On the contrary, the facts found render them wholly immaterial, for it is obvious that if the evidence affirmatively established, as the findings declare, that the judgment of divorce was rendered after due summons, and that the defendant had personal notice of the proceedings, the questions of burden of proof and collateral attack are wholly irrelevant. Again, the twenty-first and twenty-second assignments of error complain that the court erred in holding that it was not necessary that there should be an order of the court directing the publication of the summons in the divorce proceeding, and that the court erred in holding that the only papers necessary in proof of publication were the complaint, summons, and affidavit of the printer and judgment. But there are no findings which raise these questions. On the contrary, the facts found are that the summons were duly published, and that the defendant had besides personal notice. To

maintain the assignments of error, we should be obliged to go into the record and ascertain what was the proof on the subject upon which the court based its findings, and deduce from this analysis that the premise upon which the assignments just mentioned are based was a correct one. The same reasoning applies to the twenty-third and twenty-fourth assignments, which charge that the court erred in holding that the probate court by which the divorce judgment was rendered possessed common law or chancery jurisdiction, or that it was ever a court of general jurisdiction. These questions become only material for the purpose of determining the prima facie proof resulting from the record of the divorce proceeding. It is not questioned that it was correctly held that the court which rendered the judgment of divorce had jurisdiction of the subject-matter. If, therefore, it had jurisdiction, and the proof affirmatively shows the regularity and validity of the proceedings, it is wholly immaterial to determine whether it possessed common-law or chancery powers, or was a court of general ju-
[187]risdiction. *In effect, all the assignments of error and the argument based thereon rest in reason on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence and disregard the facts as found. If the argument be that the findings of fact are the mere statement of ultimate legal propositions, and therefore they may be disregarded or reviewed, then the result of the contention is that there are no findings of fact and nothing to review, and if the other aspect be looked at, the views which we have just expressed are conclusive.

Affirmed.

FLINT, EDDY, & COMPANY, *Appts.*,

v.

GEORGE CHRISTALL and James Greig, Trustees, *Appellees.*

(See S. C. "The Irrawaddy," Reporter's ed. 187–202.)

Right to general average contribution.

If a vessel seaworthy at the beginning of the voyage is afterwards stranded by the negligence of her master, the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped, and supplied, under the provisions of § 3 of the act of February 13, 1893, has no right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo.

NOTE.—*As to general average,*—see note to Columbian Ins. Co. v. Ashby, 10 : 186.

As to general average; loss by stranding,—see note to Fowler v. Rathbone, 20 : 281.

As to liability for necessaries, supplies, and repairs to ship; liability for conduct and acts of master and mariners,—see note to United States v. The Malek Adhel, 11 : 239.

[No. 591.]

Submitted April 11, 1898. Decided May 31, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying a question on which that court desires instruction, in an action in admiralty instituted in the District Court of the United States for the Southern District of New York by the libellants, George Christall *et al.*, trustees, against Flint, Eddy, & Company, for contribution from the cargo of a vessel in respect of certain general average charges arising from the stranding of the steamer Irrawaddy on the coast of New Jersey, in which action the district court made a decree in favor of the libellants; from which decree an appeal was taken to said Circuit Court of Appeals. *Question answered in the negative.*

See same case below, 82 Fed. Rep. 472.

Statement by Mr. Justice **Shiras:**

*This case comes here on a certificate from [188] the United States circuit court of appeals for the second circuit.

The facts out of which the question arises are as follows:

On November 9, 1895, the British steamship Irrawaddy, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped, and supplied, and was seaworthy.

The vessel was relieved from the strand November 20 as the result of sacrifices by jettison of a portion of her cargo, of sacrifices and losses voluntarily made or incurred by the shipowners through the master and of the services of salvors.

The Irrawaddy then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo and the losses and sacrifices of the shipowner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the shipowner, which they refused to pay.

The district court made a decree in favor of the libellants; from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the shipowner,

who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped, and supplied, under the provisions of § 3 of the act of February 13, 1893, a right to general average contribution [189]for *sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo?

Messrs. **Wilhelmus Mynderse** and **James C. Carter** for appellants.
Mr. **Harrington Putnam** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

The answer we shall give to the question certified by the circuit court of appeals must be determined by the meaning and effect which should be given to the act of February 13, 1893, known as the Harter act. Admittedly, upon the facts conceded to exist in the present case, the owner of the ship has no right to a general average contribution from the cargo, unless such right arises from the operation of that act.

We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of someone for whose acts the claimant has made himself, or is made by law, responsible to the cocontributors. We are not called upon either to trace the history of the rule, or to justify it as based on equitable principles, as it is conceded on both sides that such is the ordinary rule in the absence of statute or contract to modify it.

Nor is it necessary to inquire into the origin or nature of the law of general average. That has been so recently and thoroughly done in *Ralli* v. *Troop*, 157 U. S. 386 [39: 742], that it is sufficient to refer to the opinion of Mr. Justice Gray in that case.

Not only is the shipowner excluded from [190]contribution by *way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned. And it is the well-settled law of this court that a common carrier by sea cannot, by any stipulation with a shipper of goods, exempt himself from responsibility for loss or damage arising from the negligence of the officers or crew; that it is against the policy of the law to allow stipulations that will relieve a carrier from liability for losses caused by the negligence of himself or his servants. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397 [32: 788].

Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy at the time of beginning her voyage, or that he has used his best efforts to make her seaworthy; and that his undertaking is not discharged because the want of fitness is the result of latent defects. *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.* 136 U. S. 408 [34: 398]; *The Edwin I. Morrison,* 153 U. S. 199 [38: 688]; *The Caledonia,* 157 U. S. 124 [39: 644].

In this condition of the law the so-called Harter act was approved on February 13, 1893 (27 Stat. at L. chap. 105), wherein, after providing in the 1st and 2d sections that it shall not be lawful for any owner, agent, or master of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to exempt himself from liability for loss or damage arising from negligence in the loading or proper delivery of such property, or to insert in any bill of lading any covenant or agreement whereby the obligations of the owner to exercise due diligence in manning and equipping the vessel, and to make such vessel seaworthy and capable of performing her intended voyage should be in anywise lessened, weakened or avoided, it was, in the 3d section enacted as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel *in all respects seaworthy and properly [191]
manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from the danger of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The argument on behalf of the shipowner is clearly expressed by the learned judge of the district court in the following terms:

"There is no doubt, I think, that the liability to indemnify the cargo owner is the sole ground of the exclusion of the shipowner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation. It therefore seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average. Where due

diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by 'fault or error in the navigation or management of the ship,' the third section of that act declares that 'neither the vessel nor her owner, agent, or charterer shall become or be held responsible for damage or loss resulting therefrom;' the previous liability of the shipowner to the cargo owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construction of
[192]*law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo owner for his damages therefrom than the latter is liable to the shipowner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice voluntarily incurred, and for the common benefit, as much and as truly so when made by the shipowner as when made by the cargo owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifice as the other. . . . The application of this new relation of nonresponsibility under the Harter act to cases of general average does not, in fact, make the least change in the principles of general average contribution. The rule remains as before, that he by whose fault, actual or constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter act the shipowner, under our law, was constructively in fault for bad navigation and hence fell within the former rule. The Harter act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter." 82 Fed. Rep. 472, 474-477.

We are unable to accept this view of the operation of the act of Congress.

Plainly the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the
[193]*management of the vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship?

Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the Federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. This inequality, of course, operated unfavorably on the American shipowner, and Congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty.

Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employees was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

But we think that for the courts to declare, as a consequence of this legislation, that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the courts, but if Congress had intended to grant the further privilege now contended for it *would have expressed such an intention in [194]
unmistakable terms. It is one thing to exonerate the ship and its owner from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew.

What was the reasoning on which the courts proceeded in holding that it was against public policy to permit shipowners to contract for exemption from liability for the negligence of their agents? Was it not that such a state of the law would impel the shipowners to exercise care in the selection of those for whose conduct they were to be responsible? This being so, can it be reasonably inferred that Congress intended, when relieving shipowners from liability for the misconduct of their agents, to confer upon them the further right to participate in a general average contribution, and that to the detriment of the shippers? Such an interpretation of the statute would tend to relieve shipowners, to some extent at least, from care in

the selection of the master and crew; and it would likewise operate to influence the master in deciding, in an emergency, whether he would make a case of general average by sacrificing the vessel, in whole or in part. If he knew that the owner would participate in a contribution occasioned by a loss, he would be the less likely to exert himself and crew to avoid the loss.

It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the shipowner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution.

An examination of the cases cited has not convinced us that there has been any such final decision by the English courts. The case of *The Carron Park*, L. R. 15 Prob. Div. 203, does, indeed, hold that the relation of the goods owner to the shipowner was altered by the contract; that the shipowner was not to be responsible for the negligence of his servants in the events which have happened; and that, therefore, the shipowner's claim for general average was allowed. On the
[195] other hand, *in the case of *The Ettrick*, L. R. 6 Prob. Div. 127, the ship owner claimed the benefit of a general average contribution rendered necessary by reason of negligence in navigation, and put his claim on the ground that, having availed himself of the limited liability laws by paying into court the £8 a ton, which is the limitation fixed by the statutes of Great Britain, he was thereby relieved from his liability on account of the negligence in the navigation, and stood in the position of an innocent party entitled to share in the contribution. But the court of appeals held otherwise, and Sir George Jessel, M. R., said:

"The ground upon which the shipowner puts his claim is this: he says that the payment of £8 per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or his agents that would give rise to any liability. But I cannot read the act so. All it says is that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. It does not give him any new rights as far as I can see. . . . It seems to me that he could have no such right, for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course there is an end of the case."

But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the shipowner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption.

Upon the whole we think that in determining the effect of this statute in restricting the operation of general and well-settled principles, our proper course is to treat those principles as still existing, and to limit the relief from their operation *afforded by the [196]
statute to that called for by the language itself of the statute.

Our conclusion accordingly is, that *the question certified to us by the Court of Appeals should be answered in the negative*, and it is so ordered.

Mr. Justice **Brown**, with whom was Mr. Justice **McKenna**, dissenting:

I am constrained to dissent from the opinion of the court in this case. While I freely concede that the owner of a ship is not by the general maritime law entitled to a general average contribution, where the loss is occasioned by the fault of the master or crew, I regard the 3d section of the Harter act as introducing a new feature into the law of carriage by sea, and as eliminating altogether the question of negligence in navigation. This section provides in substance that if the owner shall exercise due diligence to make his vessel in all respects seaworthy, and properly manned, equipped, and supplied, he shall not "be held responsible for damage or loss resulting from faults or errors in navigation or in the management" of his vessel.

As the steamer Irrawaddy was stranded on the coast of New Jersey, confessedly by the negligent navigation of her master, it will not be contended that she or her owners became liable to the owners of the cargo for any damages thereby occasioned. It is said, however, that while the Harter act may be appealed to in defense of any action by the cargo against the ship, it is not available by the shipowner in a suit against the owners of the cargo for a contribution to the general average expenses occasioned by such stranding. If this be so, then the ship is thereby made responsible for a fault in her navigation to the exact extent to which she would be otherwise entitled to a general average contribution, and the statute to that extent is disregarded and nullified. I consider this a narrow and technical construction of the act. I think the 3d section makes the question of fault in navigation an immaterial one, and eliminates it from *the relations of the [197]
ship to the cargo. The section, therefore, becomes available to the shipowner either as a weapon of defense or attack. If the shipowner stands in relation to the cargo as if no fault had been committed, it is impossible for me to see why he may not avail himself of this in whatever shape the question may arise.

As the Harter act is a novelty in maritime legislation, of course it would be vain to search for authorities based upon a similar enactment; but cases are by no means wanting where a similar question has arisen upon stipulations in bills of lading exempting the owner of the ship from the consequences of faults or errors in navigation. While it is conceded in this country that such stipula-

tions are of no avail, it is equally well settled that by the law of England, and of some, if not all, of the maritime nations of continental Europe, they are held to be valid and binding.

In the case of *The Carron Park*, L. R. 15 Prob. Div. 403, a charter party contained a stipulation that the shipowners were not to be responsible "for any act, negligence, or default whatsoever of their servants during the said voyage." The cargo having been damaged by water pouring through a valve, negligently left open by one of the engineers, the owners brought suit against the vessel, and the owners of the ship counterclaimed for a general average contribution. It was held by the admiralty division that the ship was exonerated in the suit against her by the owners of the cargo, and was also entitled to her contribution. In delivering the opinion, Sir James Hannen, President, observed: "The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen upon the shipowner, and the expenditure of sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner." The case of *Strang* v. *Scott*, L. R. 14 App. Cas. 601, was cited to the proposition that the conditions ordinarily existing between parties standing in the relation of ship and cargo owners may be varied by special contract.

[198] *It is true that the case of *The Carron Park* was not one arising upon a statute but upon a stipulation in a charter party; but I think it can make no possible difference in the legal aspect of the case whether the exemption be conceded by contract or granted by statute.

The case of *The Ettrick*, L. R. 6 Prob Div. 127, is not in point. In that case the owner of a ship, sunk by a collision in the Thames, admitted the collision to be his fault, and paid into court £8 a ton in a suit to his liability. The ship having been subsequently raised at the expense of the owner, he sought to recover in general average against the cargo its contributory portion of such expenses. It was held that this could not be done, the court basing its opinion upon the language of the merchants' shipping act, § 54, which merely declared that the owners of the ship should not be answerable for damages in respect of losses to ships or goods to a greater amount than £8 per ton of the ship's tonnage. In delivering the opinion of the court, Sir George Jessel observed: "That is merely the limit of the liability for damages. It does not in any way alter the property. . . . Now, property not being altered, the ground upon which the shipowner puts his claim is this: He says that the payment of eight pounds per ton not only prevents his being answerable in damages for any more, but is equivalent to saying that he shall be in exactly the same position as if no negligence had been committed, and nothing had been done by him or by his agents that would give rise to any liability. But I cannot read the act so. All that it says is, that he shall not be answerable in damages for any greater amount. It does not make his acts right if they were previously wrongful. . . . It seems to me that he would have no such right" (that is, to salvage on the cargo), "for the statute does not destroy the effect of all that had been done, as it simply diminishes or limits the liability in damages. If that is so, of course that is an end of the case."

In the case of *The Carron Park* the stipulation exempted the ship from the consequences of all negligence in her navigation. In *The Ettrick* the act simply limited the liability of *the owner in damages to a certain [199] sum per ton. The operation of the merchants' shipping act was evidently intended to be merely defensive. *The Ettrick*, though cited by counsel, was not referred to by the court in *The Carron Park*, and was evidently regarded as standing upon a different footing.

The French law in this particular is the same: The case of *Le Normand* v. *Compagnie Generale Transatlantique*, 1 Dalloz. Jurisprudence Générale, 479, before the French court of cassation, was an appeal from the court of Rouen, which had treated as general average the expenses of salvage and towage of the steamer Amerique, after having found that the abandonment of the ship was imputable only to the master and crew, and had held that a contract exempting the ship from the consequences of negligence permitted the owners of the ship to recover from the owners of the cargo their share in contribution of the expenses of salvage. In the opinion of the court of cassation upon appeal it was said that in this bill of lading the defendant company, the owner of the Amerique, had formally excepted the acts of God, of enemies, pirates, fire by land or sea, accidents proceeding from the engine, boilers, steam, and all other accidents of the sea caused or not caused by the negligence, fault, or error of the captain, crew, or engineers, of whatever nature these accidents were, or whatever were their consequences. It was further said that no law forbade the owners of ships from stipulating that they would not answer for the faults of the captain or crew; that such an agreement is no more contrary to public policy than to fair dealing; that in upholding this clause in the bill of lading by which the defendant company declined responsibility for the faults of the crew, the decree appealed from violated no law. It was thereby established that the ship had been abandoned at sea, after consultation with the crew; that it had afterwards been picked up by three English vessels, which had towed it to Plymouth where it was voluntarily stranded, and that the defendant company had reclaimed it from the salvors by paying the expenses of salvage and towage; and thereupon the court held that this was a damage voluntarily suffered, that the expenses were incurred *for the common [200] safety of the ship and cargo, and without the payment of which the salvors would not have been obliged to deliver over the ves-

sel, and that such expenses constituted a claim for general average, notwithstanding the abandonment of the ship was not attributed to a peril of the sea, but to the fault of the master and crew. The decree was affirmed.

The case of *Crowley* v. *Saint Freres*, 10 Revue Internationale du Droit Maritime, 147 also came before the French court of cassation in 1894. In this case, an English ship, the Alexander Lawrence, on a voyage from Calcutta to Boulogne, with a cargo of jute, took fire through the carelessness of a sailor. The ship put into Port Louis, an intermediate port, with the cargo still burning, and extinguished it, subsequently arriving at her port of destination. By a clause in the charter party the ship was exonerated from responsibility for negligence. It was held that the expenses of putting into the port of refuge should be classed as general average, and not as particular average, as it had been held by the court below. The decree of that court (of Douai) was therefore reversed.

A case arising from the same disaster to the Alexander Lawrence, between the owners and the underwriters (11 Revue Internationale, 41), subsequently came before the court of appeals of Orleans, on appeal from the tribunal of commerce of Boulogne, where a similar ruling was made, and the expenses of putting into port classed as general average under the stipulation in the charter party, although in the absence of such stipulation they would have been chargeable to the ship.

The same question came before the tribunal of commerce of Antwerp, Belgium, in the case of *The Steamer Alacrity*, 11 Revue Internationale, 123, where the cargo was held to contribute to the expenses of putting into a port of refuge, in consequence of a collision due to the fault of the captain, the shipowner being exonerated by his contract from the consequences of this fault. In this case the parties had stipulated that general average expenses should be payable under the York-Antwerp rules, and that the ship should not be responsible for the faults of
[201]the captain or crew. It was *held that, by the Belgium law, parties might contract with reference to these rules, which declared the expenses of putting into a port of refuge general average; that there was no difference between such expenses when occasioned by an inevitable accident or in consequence of the fault of the captain; that the parties having stipulated that the ship should be exonerated from the consequences of such fault, the owners of the cargo were bound for their contributory shares.

From the case of *The Mary Thomas* [1894] P. 108, it would seem that the Dutch law is different; but it was said by Mr. Justice Barnes in this case (p. 116) that if the question had arisen in this country (England) "the point could hardly have occurred, as it has done, because it has already been decided by Lord Hannen, in the case of *The Carron Park*, that the cargo owners would be liable for the contribution in general average under circumstances where the accident had occurred through negligence, but where by the bills of lading the owners of the ship were not responsible for that negligence."

These are all the cases I have been able to find directly upon the question under consideration, but there is a class of analogous cases which, I think, have a strong bearing in the same direction. It is well known that by the law of England a ship is not responsible to another for a collision brought about by the negligence of a compulsory pilot. Of course where such ship is solely to blame the rule is easy of application. No recovery can be had against her. But where the faults of the two vessels are mutual, a different question arises; and in the case of *The Hector*, L. R. 8 Prob. Div. 218, it was held that, where a collision occurred by the mutual fault of two vessels, and one of such vessels had on board a compulsory pilot, whose fault contributed to the accident, the owner of that vessel was entitled to recover a moiety of the damages sustained by her without any deduction on account of the damage sustained by the other; in other words, she was not responsible for any portion of the damage done to the other vessel, but might recover the half of her damages from such other vessel. Said the master of the rolls, in delivering the opinion:

*"With regard to the Augustus, she was [202]
found to blame for the collision, therefore she is, in the first instance, liable to pay all the damage which the Hector has suffered. With regard to the Hector, it is found that her owners are not to blame, but that her navigation was to blame; but that was the fault of the pilot. The owners are not liable for this default, therefore they are not liable for anything to the owners of the Augustus. What is the result? That the liability of the owners of the Augustus is declared to have been proved, but the liability of the owners of the Hector is disproved, and they are dismissed from the suit. Therefore no balance is to be calculated; the owners of the Hector are not liable for a single pennyworth of the damage done to the Augustus. The owners of the Augustus must go against the pilot and get what they can out of him; but the Hector is entitled to succeed."

See also *Dudman* v. *Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518; *Spaight* v. *Tedcastle*, L. R. 6 App. Cas. 217.

It seems to me that the cases above cited show an almost uniform trend of opinion against the principle laid down by the court in this case. I do not contend that the decisions of the English, French, and Belgian courts should be recognized by us any further than their course of reasoning commends itself to our sense of justice; but upon questions of maritime law, which is but a branch of international law, I think the opinions of the learned and experienced judges of these courts are entitled to something more than respectful consideration. It is for the interest of merchants and shipowners, whose relations and dealings are international in their character, that the same construction should, so far as possible, be placed upon the

law maritime by the courts of all maritime nations, and I am compelled to say that I see no reason for creating an exception in this case.

---

[203] WILLIAM WHEELER HUBBELL, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 203-210.)

Dismissal upon the merits—estoppel in subsequent action—res judicata.

1. When a case is dismissed upon an opinion filed and certain findings of fact, it will be presumed to have been dismissed upon the merits and that such dismissal covered every question put in issue by the pleadings.
2. The dismissal of a suit for infringement of a patent is a complete estoppel in favor of the successful party, in a subsequent action upon the same state of facts except for a subsequent period of infringement, even if the new action is based on a different theory.
3. Neither a motion for a new trial which was overruled in the former case, nor an application for an appeal which was never allowed or perfected, will prevent the judgment from being *res judicata.*

[No. 198.]

Argued April 13, 14, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Court of Claims dismissing the petition of William Wheeler Hubbell for judgment against the United States for compensation for making and using by the defendant and its officers and employees, of plaintiff's patented invention for an improvement in cartridges. *Affirmed.*

See same case below, 20 Ct. Cl. 354.

Statement by Mr. Justice **Brown:**

This was an appeal from a judgment of the court of claims dismissing the petition of William Wheeler Hubbell, who, as patentee of an "improvement in cartridges," claimed that the United States had manufactured and used cartridges covered by his patent under an implied contract to pay a reasonable royalty therefor.

The petition contained, amongst others, the following allegations: That "your petitioner is the first and original inventor of an improvement in cartridges, for which letters patent of the United States were granted to him in due form of law, and, according to law, dated and issued the 18th day of February, A. D. 1879, vesting in him the exclusive right to make, vend, and use the same for seventeen years from the date thereof.

"Your petitioner has pending a suit for compensation up to March 31, 1883, case No. 13793, in the court of claims, and has never sued any officer nor brought any other suit than that before this present petition.

"Your petitioner prays for an account of the full and entire number of the said cartridges made or used by the defendant, its officers or employees in its service, or for distribution to the states, since the said March 31, 1883, to be separately stated when ordered, and for leave to make the same a part of this petition when precisely ascertained by amendment.

*"Your petitioner further claims a just compensation for the making or use by the defendant, its authorized officers or employees, for its service, of his said patented invention of cartridge, to wit: he claims the sum of one hundred and ten thousand dollars due to him on this behalf by the United States from the 31st March, 1883, up to May 31, 1888. [204]

"And he prays for judgment for all making or use of his said patented invention from the said 31st March, 1883, to said 31st May, 1888, by the defendant, its authorized officers or employees in its service, or on its behalf, in pursuance of law, in the sum of one hundred and ten thousand dollars, with leave to amend his petition in this behalf when the precise numbers have been duly reported by the proper departments of the United States."

Upon the trial of this case the court of claims made, amongst others, the following finding:

"The facts in this case are the facts already found in case No. 13793, between the same parties as to the same subject-matter, except as to the time since the beginning of the other action, during which time, to wit, from the beginning of the other action to the beginning of this action, the government manufactured cartridges of the same form and kind as those described in these findings, known as the 'reloading' cartridge, in which said case No. 13793 the following proceedings were had and the following facts were found, which facts are now found herein and are hereto annexed, as follows, to and including finding 8."

The 9th finding is as follows:

"The following are, in substance, the proceedings had in case No. 13793 between the same parties:

"April 19, 1883. Petition filed.

"May 18, 1883. Amendment to petition filed by allowance of judge at chambers.

"June 4, 1883. Traverse filed.

"July 25, 1883. Amendment to petition filed and allowed.

"October 2, 1884. Amendment to petition filed and allowed.

"December 15, 1884. Amendment to petition allowed.

"January 10, 1885. Claimant's requests for facts and brief filed.

NOTE.—*As to consequence of a nonsuit or dismissal of complaint,*—see note to Homer v. Brown, 14 : 970.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36 : 1073.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13 : 824.

As to what questions are concluded by res judicata,—see note to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 577.

[205] *"April 9, 1885. Additional brief for claimant filed.

"April 13, 1885. Defendant's requests for facts and brief filed.

"April 16, 1885. Argued and submitted.

"April 16, 1885. Claimant's brief of argument filed.

"April 20, 1885. Waiver filed by claimant.

"June 1, 1885. Davis, J., filed the opinion of the court. Petition dismissed. Findings of fact filed.

"August 14, 1885. Motions for new trial, amendment of findings and for reversal of judgment filed by claimant.

"August 21, 1885. Application for appeal filed by claimant.

"December 14, 1885. Motion of claimant for new trial overruled, with leave to submit to the consideration of the court. Findings 2, 3, 4, amended in the form requested by claimant in his motion, subject to objection of the defendants to their allowance.

"October 8, 1886. Claimant's request for findings of fact filed under order of court.

"March 15, 1887. Requests, etc., of October 8, 1886, ordered to law docket.

"April 15, 1889. Motion to amend findings continued.

"November 18, 1889. Continued.

"November 12, 1891. Motion of claimant to amend order of court filed.

"November 16, 1891. Motion of claimant to amend order of court heretofore entered as to the evidence to be used on the trial allowed, subject to objections of defendants on the argument."

Upon these and other facts found, the court dismissed the petition, but as no opinion was filed, the reasons for this judgment do not appear.

Subsequently additional findings were made, but as they are not material they are not here repeated.

From the judgment of the court of claims dismissing his petition, petitioner applied for and was allowed an appeal to this court.

Messrs. **F. P. Dewees, George S. Boutwell,** and *William Wheeler Hubbell* in person, for appellant.

Messrs. **Charles C. Binney** and *L. A. Pradt*, Assistant Attorney General, for appellee.

Mr Justice **Brown** delivered the opinion of the court:

As the claimant in his petition relies only upon the patent of February 18, 1879, No. 212,313, for an improvement in cartridges, and as the proceedings in the former suit in the court of claims were based, in part at least, upon this patent, it will not be necessary to refer to any prior patents.

The only defense we are called upon to consider is that of *res judicata*. As bearing upon this defense the following facts are pertinent:

April 19, 1883, claimant filed his petition in the court of claims for a royalty upon cartridges and primers alleged by him to have been manufactured by the United States under his patents, between February 18, 1879, and March 31, 1883;

June 1, 1885, this petition, after having been several times amended, was dismissed and findings of facts filed;

August 14, 1885, motions for new trial, amendment of findings, and for reversal of judgment were filed by the claimant;

August 21, 1885, application for appeal was filed by claimant, but such appeal does not appear to have been allowed;

December 14, 1885, motion for new trial was overruled by the court, and the claimant was given leave to submit to the consideration of the court certain amended findings, subject, however, to objection of the defendants as to their allowance;

October 8, 1886, claimant's request for findings was filed under order of the court, and on March 15, 1887, it was ordered to the law docket;

The argument was deferred from time to time until November 16, 1891, when the motion of claimant to amend an order of court as to evidence was allowed subject to the objections of the defendants on the argument.

The petition under consideration was filed June 11, 1888, after *the first petition had [207] been dismissed by the court of claims, and is based upon the patent issued February 18, 1879, which was one of the patents involved in the first petition. A claim is made in this petition for royalty upon cartridges manufactured, in accordance with this patent, and used by the United States for nearly six years prior to the filing of this petition, but subsequent to the time of the filing of the first petition.

In this connection the court has found that the facts in the case under consideration are the same as those in the prior case, except as to the time since the beginning of the other action, during which time, to wit, from the beginning of the other action to the beginning of this action, the government manufactured cartridges of the same form and kind as those described in these findings.

1. As the prior action was between the same parties, and was based in part, at least, and principally, upon the same patent, it would appear that the judgment of the court dismissing the petition would operate as a complete estoppel to the present suit, unless the proceedings subsequent to the judgment in the former suit in some way deprived that judgment of its force and effect as *res judicata.* 3 Robinson, Patents, § 1017.

While the record of the former case was not sent up with the transcript from the court of claims, it appears from the petition in the case under consideration that, at the time the petition was filed, there was a suit pending by the petitioner in the court of claims in case No. 13793 for compensation up to March 31, 1883; and, in the findings, that the facts in both cases were the same, except as to the time covered by the petitions. The identity of the two actions with respect to the parties, the subject-matter, and the facts sufficiently appear. As it further appears that the petition in the former case was dis-

missed upon an opinion filed and certain findings of fact, it will be presumed to have been dismissed upon the merits (*Loudenback* v. *Collins*, 4 Ohio St. 251); and that such dismissal covered every question put in issue by the pleadings, including the validity of the patent and its use by the defendants.

[208] *But if there were any doubt with regard to this point, it would be resolved by an inspection of the opinion of the court (which may be examined for the purposes of identification), as it is published in 20 Court of Claims. 354, wherein it not only appears that the case was considered and disposed of upon the merits, but the court concludes its opinion (p. 370) in the following language:

"Upon our construction of the patent in issue the government cartridges do not infringe the claimant's; but if we are in error as to this, still the claimant cannot recover, as the essential characteristics of his invention now found in the government cartridge were developed by officers of the army in 1864. That is, if the relative position of the vents and the wall of the fulminate chamber is a material part of the claimant's patent, the government has not infringed, this feature not appearing in its cartridges; but if this position is not material, still the claimant cannot recover, as the other characteristics of his invention, found in the cartridge now used by the defendants, were introduced by them prior to the use of the patent or the filing of the application for it, and even prior to the application of 1865."

Whether the reasons given by the court of claims for the dismissal of this petition are correct or not; whether, indeed, this judgment were right or wrong upon the facts presented, is of no importance here. If such judgment were based upon an erroneous view of the claimant's patent, it was his duty to have promptly taken an appeal to this court, where the whole case would have been reopened and the error of the court of claims, if such there was, would have been rectified.

It is insisted by the claimant that in the former action the main contention arose upon the manufacture and use of what was known as the "cup-anvil cartridge," together with a certain reloading cartridge, which had been experimentally manufactured, and that no claims for the "cup-anvil cartridge" or for the reloading cartridge in that suit are in issue in the case at bar. The suit, however, was upon the same patent, and it was found by the court of claims to have been upon the same facts, and we think the estop-

[209]pel operates upon everything *which was, if not upon everything which might have been, put in issue in the former case. The presumption is that the issues were the same, and if they were in fact different, it was incumbent upon the claimant to show that the prior case was decided upon questions not involved herein. We have before us only a decision upon the merits, and upon the same state of facts, of a claim identical with this, and we perceive no reason why it should not operate as an estoppel.

But there seems to be nothing upon which to base claimant's argument that the issues were not the same. The findings show that the manufacture of the reloading cartridge with the grooved anvil disk, referred to in finding 6, commenced at the Frankfort Arsenal in the month of July, 1879, and that from February, 1879, to March 31, 1883, being the period covered by the first suit, the United States manufactured 3,866,352 reloading cartridges. We see nothing to indicate that these reloading cartridges were manufactured experimentally, or that the issue as to these cartridges was not presented and decided in the former case. The claim in the present suit is also for reloading cartridges.

But, even if a somewhat different theory or state of facts were developed upon the trial of the second case, the former judgment would not operate the less as an estoppel, since the patentee cannot bring suit against an infringer upon a certain state of facts, and after a dismissal of his action, bring another suit against the same party upon the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in the subsequent action upon the same state of facts. Walker, Patents, § 468; *Dubois* v. *Philadelphia, W. & B. Railroad Co.* 5 Fish. Pat. Cas. 208; *David Bradley Mfg. Co.* v. *Eagle Mfg. Co.* 18 U. S. App. 349, 57 Fed. Rep. 989, 6 C. C. A. 661.

2. It only remains to consider, then, whether any proceedings taken in the court of claims since the dismissal of such petition deprived its judgment of its character as an estoppel. A motion for a new trial was made August 14, 1885, but as this motion was overruled in the following December, clearly this would not deprive the judgment of its efficacy as a plea *in bar. Indeed, it may well [210]
be doubted whether the pendency of a motion for a new trial would interfere in any way with the operation of the judgment as an estoppel. *Harris* v. *Barnhart*, 97 Cal. 546; *Chase* v. *Jefferson*, 1 Houst. (Del.) 257; *Young* v. *Brehe*, 19 Nev. 379.

3. It further appears that on August 21, 1885, an application for an appeal was filed by the claimant, but as this appeal was never allowed or perfected, and as it does not appear that a transcript of the record was ever filed in this court, it is obvious that the authorities which hold that an appeal perfected to a superior court vacates the judgment of the court below have no application to this case.

We are therefore of the opinion that the defense of *res judicata* is sustained, and *the judgment of the Court of Claims dismissing the petition is accordingly affirmed.*

TIDE WATER OIL COMPANY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 210-219.)

Drawback on articles exported when manufactured of imported materials—drawback on nails.

1. Boxes made in the United States from shooks imported from Canada are not wholly manufactured in the United States so as to give a right to a drawback under the United States treasury regulations of 1884, art. 966, and U. S. Rev. Stat. § 3019, when all that is done in this country is to manufacture the nails, and nail the box shooks together, and trim off any projections when the boards are not of the right length, and the cost of the labor in the United States represents only one tenth of the value of the boxes.
2. No separate drawback for nails used in the manufacture of boxes can be claimed under the United States treasury regulations of 1884, art. 966, on the ground that the nails were manufactured in the United States, when no drawback can be had on the boxes.

[No. 149.]

Argued April 29, 1898. Decided May 31, 1898.

ON APPEAL from a judgment of the Court of Claims dismissing the petition of the Tide Water Oil Company for drawback of duties paid upon shooks and iron rods imported which were manufactured into boxes in this country and subsequently exported to foreign countries. *Affirmed.*

See same case below, 31 Ct. Cl. 90.

Statement by Mr. Justice **Brown:**

This was a petition by a corporation of New Jersey for a drawback of duties paid upon certain shooks imported from Canada, and iron rods imported from Europe, which were manufactured into boxes or cases by the petitioner in its factory at Bayonne, New Jersey, and were subsequently exported to foreign countries.

The court of claims made the following findings of fact:

"1. During the years 1889, 1890, and 1891 the claimant was a corporation existing under the laws of New Jersey, organized in 1888, and having a factory for carrying on its business at Bayonne, in that state.

"2. In 1889 and 1890 the claimant imported from Canada box shooks, and from Europe steel rods, upon which importation duties amounting in the aggregate to $39,636.20 were paid to the United States, of which sum $837.68 was paid on the importation of the steel rods.

"3. The box shooks imported as set forth in finding 2 were manufactured in Canada from boards, first being planed and then cut into required lengths and widths, intended to be substantially *correct for making into [212] boxes without further labor than nailing the shooks together. They were then tied up in bundles of sides, of ends, of bottoms and of tops of from fifteen to twenty-five in a bundle for convenience in handling and shipping.

"4. The shooks so manufactured in Canada and imported into the United States as aforesaid were, at the claimant's factory in Bayonne, New Jersey, constructed into the boxes or cases set forth in Exhibit E to the petition herein, by nailing the same together with nails manufactured in the United States out of the steel rods imported as aforesaid, and by trimming when defective in length or width to make the boxes or cases without projecting parts, i. e., the shooks were imported in bundles of ends, of sides, of tops, and of bottoms, each part coming in bundles separated from the bundles of other parts. From one of these bundles of ends the ends of a box are selected, to which the sides taken indiscriminately from any bundle of sides are nailed by nailing machines; then the sides are trimmed off even with the ends by saws; then by bottoming machines bottoms taken from any bundle of bottoms are nailed on; then the bottoms are trimmed even with the sides by saws; then after being filled with cans, the tops are nailed on; and then the boxes or cases are ready for exportation.

"The cost of the labor expended in the United States in the necessary handling and in the nailing and trimming of the boxes as aforesaid was equal to about one tenth of the value of the boxes.

"The principal part of the labor performed in trimming the boxes was occasioned by the Canadian manufacturer not cutting the shooks into the required lengths and widths for use in making the boxes, and for which the claimants sometimes charged the cost of such trimming to the Canadian manufacturer.

"5. The boxes or cases made as aforesaid were exported from the United States to foreign countries in conformity with the regulations of the Treasury Department then in force, to wit, Treasury regulations of 1884, sections 966, 967 and 968, hereinafter set out, relating to drawbacks upon the exportation *of articles wholly manufactured of im- [213] ported materials; and cases so manufactured were entered for such drawback upon the exportation thereof.

"For about four years prior to July 31, 1889, the Treasury Department had allowed and paid a drawback upon the exportation of boxes made from imported shooks fastened together with nails made from imported steel rods as aforesaid; and the Treasury Department was requested to pay the drawback on the exportation of the boxes or cases set forth in Exhibit E to the petition, but refused for the reasons set forth in the fol-

NOTE.—*As to lien of United States for duties,* see note to United States v. 350 Chests of Tea, 6 : 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,— see note to Greely v. Thompson, 13 : 397.

lowing communication addressed to the collector of customs at New York:

Treasury Department, July 31, 1889.

Sir: Referring to department letter of March 2, 1885, addressed to the then collector at your port, in which a rate of drawback was established on shooks used in the manufacture of boxes, you are informed that the department has recently given the matter further consideration, and it appears upon investigation that the boxes are made complete in Canada, with the exception of nailing, and that the only manufacture which they receive in this country consists in their thus being nailed together, which part of the labor is omitted to be done in Canada merely for the convenience in shipping to the United States.

The boxes appear to have been manufactured complete abroad, and in the condition imported resemble the finished furniture imported in pieces which the department has heretofore held to be dutiable at the rate applicable to finished furniture. (See Synopsis, 4272.)

The simple act of nailing them together is not, in the opinion of the department, a manufacture within the meaning of § 3019, Revised Statutes, and the authority to allow drawback thereon is hereby revoked.

You will accordingly receive no further entries for drawback in such cases.

Respectfully yours,
George C. Tichnor,
Assistant Secretary.

Collector of Customs, New York.

[214] *"7. The Treasury regulations of 1884 referred to in finding 5, *viz.*, articles 966, 967, and 968, are as follows:

"'Art. 966. On articles wholly manufactured of imported materials on which duties have been paid, a drawback is to be allowed on exportation, equal in amount to the duty paid on such imported materials, less 10 per cent thereof, except on exportations of refined sugars, in which case the legal retention is 1 per cent.

"'Art. 967. The entry in such cases will be as follows, and must be filed with the collector at least six hours before putting or lading any of the merchandise on board the vessel or other conveyance for exportation.'"

Here follows a form of entry for exportation with oaths of exporter and of the proprietor and foreman of manufactory.

Article 968 contained a form of bond for exportation.

Upon the foregoing findings the court found the ultimate fact, so far as it was a question of fact, that the boxes or cases so exported were not manufactured in the United States, and, as a conclusion of law, that the claimant was not entitled to recover; and the petition was dismissed. Whereupon petitioner appealed to this court.

Mr. **Edwin B. Smith** for appellant.

Messrs. **Henry M. Hoyt,** Assistant Attorney General, and *Felix Brannigan*, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The single question presented for our consideration in this case is whether the boxes or cases exported by the petitioner were "wholly manufactured" in the United States within the meaning of the section hereinafter cited.

The facts were, in substance, that the claimant imported from Canada in 1889 and 1890 box shooks, and from Europe steel rods, upon which duties were paid to the amount of $39,636.20 under the tariff act of March 3, 1883 (22 Stat. at L. 488, 502, chap. 121), which levied a duty of 30 per cent upon "casks and *barrels, empty, sugar-box shooks, and [215]
packing boxes, and packing-box shooks, of wood, not specially enumerated or provided for in this act." The box shooks so imported were manufactured in Canada from boards, which were planed and cut into the required lengths and widths for making into boxes without further labor than nailing them together. They were then tied up into bundles of sides, ends, bottoms, and tops, of from fifteen to twenty-five in a bundle, for convenience in handling and shipping. After importation, they were made up into boxes or cases, by nailing the proper parts together with nails manufactured in the United States out of the imported steel rods, and by trimming, when defective in length or width, to make the boxes or cases without projecting parts.

The ends and sides of the boxes were nailed together by nailing machines, and the sides trimmed off even with the ends by saws. Then bottoms were nailed on and trimmed in the same manner. After being filled, the tops were nailed on, and the boxes made ready for exportation. The cost of the labor expended in the United States in the nailing, handling, and trimming of the boxes was about one tenth of the value of the boxes. The principal part of the labor in trimming the boxes was occasioned by the Canadian manufacturer not cutting the shooks into the required lengths and widths for making the boxes, the cost of which trimming the claimant sometimes charged to the Canadian manufacturer.

Upon this state of facts petitioner made claim for duties paid as above upon the shooks, under Rev. Stat. § 3019, which reads as follows:

"There shall be allowed on all articles wholly manufactured of materials imported on which duties have been paid when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury. Ten per centum on the amount of all drawbacks so allowed shall, however, be retained for the use of the United States by the collectors paying such drawbacks respectively."

The question arises whether the boxes in question were *"wholly manufactured" within [216]
the United States of "materials imported" from abroad. The section above quoted uses the words "wholly manufactured of materials imported," but we understand it to be con-

ceded that the words "in the United States" should be considered as being incorporated into the section after the word "manufactured." The provision would be senseless without this interpolation. The objects of the section were evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind.

The primary meaning of the word "manufacture" is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name.

The material of which each manufacture is formed, and to which reference is made in §
[217]3019, is not necessarily the *original raw material—in this case the tree or log—but the product of a prior manufacture; the finished product of one manufacture thus becoming the material of the next in rank. This case, then, resolves itself into the question whether the materials out of which these boxes were constructed were the boards which were manufactured in Canada or the shooks which were imported into the United States.

While the planing and cutting of the boards in Canada into the requisite lengths and shapes for the sides, ends, tops, and bottoms of the boxes, was doubtless a partial manufacture, it was not a complete one, since the boards so cut are not adaptable as material for other and different objects of manufacture, but were designed and appropriate only for a particular purpose, *i. e.*, for the manufacture of boxes of a prescribed size, and were useless for any other purpose. It is not always easy to determine the difference between a complete and a partial manufacture, but we may say generally that an article which can only be used for a particular purpose, in which the process of manufacture stops short of the completed article, can only be said to be partially manufactured within the meaning of this section; nor can we regard the mere assembling and nailing together of parts complete in themselves and destined for a particular purpose as a complete and separate manufacture. Thus, chairs are made of bottoms, backs, legs, and rounds, each one of these parts being made separately and in large quantities. If imported in this condition from abroad, and the parts were assembled and glued or screwed together here, we think it entirely clear that such chairs would not be wholly manufactured in the United States; and the same may be said of the staves heads, and hoops which constitute a barrel. Upon the theory of the claimant, if all the parts which constitute a wooden house were made separately, as they sometimes are, and imported from abroad and put together in this country in the form of a house, it would follow that the house must be said to have been wholly constructed in this country.

It may be said generally, although not universally, that a complete manufacture is either the ultimate product of prior *succes- [218]
sive manufactures, such as a watch spring, or a penknife, or an intermediate product which may be used for different purposes, such for instance as pig iron, iron bars, lumber, or cloth; while a partial manufacture is a mere stage in the development of the material toward an ultimate and predestined product, such for instance as the different parts of a watch which need only to be put together to make the finished article. If, for instance, the wheels, chain, springs, dial, hands, and case of a watch were all imported from abroad, and merely put together in this country, we do not think it could be said that the watch was wholly manufactured within the United States. The same remark we think may be made with reference to the shooks in this case, which were practically worthless except for being put together for a box of a definite size.

The distinction here made was alluded to in the opinion of this court in *Worthington* v. *Robbins*, 139 U. S. 337 [35: 181], in which the question arose whether "white hard enamel," used for various purposes, including watch dials, was dutiable as "watch materials," or as a simple manufacture. In delivering the opinion of the court Mr. Justice Blatchford said: "The article in question was, to all intents and purposes, raw material. If it were to be classed as 'watch materials,' it would follow that any metal which could ultimately be used, and was ultimately used, in the manufacture of a watch, but could be used for other purposes also, would be dutiable as 'watch materials.' In order to be 'watch materials' the article must in itself bear marks of its special adaptation for use in making watches. The fact that the article in question was used in the manufacture of watches has no relation to the condition

of the article as imported, but to what afterwards the importer did with it."

It does not necessarily follow that the shooks in question were not a manufacture, and dutiable as such, or that they were dutiable as boxes, though destined to be put together as such, since in *United States* v. *Schoverling*, 146 U. S. 76 [36:893], finished gunstocks with locks and mountings, unaccompanied by barrels, were held to be dutiable as manufactures of iron, and not as "guns."

[219] *Bearing in mind that the object of the drawback was partly, at least, to encourage domestic manufactures, and that all the substantial work done in this country was in nailing together the tops, bottoms, and sides of these boxes, we think it clear that it cannot be said that the boxes so constructed were wholly manufactured in the United States. The work done in trimming or sawing off the ends of the boards was a mere incident to the nailing together, and was caused by the inadvertence, negligence, or insufficient instructions given to the Canadian manufacturer, and was no proper part of the manufacture. While the amount of work done to constitute a new manufacture may not be great (*Saltonstall* v. *Wiebusch*, 156 U. S. 601 [39: 549]) yet we think the fact that in the transfer of those boards to the completed boxes, the cost of the labor expended in the United States represented only one tenth in value of the boxes is important, especially when taken in connection with the fact that the shooks when imported were usable only for a single purpose. It is quite improbable that Congress intended to allow a drawback upon the nine tenths represented by the Canadian material for the benefit of the one tenth represented by the labor put upon the boxes in this country. What was doubtless meant was to allow this drawback upon articles manufactured wholly and bona fide within the United States, either from the raw material, or from material which was the result of the last complete manufacture.

While the nails, which were used in fastening the shooks together and were made from iron rods imported from abroad, may be said to have been wholly manufactured in the United States within the principles here announced, they lost their identity as such when used in nailing the shooks together, and became so far a part of the boxes that no separate drawback could be claimed for them

There was no error in dismissing the petition, and *the judgment of the Court of Claims is therefore affirmed.*

---

[220] ELY'S ADMINISTRATOR
v.
UNITED STATES.

(See S. C. Reporter's ed. 220-241.)

Authority of Mexican officials to make a grant—sale of land by the intendant—his power to convey public lands—quantity named—obligation to sustain Mexican grant—limit of investigation—description.

1. Authority of Mexican officials to make a grant cannot be presumed from their having made it. Such grants can only be confirmed under the act of Congress when made by persons having authority or when subsequently ratified. But when an officer was in the habit of exercising that power and his acts were recognized by the Mexican authorities as valid, his authority may be presumed.
2. A sale of land by the intendant of Sonora and Sinaloa in 1821, which was completed by title issued by the commissary general and by the payment of the purchase price into the public treasury, and which was recognized as valid by the Mexican government, should be recognized as valid by the court of private land claims.
3. The power of an intendant to convey public lands was recognized by the government of Mexico as continuing after its separation from Spain.
4. The quantity named in a grant may be of decisive weight, when there is uncertainty in specific description; and it will be necessarily so if the intention to convey only so much and no more is plain.
5. Sustaining the validity of a Mexican grant to the extent of the land paid for is but carrying out the spirit of the treaty, the obligations of international justice, and the duties imposed by the act creating the court of private land claims, where the grant was of a specified quantity of land, in a certain place, at a certain price per sitio.
6. In an investigation of a Mexican land title the court of private land claims is not limited to the dry technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico.
7. The mere fact that a Mexican land grant is narrower than the limits of the outboundaries does not prevent the court of private land claims through the aid of a commissioner, surveyor, or master, from determining exactly what did equitably pass under the grant.

[No. 27.]

Argued March 15, 16, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Court of Private Land Claims in favor of the plaintiff, the United States, against Santiago Ainsa, administrator of Frank Ely, deceased, *et al.*, in a suit to settle and adjudicate the title to a large tract of land in the territory of Arizona known as the Rancho de San Jose de Sonoita, and adjudging that the title of said administrator was invalid. *Reversed,* and case remanded with directions to determine the true boundaries, etc.

Statement by Mr. Justice **Brewer:**

On October 19, 1892, proceeding under § 8 of the act creating the court of private land claims (26 Stat. at L. 854, chap. 539), the United States filed in that court a petition against Santiago Ainsa, administrator of the estate of Frank Ely, deceased, and others, alleging that said administrator claimed to

---

The docket title of this case is *Santiago Ainsa, Administrator of the Estate of Frank Ely, deceased,* v. *The United States.*

NOTE.—*As to Missouri private land claims,* see note to Les Bois v. Bramell, 11: 1051.

e the owner through mesne conveyance of a large tract of land in the territory of Arizona, known as the Rancho de San Jose de Sonoita; that he had not voluntarily come into the court to seek a consideration of his title; that the title was open to question, and was in fact invalid and void; that the other defendants claimed some interests in the land, and praying that they all might be brought into court and be ruled to answer the petition, set up their titles and have them settled and adjudicated.

In an amended answer the administrator set forth the nature and extent of his title, and prayed that it be inquired into and declared valid. Reply having been filed, the case came on for trial, which resulted in a decree on March 30, 1894, that the claim for
[221] confirmation of title be disallowed *and rejected. The opinion by Associate Justice Sluss contains this general statement of the facts:

"On the 29th day of May, 1821, Leon Herreros presented his petition to the intendente of the provinces of Sonora and Sinaloa, asking to obtain title to two sitios of land at the place known as Sonoita. The intendente referred the petition to the commander at Tubac, directing him to cause the tract to be surveyed, appraised, and the proposed sale thereof to be advertised for thirty days.

"In obedience to this order the officer proceeded to make a survey of the tract, which was made on the 26th and 27th days of June, 1821, and on the completion of the survey he caused it to be appraised, the appraised value being one hundred and five dollars. Thereupon the proposed sale was advertised for thirty consecutive days by proclamation made by a crier appointed for that purpose, beginning on June 29, and ending on the 28th day of July, 1821. Thereupon, on the 31st day of July, 1821, the officer took the testimony of three witnesses to the effect that Herreros had property and means to occupy the tract. On October 20, 1821, the proceedings above mentioned, being reduced to writing, were by the officer returned to the intendente.

"On October 25, 1821, the intendente referred the proceedings to the promoter fiscal for his examination.

"On November 7, 1821, the promoter fiscal reported to the intendente the regularity of the proceedings and recommending that the land be offered for sale at three public auctions, and thereupon the auctions were ordered to be held.

"The first auction was held on November 8, 1821, the second on November 9, and the third on November 10, 1821.

"At the conclusion of the third auction the land was struck off to Herreros at the appraised value by the board of auction, of which board the intendente was a member and the president.

"All these proceedings being concluded, on the 12th day of November, 1821, Herreros paid to the officers of the treasury the amount of the appraisement, together with the fees and charges required to be paid, and with his concurrence the *intendente and the [222]
auction board ordered the expediente of the proceedings to be reported to the junta superior de hacienda for its approbation, so that when approved the title might issue.

"There is no evidence that the sale was approved by the junta superior de hacienda.

"On the 15th day of May, 1825, Juan Miguel Riesgo, commissary general of the treasury, public credit and war of the Republic of Mexico for the State of the West, issued a title in the usual form purporting to convey the land to Herreros in pursuance of the proceedings above referred to and professing to act under the authority of the ordinance of the intendentes of Spain of the year 1786."

The conclusion reached was that "the entire proceedings set forth in the expediente of this title and the final title issued thereon were without warrant of law and invalid." Two of the justices dissented. Thereupon the administrator secured an order of severance and took a separate appeal to this court.

Messrs. **Rochester Ford** and **James C. Carter** for appellant.

Messrs. **Matthew G. Reynolds** and *John K. Richards*, Solicitor General, for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The controversy in this case does not turn upon any defect in the form of the papers. The contentions of the government are that the officers who assumed to make the grant and to execute title papers had no authority to do so, and upon this ground it was held by the court of private land claims that the grant was in its inception invalid. Secondly, that if a valid grant was made it was one of quantity, and should be sustained for only that amount of land which was named in the granting papers and paid for by the grantee.

It appears that the proceedings to acquire title were *initiated by a petition to the in- [223]
tendant, or intendente, as he is called in the opinion of the court below, of the provinces of Sonora and Sinaloa, on May 29, 1821; that, so far as that officer was concerned, they were concluded and the sale completed on November 12, 1821. Nothing seems to have been done after this date until May 15, 1825, when the commissary general of the Republic of Mexico for the State of the West on application issued a title in the usual form. So the question is as to the power of these officers to bind the government of Mexico.

Few cases presented to this court are more perplexing than those involving Mexican grants. The changes in the governing power as well as in the form of government were so frequent, there is so much indefiniteness and lack of precision in the language of the statutes and ordinances, and the modes of procedure were in so many respects essentially different from those to which we are accustomed, that it is often quite difficult to determine whether an alleged grant was

made by officers who, at the time, were authorized to act for the government, and was consummated according to the forms of procedure then recognized as essential. It was undoubtedly the duty of Congress, as it was its purpose in the various statutory enactments it has made in respect to Mexican titles, to recognize and establish every title and right which before the cession Mexico recognized as good and valid. In other words, in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after; that which the law would enforce before should be enforceable after the cession. As a rule, Congress has not specifically determined the validity of any right or title, but has committed to some judicial tribunal the duty of ascertaining what were good and valid before cession, and provided that when so determined they should be recognized and enforced.

Of course in proceeding under any particular statute the limitations prescribed by
[224] that statute must control; and whatever *may be the obligations resting upon the nation by virtue of the rules of international law or the terms of a treaty, the courts cannot pass beyond such limitations. In the case of *Hayes* v. *United States*, just decided, 170 U. S. 637 [42: 1174], we called attention to the fact that in the act creating the court of private land claims there was a prohibition upon the allowance of any claim "that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land," and pointed out the difference between this statute and those construed in the *Arredondo Case*, 6 Pet. 691 [8: 547]: and the act of March 3, 1851, considered in the *Peralta Case*, 19 How. 343 [15: 678]. We held that under the act of 1891 the court must be satisfied, not merely of the regularity in the form of the proceedings, but also that the official body or person assuming to make the grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified. We are not to presume that, because certain officials made a grant, therefore it was the act of the Mexican government and to be sustained. It must appear that the officials did have the power, and we are not justified in resting upon any legal presumption of the existence of power from the fact of its exercise.

While this is true, yet when the statutes and ordinances defining the powers and duties of an officer are somewhat indefinite and general in their terms, and that officer was in the habit of exercising the same power as was exercised in the case presented, and such exercise of power was not questioned by the authorities of Mexico, and grants purporting to have been made by him were never challenged, there is reason to believe that the true construction of the statutes or ordinances supports the existence of the power. Cases now before us disclose that about the time the intendant acted in this case similar action was taken by him in respect to other applications for the purchase of land; that through a series of years from 1824 downward, the commissary general, the officer created by the act of September 21, 1824, recognized his acts *as creating equitable [225]
obligations on the part of the government, and attempted to consummate the sales by papers passing the legal title; that the title papers thus executed were duly placed of record in the proper office, and fail to show that subsequently thereto the Mexican government took any steps to question the title or disturb the possession. While this may not be conclusive as to the validity of the grants and the existence of the power exercised by the intendant, it certainly is persuasive, and we should not be justified in lightly concluding that he did not possess the power which he was in the habit of exercising.

What powers did the intendant possess at the time this sale is alleged to have taken place? It is conceded by the government that by the ordinance of December 4, 1786 (at which time Mexico was a province of Spain), the intendants had full authority in reference to the sale of lands. Article 81 of that ordinance (Reynolds' Spanish & Mexican Land Laws, p. 60) is as follows:

Art. 81. "The intendants shall also be judges, with exclusive jurisdiction over all matters and questions that arise in the provinces of their districts in relation to the sale, composition, and distribution of crown and seignioral lands. The holders thereof, and those who seek new grants of the same, shall set up their rights and make their applications to said intendants, who, after the matter has been duly examined into by an attorney of my royal treasury, appointed by themselves, shall take action thereon, in accordance with law, and in conjunction with their ordinary legal advisers. They shall admit appeals to the superior board of the treasury, or, should the parties in interest fail to employ that recourse, submit a report thereto, together with the original proceedings, when they consider them in condition to issue the title. The board shall, after examination thereof, return them either for issue of title, if no correction is necessary, or, before doing so, for such other proceedings as in the opinion of the board are required, with the necessary instructions. In the meantime, and without further delay, the necessary confirmation may be made, which said superior board shall issue at the proper time, proceeding *in this matter, as also the intendants [226]
their deputies and others, in accordance with the requirements of the royal instructions of October 15, 1754, in so far as they do not conflict with these, without losing sight of the wise provisions of the laws therein cited and of law 9, tit. 12, book 4."

It is, however, contended that prior to the transfer of title in this case this authority was taken away from the intendant. In support of this contention four matters are

referred to by counsel: 1. The adoption of the Constitution of March 18, 1812, and the promulgation of the law of January 4, 1813. 2. The resolution of the council of the Indies, before a full board at Madrid, December 23, 1818. 3. The decrees of Ferdinand VII. re-establishing the Constitution of 1812, and convoking the Cortes, March 6, 7, 9, 1820. 4. The imperial colonization law of January 4, 1823.

Of these in their order, though it may be well here to note that the colonization law was not passed until after the sale in controversy had taken place.

On March 18, 1812, in the midst of troublous times in Spain, a Constitution (Reynolds, p. 79) was adopted, and by it and the law of the Cortes of January 4, 1813 (Reynolds, p. 83), it is insisted that a different mode of disposing of the public lands was created. As, however, this continued in force only until May 4, 1814, when the King, Ferdinand VII., returned to the throne and issued a decree refusing to recognize the existing order of things and declaring the Constitution of 1812 revoked, it would seem that the powers theretofore vested in the intendants were re-established. Indeed, on December 28, 1814, the King issued a royal cédula or edict, the ninth article of which is as follows (2 White, New Recopilacion, p. 168):

"The governor intendants shall resume all the powers appertaining to them before the promulgation of the Constitution, so called; and shall consequently exercise said powers, as well in matters of government as in those of economy and litigation relating to the royal treasury, agreeably to the laws and ordinances respecting intendants."

Clearly thereafter the intendants had the
[227] powers given *them by the ordinance of 1786. *Sabariego* v. *Maverick*, 124 U. S. 261 [31: 430].

On December 23, 1818, a resolution passed by the council of the Indies, at Madrid, and approved by the King, provided that all business pertaining to the alienation of lands in New Spain should belong to the department of the office of the treasury of the Indies at Madrid. Hall, Mexican Law, p. 76, § 188. In March, 1820, Ferdinand VII., under pressure from the people, adopted the Constitution of 1812 and took an oath to support it. Did this resolution of December, 1818, or this re-establishment of the Constitution, or both together, put an end to the power of the intendants in respect to the sale of lands? Clearly the resolution of December, 1818, would not have that effect. The mere placing of the control over land matters in a particular government department at Madrid would in no manner affect the powers of local officers until and unless such department should so order, and there is no suggestion that any orders to that effect were ever issued. The resolution would have no more effect on the powers of local officers than would a transfer of the land department of this government from the control of the Secretary of the Interior to that of the Secretary of the Treasury. The local officers would simply have to respond to new superiors, and that is all.

Nor do we think that the re-establishment of the Constitution, even if the re-establishment of that instrument carried with it the re-enactment of the law of the Cortes of January 4, 1813, put an end to the office of intendant, or wholly abrogated his powers. So far as the act of January 4, 1813, is concerned, while it did authorize the distribution of part of the lands on account of military service, it still provided that half of the public and crown lands should be reserved to serve as a mortgage for the payment of the national debt, and recognized the disposition of such lands by the "provincial deputation," as it was called. Turning to the Constitution we find the following provisions in chapter 2, article 324: "The political government of the provinces shall reside in the superior chief appointed by the King in each one of them." *Article 325: "In each prov- [228]
ince there shall be a deputation called provincial, to promote its prosperity, presided over by the superior chief." Article 326: "This deputation shall be composed of the president, the intendant, and seven members elected in the manner that shall be stated." While it may be that under the terms of these and subsequent articles the general control over the affairs of a province was vested in the provincial deputation, of which deputation the intendant was to be one member, we find nothing in them that either put an end to the office of intendant or had any other effect than to subject his actions to the control of the provincial deputation. The question is not what the provincial deputation when organized would do, but whether the mere re-establishment of the Constitution, which provided for a provincial deputation, operated before any action taken under it, to put an end to the powers theretofore vested in the intendants. It may well be that in thus arranging for a new system of control, without abolishing the office of intendant, but on the contrary, in terms recognizing its continuance, the purpose was not to create an interim in which no person should have power to act for the government in the alienation of its lands, but that the intendant should continue to exercise the powers he had theretofore exercised until the King should appoint a superior chief, and the other members of the deputation be elected.

The very next year witnessed the separation of Mexico from the kingdom of Spain. On February 24, 1821, a declaration of independence was made in the form known as the plan of Iguala, and this declaration of independence was made good by the surrender of the city of Mexico on September 27, 1821. The 15th section of this plan provided that "the junta will take care that all the revenues of departments of the state remain without any alteration whatever, and all the employees, political, ecclesiastical, civil, and military, will remain in the same state in which they exist to-day." Prior to that time, and on August 24, 1821, what is known as the treaty of Cordoba was signed at that village

by General Iturbide, for Mexico, and Viceroy O'Donoju, for Spain, the latter, however, [229]*having no previous authority from Spain, and this treaty was by Spain afterwards repudiated. This treaty provided that "the provisional junta was to govern for the time being in conformity with the existing laws in everything not opposed to the plan of Iguala, and until the Cortes shall form the constitution of the state." Immediately after the surrender of the city of Mexico a provisional council or junta, consisting of thirty-six members, was created under the plan of Iguala, which assumed the control of the government, and on October 5, 1821, this provisional council promulgated the following order (Reynolds, p. 95):

"The sovereign provisional council of government of the empire of Mexico, considering that from the moment it solemnly declared its independence from Spain all authority for the exercise of the administration of justice and other public functions should emanate from said empire, has seen fit to habilitate and confirm all authorities as they now are in conformity with the plan of Iguala and the treaty of the village of Cordoba, for the purpose of legalizing the exercise of their respective functions."

That the office of intendant was one of those continued in existence by this order is clearly shown by the decree of September 21, 1824, creating the office of commissary general. Reynolds, p. 123. Its first two articles are:

"Art. 1. So far as concerns the federation, the officers of general and local depositories, and all revenue employees that have been retained by the federation, are discontinued.

"Art. 2. From the intendants and other discontinued officers the government shall appoint, in each state where it appears necessary, a commissary general for the different branches of the exchequer, public credit, and war."

Prior thereto, and on October 24, 1821, the provisional council passed an order declaring that the office of superintendent general of the treasury was not necessary, and added, "and in consequence, has decided that the duties of the superintendency be performed, as your excellency proposed in your said report, by the directories general of the revenues, the officers of the treasury and intendants, in the [230]*cases and matters that severally belong to them, in conformity with their ordinances, without any variation in them." Reynolds, p. 96. On January 16, 1822, it ordered that, until the next august national congress fixes the system of public revenues, the intendants should remain as they are, except those who are reappointed and have, in their former offices, had a higher salary than that the intendants of Sonora and Pueblo now have." Reynolds, p. 98. And on February 2, 1822, it directed that "a report of the receipts of the treasuries since independence was sworn to be forwarded by the intendancies of the empire; and a statement of the receipts and disbursements of the last fifteen days since the 24th of December." Reynolds, p. 99.

So that long after the sale here in question was made the government of Mexico recognized the office of intendant as continuing, and no statute or ordinance appears which in terms at least took away from that officer all control over the sales of public lands.

It is contended that the mere change of sovereignty revoked all authority to make sales of the public lands, and *United States* v. *Vallejo*, 1 Black, 541 [17: 232] is cited, in which it was held that the decree of the Spanish Cortes of 1813, in relation to the disposition of the crown lands, was inapplicable to the state of things which existed in Mexico after the revolution of 1820, and could not have been continued in force there, unless expressly recognized by the Mexican congress.

And also *More* v. *Steinbach*, 127 U. S. 70, 81 [32:51,55], in which it was observed that—

"The doctrine . . . that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new sovereign over public property can be taken except in pursuance of his authority on the subject."

*It is doubtless true that a change of sover- [231] eignty implies a revocation of the authority vested by the prior sovereign in local officers to dispose of the public lands. And yet we think that rule is not controlling in this case, for the new sovereign made an order continuing the functions of the local officers, and one of those local officers making a sale in accordance with the provisions of the prior laws caused the money received therefrom to be paid into the treasury of the new sovereign, and that sovereign never returned the money thus received or challenged the validity of the sale thus made. This is not a case in which the local officers attempted to dispose of public lands in satisfaction of obligations created by the former sovereign, but one in which a sale was made for money, and that money passed into the treasury of the new sovereign.

Again, the original ordinance of intendants provided for an examination of the proceedings by "an attorney of my royal treasury." The proceedings had in this case were referred to the promoter fiscal, such being the name of the legal adviser of the treasury department, who approved them. So we have presented the case of a sale made by an officer who at one time undoubtedly had power to make a sale, who was directed by the original ordinance creating his office and establishing his powers to refer his proceedings to the legal adviser, a reference of the proceedings had by him to such legal adviser and a decision of such adviser that the proceedings

were regular and that the sale ought to be consummated. Under those circumstances it is not inappropriate to refer to what was said in *Mitchel* v. *United States*, 9 Pet. 711, 742 [9:283, 294], in reference to the validity of a grant in Florida:

"It was done on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done."

Again, it must be noticed that according to the report of the proceedings the money received for this land was paid into the public treasury, the entry on the account book being in these words:

[232] *Charged one hundred and sixteen dollars, two reales and five grains paid by Don Jose Maria Serrano in the name of and as attorney for Don Leon Herreros, resident of the company of Pimas at Tubac, in the following manner: One hundred and five dollars as the principal value for which was auctioned by this intendencia one sitio and three quarters of another of lands for raising cattle contained in the place of San Jose de Sonoita, situated in the jurisdiction of said company; six dollars, one real and seven grains for the said half annual charge and eighteen per cent for transfer to Spain; two dollars, ten grains for the two per cent as a general charge, and the three dollars as dues for the extinguished account, as is explained by the order of the intendencia marked No. 32, $116 2r. 5g.

Escalante.
Fuente.
Jose Maria Serrano.

It would seem not unwarranted and unreasonable to refer to the familiar rule that where an agent, even without express authority, makes a sale of the property of his principal, and the latter with full knowledge receives the money paid on account thereof, his retention of the purchase price is equivalent to a ratification of the sale. We do not mean, however, to state this as a general proposition controlling all municipal and governmental transactions, but only as one of the circumstances tending to strengthen the conclusion that these acts of the intendant were not mere usurpations of authority, but were in the discharge of duties and the exercise of powers conceded to belong to his office.

Passing beyond the action of the intendant, we find that in 1825 the commissary general executed title papers, thereby ratifying the sale made by the intendant four years before. We have heretofore quoted articles 1 and 2 of the act of September 21, 1824, creating such office. We now quote articles 3, 4, and 5:

"Art. 3. These commissaries shall be, in the state or states and territories of their de-[233]marcation, head officers of all *branches of the exchequer. Consequently they are responsible for the prompt execution of the laws that govern their administration, and all employees thereof shall be subordinate to them.

"Art. 4. They shall collect and disburse, under the laws and orders of the government, the proceeds from the revenues and the contingents of the states.

"Art. 5. The revenue on powder, salt deposits, the proceeds from the revenue on tobacco that belong to the federation, national properties and vacant lands (cascos), contingents, customs, tolls, and all the branches pertaining to the public credit, shall be administered directly by the commissary. The revenue on tobacco in the places where raised, that from the maritime customs, from the mail and lotteries, shall continue under their special administration, subordinate in all respects to the commissaries."

Obviously these articles gave to this newly created officer the fullest powers in respect to the national revenues. When an office is created with such large powers as these, and the incumbent thereof, reviewing proceedings theretofore had by prior representatives of the government, and finding that a sale made by one of such prior officers has resulted in the payment of the cash proceeds thereof into the public treasury, confirms his action, ratifies his proceedings and issues appropriate title papers therefor, it would seem that any doubts which might hang over the power of the prior officer were put at rest, and that thereafter no question could be raised as to the validity of the sale.

And, indeed, such seems to have been the assumption on the part of the government of Mexico, for there is no suggestion that from the time of the execution of these title papers in 1825 up to the date of the cession, 1853, the government ever raised any question as to the validity of the sale or sought to disturb the possession of the grantee. While of course time does not run against the government, and no prescription, perhaps, may be affirmed in favor of the validity of this grant, yet the inaction of the government during these many years is very persuasive, not merely that it considered *that the intendant [234] had the power to make the sale, but that in fact he did have such power. These considerations lead us to the conclusion that this grant was one which, at the time of the cession in 1853, was recognized by the government of Mexico as valid, and therefore one which it was the duty of this government to respect and enforce.

We pass, therefore, to a consideration of the second question, and that is, the extent of the grant. It is claimed by the appellant that the grant should be sustained to the extent of the outboundaries named in the survey. He insists that the accepted rule of the common law is, that metes and bounds control area; that a survey was in fact made and possession given according to such survey, and that although it now turns out that the area within the survey is largely in excess of the amount applied and paid for, the grant must be held effective for the area within the survey.

We had occasion to examine this question in *Ainsa* v. *United States*, 161 U. S. 208, 229 [40:673, 680], and there said:

"So monuments control courses and dis-

tances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain."

We think this case comes within the rule thus stated. The defendant in his answer alleges that the grant comprises 12,147.69 acres, while counsel for the government say that the measurements given by the surveyor make the area 22,925.87 acres. The amount of land appraised, advertised, sold and auctioned off was one and three quarter sitios (7,591.61 acres). While, of course, any slight discrepancy between the area of the survey and that ostensibly sold might be ignored, yet the difference between the amount which was understood to have been sold and the amount now found to be within the limits of the survey is so great as to suggest the propriety of the application of the rule laid down in *Ainsa* v. *United States, supra.* There can be no doubt from the record of the proceedings that one and three quarter sitios was all that the purchaser supposed he had pur-
[235] chased, all *that the intendant supposed he had sold, and all that was advertised or paid for. The original petition, after stating that there was a place known as San Jose de Sonoita, declared that the petitioner registered "in the aforesaid place two sitios of land," which he desired to have surveyed, and to pay therefor the just price at which it might be valued. The petition therefore was not for any tract known by a given name, but for a certain amount of land in such place. The report of the survey is very suggestive. We quote from it as follows:

"In the ancient abandoned place of San Jose de Sonoita, on the 26th day of the month of June, 1821, I, the said lieutenant commander and subdelegate of the military post and company of Tubac and its jurisdiction, in order to make the survey of the land denounced by Don Leon Herreros of this vicinity, delivered to the appointed officials a well twisted and stretched cord, and in my presence was delivered to them a castilian vara, on which cord were measured and counted fifty regulation varas, and this being done, at each were tied poles, and standing on the spot assigned by the claimant as the center, which was in the very walls of the already mentioned Sonoita, there were measured in a northeasterly direction sixty-three cords, which ended at the foot of some low hills, a little ahead of a spring—a chain of mountains of a valley which goes on and turns to the east, where was placed a heap of stones as a monument; and being about to return to the center, the claimant expressed a desire that the survey should be continued down the cañon until the two sitios should be completed, that on each side we should survey to him only twenty-five cords, because if the survey should extend further, by reason of the broken-up condition of the country and the rocky hills in sight, such land would be useless to him, saying, at the same time, that, continuing the measurement along the cañon (because it was impossible to go in any other direction on account of the roughness of the ground), by reason of the many turns that had to be made, so many cords should be deducted from the total number measured as would be calculated to result in excess of the *real length measured, [236]
taken on a straight line, and considering his demand reasonable I ordered the continuation of the survey as follows, to wit.

. . . .

"And in view of the suggestion made by the claimant to reduce the number of cords actually measured so much as might be calculated to be in fact in excess of the true measurement by reason of the many turns of the cañon over which the survey was made, as it could not be carried on straight, I appointed for that purpose Lieutenant Don Manuel Leon and the citizen Don Jose Ma. Sotelo who were unanimously of the opinion to deduct twenty-five cords out of the three hundred and twelve cords measured in the last survey down the cañon, the claimant consenting thereto as just; the survey was calculated to be two hundred and eighty cords, with which this survey was finished, resulting from it one sitio and three fourths of another sitio, registered by Don Leon Herreros for raising stock and for farming purposes."

The appraisers reported as follows:

"In virtue thereof they said that according to and because of the examination they had made and being aware of the existing regulations on the subject, the price should be fixed at, and they fixed it at, sixty dollars for each sitio, because they have running water and several banks of arable land which can be made use of by cultivation."

The direction for the almoneda or offer of sale was of the lands "composed of one sitio and three fourths of another." The first almoneda was of lands "comprising one sitio and three fourths of another. . . . and appraised in the sum of one hundred and five dollars, at the rate of sixty dollars per sitio." The property put up for sale was lands "comprising one sitio and three fourths of another, . . . appraised at one hundred and five dollars, at the rate of sixty dollars each sitio." The report of the promoter fiscal opens with this statement:

"The promoter fiscal of this treasury has examined carefully the expediente of the lands surveyed in favor of Don Leon Herreros, resident of the military post of Tubac, by the Commissioner Don Elias Ygnacio Gonzales, lieutenant *commander of the [237]
post, in the place called San Jose de Sonoita, in that jurisdiction, from which resulted one sitio and three fourths of another, for raising stock and horses, valued at sixty dollars each sitio, which sums up one hundred and five dollars, as it has running water and some pieces of land fit for cultivation."

Subsequently to this report the direction was made for three public auctions, which were made, and the record of the first auction, the others being similar, is in these words:

"1st auction. At the city of Arizpe, on the 8th day of the month of November, 1821, there convened as a board of auction the intendente as president and the members composing the board, in order to make the first auction of the lands referred to in this expediente. They caused many persons to collect by the beating of drums at the office of the intendencia, and in their presence they made the crier, Loreto Salcido, announce, as he did in a loud and clear voice, saying: 'There is to be auctioned at this board of auction one sitio and three fourths of another of public lands, for raising cattle, comprised in the place of San Jose de Sonoita, in the jurisdiction of the military post of Tubac, surveyed in favor of Don Leon Herreros, resident of the same, and appraised in the sum of one hundred and five dollars, at the rate of sixty dollars per sitio; whoever wants to make a bid on it, let him do so before this board, which will admit it if done properly; with the understanding that at the third and last auction, which will take place the day after to-morrow, the property will be sold to the highest bidder.' "

The payment was, as appears from the entry in the treasury office, heretofore quoted, of "one hundred and five dollars as the principal value for which was auctioned by this intendencia one sitio and three quarters of another of lands for raising cattle, contained in the place of San Jose de Sonoita." So, notwithstanding the fact that as shown by the report of the surveyors, a survey was made, all the proceedings from the commencement to the close contemplated, not the purchase of a given tract of land, but a certain amount of land in the place of San Jose de Sonoita. Every consideration of
[238] equity,*therefore, demands that the title of the purchaser should be confined to the one and three fourths sitios for which he paid.

As indicated in *Ainsa* v. *United States, supra,* too much stress cannot be laid on the technical rules of the common law in reference to the dominance of courses and distances over area. It is a matter of common knowledge that in this part of the country large areas beyond the immediate reach of water courses or springs were arid; that purchases were of lands so watered or so susceptible of watering that crops could be expected therefrom, or pasturage furnished for stock. The land beyond the reach of these water supplies was deemed of little value, and hence slight attention was paid to it. Every purchase therefore must be considered as dominated by this important and single fact. Rude methods of measurement were resorted to. As shown in the report of the survey in this case mere estimates were relied upon. Doubtless this carelessness was partly owing to the fact disclosed in *Ainsa* v. *United States,* that any overplus above the actual amount paid for still remained the property of the government, payment for which could be compelled of the locator, or, on his failure to make such payment, could be appropriated by any third party desiring to purchase. The fact that during these years no challenge was made of the overplus is not important. The government was indifferent. Its rights could be enforced at its leisure, and no individual cared to purchase any surplus of arid lands. The presumption which might obtain in other places from the inaction of the government, the failure of any individual to assert a claim to the overplus, is in respect to the lands in this territory of no significance. Who there would care to question the right of a locator along a waterway to any overplus of arid lands? Such overplus was of no value, and no third party would ever care to challenge the locator's right to this overplus, and the government, like the individual, was also indifferent. So the silence and inaction of the government and third parties are not strange, and create no presumption in favor of the validity of the grant to the extent of the survey.

Sustaining the validity of the grant to the extent of the *land paid for is but carrying [239]
out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the court of private land claims. Article 8 of the treaty of Guadalupe Hidalgo provided in reference to the ceded territory that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever," and that "in the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected" (9 Stat. at L. 929); and these stipulations were reaffirmed in article 5 of the Gadsden Treaty (10 Stat. at L. 1035). Article 6 of that treaty, which placed a limitation, provided "that no grants of land within the territory ceded . . . will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory, which have not been located and duly recorded in the archives of Mexico." But this limitation is not to be understood as denying the obligations imposed by the rules of international law in the case of cession of territory, but simply as defining specifically the evidences of title which are to be recognized. The spirit of the treaty is fully carried out when the amount of land petitioned and paid for is secured to the grantee or his successors in interest. This government promised to inviolably respect the property of Mexicans. That means the property as it then was, and does not imply any addition to it. The cession did not increase rights. That which was beyond challenge before remained so after. That which was subject to challenge before did not become a vested right after. No duty rests on this government to recognize the validity

of a grant to any area of greater extent than was recognized by the government of Mexico. If that government had a right, as we [240]have seen in *Ainsa* v. *United States* *it had, to compel payment for an overplus or resell such overplus to a third party, then this government is under no moral or legal obligations to consider such overplus as granted, but may justly and equitably treat the grant as limited to the area purchased and paid for.

It may be said that to consider the tract granted as one not extending to the limits of the outboundaries of the survey is to hold that the tract granted was not located, and therefore, within the terms of the Gadsden treaty, not to be recognized by this government, as suggested in *Ainsa* v. *United States*. In that case it appeared that while the outboundaries of the survey extended into the territory ceded by Mexico to the United States, the grantee had taken and was in possession of land still remaining within the limits of Mexico, to the full extent which he had purchased and paid for, and therefore no legal or equitable claim existed against the United States in reference to land within the ceded territory.

It is also undoubtedly true, as disclosed in that case, that where there is a mere grant of a certain number of acres within specified outboundaries there may be such indefiniteness as to prevent a court from declaring the true location of the granted lands. And yet it is also true that there may be disclosed by the survey or other proceedings that which will enable a court of equity to determine with reasonable certainty what lands were intended to be granted and the title to which should be established. It must be remembered in this connection that by § 7 of the act creating the court of private land claims, it is provided "that all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States." Therefore in an investigation of this kind that court is not limited to the dry, technical rules of a court of law, but may inquire and establish that which equitably was the land granted by the government of Mexico. It was doubtless the purpose of Congress, by this enactment, to provide a tribunal which should examine all claims and titles, and that should, so far as was practicable in conformance with equitable rules, finally settle and determine the rights of all claim-[241]ants. *It will be unnecessarily limiting its powers to hold that it can act only when the grant to the full outboundaries of the survey is valid, and is powerless when a tract within those outboundaries was granted. Many things may exist by which the real tract granted can be established. In the case before us, if it be possible to locate the central point from which according to the report the survey was made (and we judge from the testimony that it is possible) the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for. If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity by its commissioner or master to determine exactly what was intended to pass under the grant. We do not mean to anticipate all the questions that may arise. We simply hold that the mere fact that the grant is narrower than the limits of the outboundaries does not prevent the court of private land claims from determining through the aid of a commissioner, surveyor, or master exactly what equitably did pass under the grant. It is enough for this case to hold that the powers of the court of private land claims are not narrow and restricted, and that, when it finds that there is a valid grant for a certain number of acres within the outboundaries of a larger tract, it may inquire, and, if it finds sufficient reasons for determining the true boundaries of the tract that was granted, it can so prescribe them, and sustain the claim to that extent, referring to the land department the final and absolute surveys thereof. In view of these considerations, we are of opinion that this grant should be sustained to the amount of one and three-fourths sitios, and *the judgment of the Court of Private Land Claims is reversed*, and the case remanded to that tribunal, with directions to examine and decide whether there be sufficient facts to enable it to determine the true boundaries of the one and three fourths sitios.

UNITED STATES, *Appt.*, [242]

v.

FREDERICK MAISH and Thomas Driscoll, Partners as Maish & Driscoll.

(See S. C. Reporter's ed. 242, 243.)

Extent of Mexican grant.

A Mexican grant should not be sustained by the court of private land claims for more than the amount purchased, petitioned, and paid for, when all the proceedings contemplated a sale of that quantity only.

[No. 297.]

Argued March 15, 16, 1898. Decided May 31, 1898.

APPEAL from a decree of the Court of Private Land Claims confirming the title of the petitioners, Frederick Maish *et al.*, to a tract of land in the county of Pima, and territory of Arizona, under a Mexican grant. *Reversed*, and case remanded for further proceedings.

The facts are stated in the opinion.

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11 : 1051.

Messrs. **Matthew G. Reynolds** and *John K. Richards*, Solicitor General, for appellant.

Mr. **Rochester Ford** for appellees.

Mr. George Lines filed a brief for the Sopori Land & Mining Company.

Mr. Justice **Brewer** delivered the opinion of the court:

This case resembles that of *Ainsa* v. *United States* just decided, 171 U. S. 220 [*ante*, 142].

The proceedings for the sale were had in 1820 and 1821 and before the same intendant. We deem it unnecessary to add anything to what was stated in that opinion as to the law controlling. It is sufficient to say that while the claim now made is for 46,696.2 acres, the application for purchase was for four sitios (17, 353.84 acres). All the proceedings contemplated a sale of only that amount of land. Thus the appraisers stated that "from their examination they said that each sitio should be valued at thirty dollars, taking into consideration that none of them had running water or natural standing water, but that water facilities might be obtained by means of a well." The first of the three final auctions was reported in these words:

"In the city of Arizpe, on the 13th day of December, 1821, there met as a board of auction the provisional intendant, as president, and the other members that compose it, to hold the first auction of the lands to which these proceedings refer, and they caused the people to be assembled at this office by the [243]*beating of the drum, and many persons gathered at the office of the intendant, when the auctioneer, Loreto Salcido, in their presence was ordered to ask for a bid, which he did in a loud and clear voice, saying: 'Here before this board of the treasury are being sold four sitios of public land for the raising of cattle situated at the place called San Ygnacio de la Canoa, within the jurisdiction of the military post of Tubac, surveyed in favor of Tomas and Ygnacio Ortiz, residents of that same town, and appraised in the sum of one hundred and twenty dollars, being at the rate of thirty dollars for each sitio, it being necessary to dig a well to make the land useful. Whosoever wishes to make a bid upon this land, let him come forward and do so in the manner established by law before this board, where his bid will be heard, notice being given that the Rev. Father Fray Juan Bano, minister of the mission of San Xavier del Bac, in the name of Ygnacio Sanches and Francisco Flores, resident citizens of the same town, had bid for said land the amount of two hundred and ten dollars; and with the understanding that on the third auction, which is to take place on the day after tomorrow, the sale shall be settled upon the highest bidder.' As no bidder appeared, the board adjourned, and the minutes were signed by the president and members of this board."

At the third auction a bid of $250 was made, and on that bid the property was struck off to Tomas and Ygnacio Ortiz, who subsequently paid into the treasury the full amount of the purchase price with all charges. Nothing seems to have been done on this purchase until 1849, when title papers were issued by the substitute treasurer general of the state of Sonora.

Without repeating the discussion contained in the foregoing opinion, we think that the grant should be sustained for the four sitios purchased, petitioned and paid for, and for no more. As the grant was confirmed *in toto we are compelled to order that the decree of the Court of Private Land Claims be reversed*, and the case remanded to the court for further proceedings.

WILLIAM FAXON, Jr., Trustee, *et al* [244]
Appts.,
v.
UNITED STATES and George W. Atkinson *et al.*

(See S. C. Reporter's ed. 244-260.)

Court of private land claims—power of treasurer of Sonora to grant Mexican lands—pueblo and mission lands.

1. In order to the confirmation of any claim, the court of private land claims must be satisfied of the regularity in form of the proceedings, and that the official body or person making the grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified.
2. The treasurer of the department of Sonora did not in 1844 have the power to determine by his sole authority that abandoned pueblo and mission lands belonged to the class of the temporalities, and that their value was not over $500, and to sell and grant them independently of other officials.
3. Pueblo and mission lands in Mexico when abandoned seem to have become, under the laws existing in 1844, a part of the public domain of the nation, to the disposal of which only the laws of the nation applied, and which could not be granted by the treasurer of a department.

[No. 119.]

Argued March 18, 1898. Decided May 31, 1898.

APPEAL from a decree of the Court of Private Land Claims, rejecting the claim of William Faxon, Jr., trustee, for the confirmation of his title to land known as the Tumacacori, Calabazas, and Huebabi grant, situated in the valley of the Santa Cruz river, Pima county, Arizona. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

Three separate petitions were filed in the court of private land claims for the confirmation of what was commonly called and known as the Tumacacori, Calabazas, and Huebabi grant, situated in the valley of the Santa Cruz river, Pima county, Arizona, the petitioners in each claiming under the original grantee. The causes were consolidated

NOTE.—*As to Missouri private land claims,* see note to Les Bois v. Bramell, 11: 1051.

and tried under the petition of William Faxon, Jr., trustee, and others. The petition alleged that the claimants were the owners in fee of the tract of land in question under and by virtue of a certain instrument in writing, dated April 19, 1844, "made and executed by the treasury department of Sonora in compliance with the law of the Mexican Congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned pueblos," running to Don Francisco Alejo Aguilar, to whom said treasury department sold the tract April 18, 1844, for the sum of $500.

That in the year 1806, the governor of the
[245]Indian pueblo *of Tumacacori petitioned Don Alejo Garcia Conde, intendente of the province, etc., etc., to issue to the Indians of the pueblo a grant of lands for the "fundo legal" and also for the "estancia" of the pueblo to replace ancient title papers which had been lost or destroyed; that in accordance with that petition the lands mentioned were ordered to be surveyed, which was done, and the boundary monuments established, by Don Manuel de Leon, commandante of the presidio of Tubac; that on April 2, 1807, the said intendant Conde issued a royal patent or title to the Indians of the pueblo of Tumacacori for the lands, as set forth in the proceedings of the survey thereof and in the copy of the original expediente.

That under the law of the Mexican Congress of February 10, 1842, Don Francisco Aguilar, on April 18, 1844, became the owner by purchase, as before mentioned, "of the four square leagues of agricultural and grazing lands of the 'fundo legal' of the abandoned pueblo of Tumacacori and the sitios of the estancia (stock farm) of Calabazas, and the other places thereunder pertaining." It was averred that all the steps and proceedings in the matter of the grant and sale were regular, complete, and legal and vested a complete and valid title in fee in the grantee; and that the grantee at the time went into actual possession, use, and occupation of the grant and erected the proper monuments thereon, and that he and his legal representatives have continued ever since and until the present time in the actual possession, use, and occupation of the same, and are now possessed and seised in fee thereof.

The United States answered alleging that the alleged sale to Aguilar was without warrant or authority of law and void; that, if these lands had been theretofore granted to the pueblo of Tumacacori, they were abandoned about 1820, and by virtue thereof became public lands; that the title to said property, if any passed in 1807, was purely usufructuary, and vested no estate, legal or equitable, in the said pueblo or mission, but that the same and the right of disposition were reserved to and remained in the national government.

The answer denied that Aguilar became the owner by purchase or otherwise of any lands
[246]included in the alleged grant *of 1807 to the pueblo, or of any land of that mission or its dependencies; that the alleged grant was ever located and recorded as provided by the sixth article of the treaty of Mesilla (Gadsden purchase); that the original grantee or grantees were ever owners of the property as against the Republic of Mexico, or are now the owners thereof as against the United States or its grantees; that the grantee Aguilar, in the year 1844, went into actual possession and occupation of the grant, and erected monuments thereon, or that he and his representatives have continued ever since in the actual possession, use, and occupation of the same.

The answer averred that the proceedings for sale were never taken under the express order or approval of the general government, and never submitted to said general government for ratification or approval; that the lands claimed far exceeded those contained in the original survey; that the sale was by quantity and limited; and that the alleged grant was so indefinite and uncertain as to description as to carry no title to any land.

On the hearing the testimonios of the grants of 1807 and of 1844 were put in evidence. Evidence was adduced to the effect that Aguilar, the original grantee, never took or had possession of the lands; that he was the brother-in-law of Manuel Maria Gandara, who was the Governor of Sonora in 1842, and in 1845 to 1853, except a few months; to whom Aguilar conveyed in 1856, and, more formally, in 1869; that Gandara was in possession in 1852, 1853, 1854, and 1855, through his herdsmen; and that, as contended by counsel for petitioner, the money for the purchase was furnished by Gandara, and Aguilar took the title as trustee for him. Apparently the expedientes were not in the archives, nor was there any note of the grant in the book of toma de razon for 1844.

A translation of the titulo of 1844 is given in the margin.†

†Treasury of the Department of Sonora, 1844. Title of sale, transfer, and adjudication of agricultural lands which include the 4 leagues of the fundo legal of the deserted pueblo of Tumacacori and the 2 sitios of its estancia (stock ranch) of Calabasas and the other places thereto annexed, the same being situated in the jurisdiction of the District of San Ignacio, issued by the said departmental Treasury in compliance with the supreme decree of the 10th of February, 1842, in favor of Don Francisco Alejandro Aguilar, a resident of the port and village of San Fernando de Guaymas.

Second Seal. Seal Four Dollars.
Eighteen hundred and forty-four and eighteen hundred and forty-five.

Ignacio Lopez, captain of cavalry retired to the infantry, honorary intendant of the army and treasurer of the Department of Sonora.

Whereas the supreme decree of February 10, 1842, provides for the sale, on account of the critical condition of the public treasury, of the properties pertaining to the department of temporalities, of which class are the farming lands and the lands for breeding cattle and horses respectively of the 4 leagues of the town site of the depopulated town of Tumacacori and the 2 sitios of the stock farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano, and Calabazas, whose areas, boundaries, monuments, and conterminous tracts are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned sur-

[247] *The court of private claims rejected the claim on the ground that the sale in question was void for want of power on the part of the officer attempting to make it.

Mr. **Francis J. Heney** for appellant.

Messrs. **Matthew G. Reynolds** and *John K. Richards*, Solicitor General, for appellee.

[249] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

In order to the confirmation of any claim, [250] the court of private*land claims, under the act creating that tribunal (26 Stat. at L. 854, chap. 539), must be satisfied not merely of the regularity in form of the proceedings, but that the official body or person assuming to [251] make the grant was vested with authority,*or that the exercise of power, if unwarranted, was subsequently lawfully ratified; and the same rule applies to this court on appeal. *Hayes* v. *United States*, 170 U. S. 637 [42: 1174]; *Ely's Administrator* v. *United States*, 171 U. S. 220 [*ante*, 142].

The titulo shows that Ignacio Lopez, treasurer of the department of Sonora, assumed to make the sale and grant of the lands in question, in the exercise of sole authority, *ex officio*, under the decree of February 10, 1842, and article 73 of the law of April 17, 1837, as being property "pertaining to the department of temporalities," the value whereof did not exceed $500. He asserted the power to determine, alone, that the lands were of the temporalities; that their value was not over $500; and to sell and grant them independently of other officials than himself.

The court of private land claims held that if the lands belonged to the class of temporalities it was clear that the treasurer of the department had no power to make a sale by his sole authority, whether the value exceeded five hundred dollars or not; and if the lands did not belong to that class, nevertheless

veyor, Don Manuel de Leon, veteran ensign and late commandant of the presidio of Tubac, according to the information obtained in relation thereto at the instance of this departmental Treasury, said temporal farming and grazing lands being valued in the sum of $500, as provided in article 2d of the aforesaid supreme decree of February 10, 1842; and complying punctually therewith I have ordered the formation of the corresponding expediente by the court of first instance and of the treasury of the district of San Ignacio, during which proclamations (pregones) no bidder appeared; therefore, and in compliance with article 73 of the law of April 17, 1837, as the sale in question on account of the national Treasury does not exceed $500, this said treasury proceeded to the public sale of the aforementioned lands of the depopulated Tumacacori and the lands of its stock farm, Calabazas, and other annexed points, all belonging to the department of temporalities, on the 16th, 17th, and 18th of the current month of April, in solicitation of bidders, without there being any other than Don Francisco Alexandro Aguilar, a merchant and resident of this port and village of San Fernando de Guaymas, for said sum of $500, the appraised value at which said temporalities have been sold, as appears from the third and last offer, which literally is as follows:

Third Seal. One Dollar. Years 1844 and 1845.

In the port and village of San Fernando de Guaymas, on the eighteenth of April, eighteen hundred and forty-four, I, the undersigned, departmental Treasurer, being in the office of this treasury under my charge, with my attendant witnesses, Don Jose Maria Mendoza and Don Vicente Irigoyen, in the absence of a notary of the treasury and of a notary public, in compliance with the provisions of article 73 of the law of April 17, 1837, since the price or value of the temporalities to which these proceedings relate do not exceed five hundred dollars, ordered that the third and last offer be made for the final sale of the temporal lands of Tumacacori and Calabazas referred to in this expediente and that to that end a proclamation be made to the public at the sound of the drum, as, in effect, the public crier, Florentino Baldizan, made in a high and clear voice, saying: "The treasury of the department is going to sell, on account of the national treasury and in accordance with the supreme decree of February 10, 1842, the agricultural lands and lands for raising cattle and horses which comprise the 4 leagues of the town site of the depopulated town of Tumacacori and the 2 sitios of the depopulated stock farm of the same at the points of Huebabi, Potrero, Cerro de San Cayetano and Calabazas, situated in the District of San Ignacio, the areas, monuments, boundaries, and conterminous tracts of which are stated in the corresponding proceedings of survey executed in the year 1807 by the commissioned surveyor, Don Manuel de Leon, veteran ensign and late commandant of the presidio of Tubac, as appears from the information obtained at the instance of said departmental treasury, from which it also appears that the original titles of grant and confirmation of said temporalities still exist, which temporalities have now been valued at $500 in accordance with article 2d of said supreme decree of February 10, 1842.

"Whoever desires to make a bid come forward and make it to this departmental treasury, where it will be received in conformity with the laws, with the understanding that the final sale is to be made now to whomever should be the highest bidder."

In which act Don Francisco Alexandro Aguilar, a merchant and resident of this port, appeared and made the bid of $500, at which said temporalities are appraised; and no other bidder having appeared and the hour for midday prayer of this day having already struck, the public crier finally said: "Once, twice, three times; sold, sold, sold; may it do good, good, good to Don Francisco Alejandro Aguilar."

In these terms this act was concluded, the aforesaid farming lands and lands for raising cattle and horses of the depopulated town site and stock farm of the temporalities of Tumacacori and Calabazas being publicly and solemnly sold to Don Francisco Alexandro Aguilar, a merchant and resident of this port, for the sum of $500.

And in due witness thereof and for the usual purposes these proceedings were closed and entered and I signed them together with the party in interest and my undersigned attendant witnesses.

Ignacio Lopez.
Francisco A. Aguilar.

Witness: Jose Maria Mendoza.
Witness: Vicente Irigoyen.

In which legal terms was concluded the sale of the farming lands and lands for raising cattle and horses, which comprise the 4 leagues of the depopulated town site of Tumacacori and the 2 sitios of its stock farm, Calabazas, and other annexed points, all temporalities, situated in the jurisdiction of the District of San Ignacio, the original expediente remaining deposited in the archives of this treasury as perpetual evidence, with the understanding that when the original titles of Tumacacori and Calabazas are obtained, they shall be aggregated to the present one.

Whereas the agricultural lands and lands for raising cattle and horses, which comprise the 4 leagues of the depopulated town of Tumacacori and the 2 sitios of its stock farm of Calabazas and other annexed points, all temporalities, in the jurisdiction of the district of San Ignacio, have been sold to Don Francisco Alejandro Aguilar, a resident and merchant of this port, for the sum of $500, which sum together with the others pertaining to the treasury, he has paid into this departmental treasury, I, therefore, in use of the powers, the laws on the matter, as also the supreme decree of the 10th of February, 1842, conceded to me, by the pres-

there was the same want of power under the laws of Mexico in relation to the disposition of the public domain.

Many of the laws in this regard have been set forth in *United States* v. *Coe*, 170 U. S. 681 [42: 1195]; *Hayes* v. *United States*, 170 U. S. 637 [42: 1174]; *Ely's Administrator* v. *United States*, 171 U. S. 220 [*ante*, 142]; and other cases, and the statement of so much thereof as particularly bears on the matter in hand involves some repetition.

By the law of January 26, 1831, a general department of revenues was established, under whose control all branches of the treasury were placed, except the general administration of the mail and of the mint. A general director and three auditors were provided for, to be appointed by the government, and the general department was divided into three
[252] sections *of each of which an auditor was the chief. 2 Dublan and Lozano, Mex. Laws, 308.

May 21, 1831, a law was passed creating commissaries general and commissariats, and on July 7, 1831, regulations were issued under the law of January 26. The first auditor was made chief of the first section, having charge, among other things, of "national property in which is included, under article 9 of the law of August 4, 1824, that of the inquisition and temporalities, and all other country or town property belonging to the Federation." 2 Mex. Laws, 329, 341.

The tenth regulation provided that the general department should take an exact account of the number, location, value, condition, and present method of administration of all the property and estates of the Nation, in which were included those of the inquisition and temporalities, and all others that belong to the public exchequer, in accordance with the law of August 4, 1824; should see to the thorough collection of the proceeds, as provided in the law of January 26th and other laws; and should do whatever it considered most beneficial in regard to the sale, lease, or other means of administration that might be advisable, in whole or in part, of the property in question.

Certain regulations were thereafter prescribed, and set forth in a circular of July 20, 1831 (2 Mex. Laws, 351), whereby the commissariats general were located in the capitals of certain enumerated states; and, at designated points in others, that of Sonora being at Arizpe; but the commissaries, if they thought a change would be advantageous, were required to bring it to the notice of the government with their reasons.

Articles 126 and 127 of these regulations read:

---

ent title and in the name of the Mexican Nation and of the supreme government, formally cede, sell, give, and adjudicate the said farming lands and lands for raising cattle and horses, which comprise the 4 leagues of the depopulated town site of Tumacacori and the 2 sitios of its stock farm of Calabazas and other annexed points already mentioned to the said purchaser, Don Francisco Alejandro Aguilar, by way of sale, and with all the qualities, solemnities, firmness, and subsistence the law establishes, for himself, his heirs, children, and successors, with all their entrances, exits, lands, timber, groves, shrubs, pastures, centers, circumferences, waters, springs, watering places, uses, customs, servitudes, and other things pertaining to said possessions, with their inclosures, metes and bounds for the sum of $500, at which they have been sold to said Francisco Alejandro Aguilar, with the precise condition that the said buyer, and his successors in their case, are to maintain the above mentioned agricultural lands and lands for raising cattle and horses that comprise the 4 leagues of the depopulated town site of Tumacacori and the 2 sitios of its stock farm of Calabazas populated, possessed, cultivated and protected, without passing beyond their metes and bounds and without their being totally abandoned; with the understanding that if the said abandonment and depopulation of said farming and grazing lands should take place for the space of three consecutive years, by the neglect or fault of their owners or possessors and there should be any person who denounces them, in such event after verification of the fact, they shall be declared public lands and shall be sold at public sale, on account of the national treasury, to whomever should be the highest bidder, excepting, as is just, those cases where the abandonment, depopulation or lack of protection are on account of the notorious invasion or hostilities of enemies or epidemics or other like causes, and only for the period or periods of such occurrences, cautioning as the aforesaid Don Francisco Alejandro Aguilar and his successors are strictly cautioned that they are to restrict themselves to the belongings, metes, and bounds of the aforesaid agricultural and grazing lands of the town site of Tumacacori and its stockfarm of Calabazas, constructing and maintaining on said possessions the necessary monuments of stone and mortar under the penalties established by the laws in case of neglect.

And with the powers, which they and the divers superior provisions that govern the matter, concede and confer on me, I order and require respectively of the judges, justices, and local authorities that at present are and shall hereafter be in the district of San Ignacio, that, for the sake of the good and prompt administration of justice and in observance of the aforesaid legal provisions they do not permit the said Francisco Alejandro Aguilar nor his successors to be, in any manner, disturbed, annoyed, or molested in the free use, exercise, property, dominion, and possession of the said agricultural lands and lands for raising cattle and horses of the town site of Tumacacori and stock farm of Calabazas, but rather shall watch and see with the greatest efficacy that they are always protected and maintained in the quiet and peaceable possession to which they are entitled by legitimate right, so that, in this manner, they may freely have the benefit of, enjoy, possess, sell, exchange, barter, donate, transfer, devise, cede, and alienate the aforesaid agricultural lands and lands for raising cattle and horses of the 4 leagues of the town site of Tumacacori and its stock farm, Calabazas, and other annexed points, at their free arbitrament and election, as absolute owners and proprietors of said possessions, with the understanding also that just as soon as the original titles of said agricultural and grazing lands are obtained they shall be aggregated to the present ones, and the transmittal and delivery of said original documents are considered as made and verified from this moment in favor of said party in interest, Don Francisco Alejandro Aguilar.

In which terms I have issued this title of formal sale, transfer, and adjudication to said Mr. Aguilar, his heirs and successors, delivering it to the former for his security and other convenient uses, after entry thereof in the proper place.

Given in the port and village of San Fernando de Guaymas, on the nineteenth day of the month of April, eighteen hundred and forty-four, authenticated and signed by me, the treasurer of the department, sealed with the seal which this treasury uses, before my undersigned attendant witnesses, in the absence of a notary of the treasury or a notary public, there being none, according to law.

Ignacio Lopez.

Witness: Jose Diego Labandera.
Witness: Jose Maria Mendoza.

"126. All purchases, sales, and contracts made on account of the treasury, whatever be their purpose, shall be made by the commissaries general sitting as boards of sale; but before convoking them, it shall be absolutely necessary to receive first the order therefor, either from the supreme government, communicated directly or through the treasury general, or rather from the directory of revenues, when it relates to matters subject thereto.

[253] *"127. Said board shall hold its sessions in the room most suitable for the purpose in the commissariats, or in the public place nearest to those offices, and the regular members shall be the commissary or subcommissary, who shall preside, the senior officer of the treasury, or the one who acts in his stead, and the attorney general, where there is one, and each of these employees shall take the place or seat to which he is entitled in the order in which they are named."

Besides the regular members, it was provided by article 128 that there should be special members, depending on the character of the sale, purchase, or contract being made, as for instance, when it related to the offices or revenues in the federal district subject to the directory general, the auditor in charge should attend; and if subject to any of the other departments, the chief clerk of the bureau of accounts, etc. If it related to supplies for army service, the officer appointed by the proper inspector should be present; if to business pertaining to the artillery arsenals, etc., the chief officer thereof; if to hospital service, the first assistant of the medical corps; if to fortification works, the chief of the corps of engineers; and if, finally, to other matters, the employee of the nearest related department appointed by the commissary general. Timely notice was required to be given to the regular and special members of the day and hour of the sale, which ordinarily should be held at 10 o'clock in the morning.

It was also provided that if there was a notary public in the place, he should necessarily be present at the sessions of the board, and that whatever was done therein should be certified to by him, or by two attending witnesses, if there was none; that the sales or purchases intended to be made should be published for at least eight days beforehand by placards put up in the most public and frequented places, and also inserted in newspapers of greatest circulation, if there were any, care being taken that the notices contained the necessary information about the matter and its most essential circumstances; that when the sale was opened, and the customary proclamations made, all lawfully

[254] made bids should be received *until the day of final sale, which should be made "to the bidder who offers the most advantages to the treasury, as determined by an absolute majority of the votes of the board, which minute and everything that may have occurred at the sale shall be entered on the book, which the commissary and subcommissaries shall keep for the purpose, and which the members shall sign with attending witnesses or with the notary, who, besides, shall draw up all other necessary papers. In the absence of a notary, a clerk, whom the commissary shall bring for the purpose, shall draw up the minutes and the conclusions." The proceedings were then to be forwarded with a report thereon to the supreme government, "without whose approval the purchase, sale, or contract shall not be carried into effect;" and it was also provided that "when there is evidence that any member of the board has bought or sold at the sale, himself or through a third person, the sale shall be void and he shall be punished with the penalties the laws impose upon those who commit like abuses."

In 1835 the state legislatures were abolished and department bodies established; and the bases for a new constitution were adopted, followed by such constitution dividing the country into departments, the interior government of which was intrusted to the governors in subordination to the general government. 3 Mex. Laws, 75, 89, 230, 258.

By a decree of April 17, 1837, the principal officer of the general treasury in each department was designated as a superior chief of the treasury, and on him and his subordinates were conferred by article 92 the powers and duties formerly exercised by the commissary general and his subcommissaries, "in so far as they do not conflict with this decree, for in that respect all existing laws stand repealed." 3 Mex. Laws, 363.

Articles 73, 74, 75, and 76 were as follows:

"73. All the purchases and sales that are offered on account of the treasury and exceed five hundred dollars shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the superior *chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury, and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury, for such purposes as may be necessary and to enable him to make a report to the supreme government. [255]

"74. The superior chiefs shall hold meetings of the boards of the treasury at least twice a month, and when they consider it necessary according to the difficulty and importance of the business. These boards shall be composed of said chief, the departmental treasurer, the attorney general of the treasury, the principal collector of the revenues and the auditor of the treasury, who shall act as secretary thereof.

"75. The object of the board of the treasury shall be to procure the prosperity and increase of the revenues of the treasury, the most easy and prompt collection thereof, to promote the economies that should be made, to expedite such grave matters of difficult solution as the superior chief may bring to its knowledge, and to make a report to the latter of bad management, improper conduct, failure to comply with their duties and other omissions of which they may have knowledge,

or may have observed in the employees of the treasury of the department.

"76. The minutes of the board shall be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme government, when the case requires it."

By a law of December 7, 1837, it was made the duty of the governors, among other things, "to preside over the boards of sale and of the treasury, with power to defer the resolutions of these latter until, in the first or second session thereafter, the matter under consideration is more carefully examined into." 3 Mex. Laws, 443.

By article 140 of a decree of June 13, 1843,
[256] it was made the duty *of the governor of each department to publish the decrees of the president and cause them to be complied with; and by subdivision 10 of article 142, the governor was made the chief of the public treasury of the department with general supervision of the same. 4 Mex. Laws, 428. And in passing it may be remarked that there is absolutely nothing in this record to indicate that the governor participated in any way in the act of sale, while the terms of the testimonio clearly show that the departmental treasurer proceeded and assumed to proceed upon his own sole authority.

December 16, 1841, the office of the superior chief of the treasury created by the decree of April 17, 1837, was abolished, and it was provided that the departmental treasurers should continue for the present to perform the functions of their office as established by the law creating them, and also to perform those of the discontinued chiefs of the treasury, except such as were assigned to the commandants general, who were to be inspectors and visitors of the treasury offices, and to see that the public revenues were well and faithfully collected, administered, and disbursed; and to make timely reports to the supreme government of what they observed, which should be brought to its attention. 4. Mex. Laws, 75.

On February 10, 1842, the following decree was issued:

"Antonio Lopez de Santa Ana, etc.

"Article 1. The boards of sale in the several departments will proceed to sell, at public auction, to the highest bidder, the properties (fincas) situated therein that pertain to the department of temporalities.

"2. No bid will be admitted that does not cover the amount considered to be the value of the property (fincas), computed from the amount of the leases, which shall be considered as the interest thereof, at the rate of five per cent.

"3. The bids shall be made for cash, which shall be paid when the sale is approved, less the amount of the burden imposed on each property (fincas), which the buyers shall continue to recognize with a mortgage thereof.

"4. No action or claim, which the actual lessors of the property (fincas), in question,
[257] may intend to set up for *improvements or under other pretext shall, in any manner, embarrass the proceedings of the board of sale in making the sales, but the right of parties in interest to apply to the supreme government, or to the proper authorities, shall remain intact.

"Therefore I order this to be printed, published, and circulated, and demand that it be complied with." 4 Mex. Laws, 114.

Lopez certified that it was in virtue of this decree that he had sold the lands in question as belonging to the class of temporalities, and as being of a value not exceeding $500, in which case he assumed that he was authorized to sell irrespective of the board of sales in view of article 73 of the decree of April 17, 1837. The argument is that as that article provided that all purchases and sales exceeding $500 should be made necessarily by the board of sales, therefore all property under that value could be sold by the departmental treasurer alone; but the difficulty is, as pointed out by the court of private land claims, that even if that provision operated in the manner contended for, it had no application to a sale under the decree of February 10, 1842, which specifically directed that the sales should be made by the board, and contained nothing to suggest that the value of the property affected the power and duty of the board in any way.

The decree recognized the existence of the boards of sale as the only proper official organs to accomplish the results desired, and it was this decree that was relied on as justifying the proceedings. If these lands were not of the temporalities, then the basis of the sale utterly failed, as the decree applied only to property of that class, and if of the temporalities the sales were to be made by the board.

In relation to article 73 of the law of 1837, some further observations may be added.

The regulations of July 20, 1831, and the law of April 17, 1837, treated of the same subject-matter, and must be read together; and prior laws, so far as not conflicting, were expressly saved from repeal by article 92 of the latter act.

*By § 73, the board of sales was necessarily [258]
to make sales exceeding $500, but nothing was said as to sales for less than that sum. This would seem to have left the law of 1831 in force in respect of the making and the conduct of sales of property having a value below that amount, and whether the board of sales consisted of the membership prescribed by § 73, or was composed in some respects of a different membership, is not material. While these various laws are rather confusing in their number and minuteness, nothing is clearer than that the power to make sales and grants was vested in the treasury department of the nation and governed by strict rules and regulations, none of which contemplated that any single officer could make the sales. It is enough that the departmental treasurer did not possess the power, acting singly and on his own responsibility, to conclusively determine to what class lands belonged, and their value, and

having decided these points, thereupon to exercise the sole power of sale.

Tumacacori, Calabazas, and Huebabi are said to have been originally separate and distinct pueblos and missions, of which the two latter were abandoned as early as December, 1806, when the native Indians of Tumacacori and the governor of said Indians presented petitions to the governor and intendente conde to give them title in accordance with the royal instructions of October 15, 1754, and of article 81 of the royal ordinances of December 4, 1786 (alleging the loss or destruction of their old title papers), of the lands embraced in the fundo legal and the estancia of each pueblo and mission, whereupon the grant of 1807 was made.

The titulo refers to some lands acquired by purchase, though the record leaves that matter entirely vague and uncertain, and declares the grant to be made to the pueblo and natives of Tumacacori, that they may "enjoy the use and freely possess at will and for their own benefit in community and individually, and for the decent support of the church of said mission, but under the condition that in no case and in no manner shall they alienate at any time any part of said lands which are adjudicated and assigned to them, since they
[259] are all *to be considered as belonging to the Republic and community of natives alone, for their proper use, as well for sowing purposes as for stockraising and the increased prosperity of the same."

This was in accordance with the general rule that the missionaries and Indians only acquired a usufruct or occupancy at the will of the sovereign. *United States* v. *Cervantes*, 18 How. 553 [15: 484].

Prior to 1829, the tribunal of the inquisition had been abolished by the Cortes, and the monastic and other religious orders suppressed, and on the 10th of May of that year it was ordered, through the department of the treasury, that "the property in which consist the funds of the temporalities of the ex-Jesuits and monastics and the rural and urban estates belonging to the inquisition" be sold at public sale to the best and highest bidder. 2 Mex. Laws, 108. May 31, 1829, the commissary general of Mexico published a "list of the urban and rural estates relating to the temporalities of the ex-Jesuits and suppressed monastics with a statement of their values, the burdens they carry, and annual revenue" (Ibid. 117), which did not include the lands in question. The departmental treasurer did not claim, and manifestly did not acquire, the power to sell these lands under the order of May 10, 1829, or the regulations of July 7, 1831, bearing on that subject.

By a decree of April 16, 1834 (2 Mex. Laws, 689), the missions of the Republic were secularized, that is to say, converted from sacred to secular uses, and so far as these lands could have been regarded as temporalities, that is, profane property belonging to the church or its ecclesiastics, that decree changed their condition.

And, as many years before the sale in question, the lands of this pueblo and mission were abandoned, it would seem that they thus became a part of the public domain of the nation, and that as such the only laws applicable to their disposal were the laws of the nation in relation to its vacant public lands, to which the proceedings in this instance do not purport to have conformed or to have been made under them.

We concur with the court of private land claims that in either *view there was a fatal [260]
want of power in the departmental treasurer to make the sale, and it is not asserted in the petition, nor was any evidence introduced to show that his action was participated in or ratified by the governor, or by the national government in any manner. And this is not a case in which the sale and grant can be treated as validated by presumption.

Decree affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *et al., Plffs. in Err.,*

v.

PATRICK R. SMITH.

(See S. C. Reporter's ed. 260-276.)

Grant to railroad company—extent of occupation.

1. The occupation and survey of lands with intent to locate a town site thereon, but without filing a plat or obtaining the adoption of the town site or a patent therefor until after a railroad is located thereon, does not prevent the land from being a part of the public domain for the purposes of a grant to the railroad company.
2. The fact that only 25 feet in width of its right of way has been occupied for railroad purposes, under a grant of 200 feet on each side of the track, does not prevent a railroad company from claiming the full width of the grant as against persons who had occupied the premises for the purpose of making a town site location thereof, but had not acquired a right thereto as against the railroad company when the road was built.

[No. 93.]

Argued November 4, 5, 1897. Ordered for Reargument January 10, 1898. Reargued March 21, 1898. Decided May 31, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of North Dakota, in favor of the plaintiff, Patrick R. Smith, in an action brought by him against the Northern Pacific Railroad Company to recover the pos-

NOTE.—*As to pre-emption rights,* see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

session of land in the city of Bismarck and territory of Dakota, now state of North Dakota. *Judgments of the Circuit Court of Appeals and of the Circuit Court reversed,* and cause remanded to the latter court with directions to enter a judgment in favor of the defendants.

See same case below, 19 U. S. App. 131, 58 Fed. Rep. 513, 7 C. C. A. 397.

Statement by Mr. Justice **Shiras:**

This was an action brought by Patrick R. Smith on the 28th day of December, 1891, in the circuit court of the United States for the district of North Dakota against the Northern Pacific Railroad Company. The complaint and answer were as follows:

"The complaint of the above-named plain-
[261] tiff respectfully *shows to this court and alleges that the plaintiff is, and ever since the organization of the state of North Dakota has been, a citizen thereof and that prior thereto he was during all the time hereinafter mentioned a citizen of the territory of Dakota.

"That during all the time hereinafter mentioned the above-named defendant has been and still is a corporation created by and existing under and in virtue of an act of the Congress of the United States of America, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route,' approved July 2, 1864.

"That on the 14th day of September, A. D. 1876, the plaintiff became and ever since has been and still is duly seised in fee simple and entitled to the possession of the following-described real property situated in the city of Bismarck, in the county of Burleigh and territory of Dakota (now, and since the organization thereof under a state government, the state of North Dakota), to wit: Lots numbered five, six, seven, eight, nine, ten, eleven, and twelve, in block number eight, according to the recorded plat of the city of Bismarck, Dakota Territory, together with the hereditaments, privileges, and appurtenances thereof and thereto belonging.

"That said defendant more than six years prior to the commencement of this action wrongfully and unlawfully went into possession of the premises above described. That said defendant ever since said entry has wrongfully and unlawfully retained and withheld, and still does wrongfully and unlawfully retain and withhold, the possession thereof from the plaintiff. And that the use and occupation thereof during said time was worth at least five thousand dollars a year. That the damage to the plaintiff by the wrongful withholding of the possession of the premises as aforesaid is the sum of thirty thousand dollars.

"Wherefore the plaintiff demands judgment against said defendant for the possession of said premises and for the sum of thirty thousand dollars, his damages as aforesaid, together with his costs and disbursements herein."

*"The defendant for amended answer to the [262]
complaint herein:

"First. For a first defense, alleges—

"That the land mentioned in the complaint is situated within two hundred feet of the center line of the roadbed of its line of railroad constructed through the state of North Dakota, and has been for more than twenty years in its lawful possession as its right of way, roadbed and depot grounds, and that the same was granted to it as a right of way by the act of Congress described in the complaint.

"Admits that at all times mentioned in the complaint the plaintiff was a resident of the city of Bismarck in the state of North Dakota, and further admits that the defendant is a corporation created by the said act of Congress. Denies each and every allegation in the complaint not hereinbefore specifically admitted, and it specifically denies that by reason of any of the allegations or things in the said complaint set forth the plaintiff has been damaged in any sum whatever.

"Second. For a second defense—

"That on the ninth day of May, 1889, the plaintiff impleaded the defendant in the district court within and for the county of Burleigh, in the sixth judicial district for the territory of Dakota (now the state of North Dakota), for the same cause of action for which he has impleaded it in this action.

"That at the time of the commencement of this action, said action was pending in said court and is still pending therein.

"Third. For a third defense—

"That on the 31st day of January, 1878, the defendant recovered judgment against the plaintiff for the possession of a portion of the property described in the complaint, to wit, that portion thereof described as lots eleven and twelve, for six cents damages and for $——— costs, and that said judgment was rendered upon the cause of action mentioned in the complaint, which judgment is in full force, unreversed, and unsatisfied.

"Wherefore, the defendant demands judgment: 1st. That the complaint be dismissed. 2d. For its costs and disbursements in this action."

*The findings of fact and law made by the [263]
trial court were as follows:

"The property in controversy, the same being eight lots in the city of Bismarck in North Dakota, described as lots five (5) to twelve (12) both inclusive, in block eight (8), in the city of Bismarck, which was formerly known as Edwinton, and the name of which was changed by act of the legislature of the territory of North Dakota to 'Bismarck,' was part of an eighty (80) acre tract of land which was entered by John A. McLean as mayor of the city of Bismarck, in behalf of its inhabitants, under the town-site act (Revised Statutes, § 2387), and was patented to him thereunder July 21, 1879.

"The corporate authorities of that city subsequently and more than six years prior to the commencement of the action conveyed these lots to Patrick R. Smith, the plaintiff.

"The eighty (80) acre tract, on which these lots were situated, was selected as the location of a portion of this town site, and surveyed prior to June 20, 1872. In the year 1872 the attorney of the Lake Superior & Puget Sound Land Company—the company that first made this selection—commenced and thereafter continued to sell lots upon this town site according to a plat thereof, which was then made, and subsequently, on February 9, 1874, recorded in the office of the register of deeds of the county in which the land was situated. By the first of January, 1873, thirty buildings had been erected on the town site, and from that time until the patent was issued the population of the city and the improvements in it continued to increase. It was upon the town site thus selected and the plat thus made, which was afterwards adopted as the plat and site of the city of Bismarck, that the patent to McLean was based, and this patent contained no reservation of any right of way to the Northern Pacific Railroad Company.

"The congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof filed in the General Land Office in March, 1873.

"On February 21, 1872 the Northern Pacific
[264] Railroad *Company filed in the Department of the Interior the map of its general route east of the Missouri river. This route passed about three quarters of a mile south of this eighty-acre tract. On May 26, 1873, it filed with the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and he accepted, its map fixing the definite location of its line. The Interior Department thereupon designated such line upon its record maps for its use, and copies of such record maps were forwarded to and remain on file in the office of the register and receiver of the land office at Bismarck, having jurisdiction of that part of the public domain embracing the premises in question. The line thus fixed passed about two miles south of this eighty-acre tract. During the year 1872 grading was done by the company on this line extending in a continuous line from its grading east of the township in which this tract was located to a point one-quarter of a mile west of the west line of this eighty-acre tract extended south to its intersection with the grading. During the year 1872 there was a line staked out across this tract substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the year 1873 the railroad was constructed across this tract and has since remained and been operated upon it. The grading on its line of definite location two miles south was abandoned. The lots in question are within two hundred feet of the main track of this railroad as actually constructed and more than two miles from its line of definite location as shown on its map filed to definitely fix this line, and have been occupied by the defendant, through its tenants, during the period in question; but no part of the same, except the rear twenty-five feet thereof, has ever been occupied for railroad purposes.

"In the year 1877 the defendant commenced an action in the district court of Burleigh county, territory of Dakota (now the state of North Dakota), in which county the premises next hereinafter described were and are situated, against certain parties, including the plaintiff herein, to recover the possession of part of the premises here in question, which portion is particularly described as follows:
Commencing at the *southeast corner of Main [265]
and Third streets in the city of Bismarck, the same being the northwest corner of block eight (8), running thence east along the south line of said Main street, a distance of fifty (50) feet; thence south, parallel with the east line of said Third street, a distance of seventy-five (75) feet to said east line of said Main street, a distance of fifty (50) feet, to said Third street; thence north, along said east line of said Third street, a distance of seventy-five (75) feet to the place of beginning. And such proceedings were duly had in said action in said court (the same being a court of competent jurisdiction of the parties and subject-matter of said action) that the defendant in the action herein (the plaintiff in the action last above referred to) duly recovered in said action a judgment against the defendants in that action including the plaintiff in this action, for the possession of the premises last above described and for nominal damages for the withholding thereof.

"That the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action, is the sum of twenty-six thousand dollars.

"From the foregoing facts I find, as conclusions of law, that the plaintiff is entitled to the possession of the premises above described, and to recover from the defendant the sum of twenty-six thousand dollars with interest thereon from the 28th day of December, A. D. 1891, at the rate of seven per cent per annum, and his costs and disbursements."

Mr. **C. W. Bunn** for plaintiff in error on both arguments. *Mr. C. W. Holcomb* filed a supplemental brief for plaintiff in error by leave of the court.

Mr. **Hiram F. Stevens** for defendant in error on both arguments.

Mr. Justice **Shiras** delivered the opinion of the court:

By the second section of the act of July 2, 1864, creating the Northern Pacific Railroad Company, there was granted *to that com- [266]
pany, its successors and assigns, the right of way through the public lands to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain.

During the year 1872 there was a line staked out across the tract, a portion of which is in dispute in this case, substantially where the railroad is now constructed, but no grading was done on this line until the spring of 1873. In the latter year the rail-

road was constructed across this tract, and has since remained and been operated upon it. The lots in question are within 200 feet of the main track of this railroad as actually constructed, and have been occupied by the defendant during the entire period since the construction of the road, excepting lots eleven and twelve, which during about three years were in the adverse possession of the firm of Browing & Wringrose and of Patrick R. Smith, the defendant in error, as the tenant of said firm.

In 1877 an action of ejectment, to recover possession of said lots eleven and twelve, was brought by the Northern Pacific Railroad Company, in the district court of the territory of Dakota against Browing & Wringrose and said Patrick R. Smith, which action resulted, on January 31, 1878, in a final judgment, still subsisting, against said Smith and the other defendants.

On the trial of the present action, which was brought in the circuit court of the United States for the district of North Dakota in 1893, and which brought into question the title and possession of lots five, six, seven, eight, nine, and ten, as well as of lots eleven and twelve, the plaintiff, Patrick R. Smith, set up, as the basis of his title and right of possession, a deed of conveyance by the corporate authorities of the city of Bismarck of the said lots as part of a town-site plat patented to John A. McLean, as mayor of said city, on July 21, 1879. The record does not disclose a copy of such deed to Smith, nor its date. In his complaint Smith alleged that "on the fourteenth day of September, A. D. 1876, he became and ever since has been and still is duly seised in fee simple and entitled to the possession" of the property in
[267] dispute. *In the findings it is stated that the city authorities conveyed these lots to Patrick R. Smith, the plaintiff, *subsequently* to the granting of the patent to the mayor on July 21, 1879.

The defendant, the Northern Pacific Railroad Company, at the trial relied on its grant of right of way from the United States on June 2, 1864, on its possession of lots six, seven, eight, nine, and ten since the construction of the railroad in 1873, and of lots eleven and twelve since their recovery under the action and judgment in 1878, and the company likewise put in evidence the record of said suit and recovery as constituting *res judicata.*

The learned judge of the circuit court, after stating the foregoing facts, and some others not necessary to be here mentioned, entered judgment that the plaintiff was entitled to recover the possession of all of said lots and the sum of $26,000, as the value of the use and occupation of the premises in question, for six years prior to December 28, 1891, the date of the commencement of the action; and that judgment was affirmed by the circuit court of appeals. 32 U. S. App. 573.

When it was made to appear that, by the 2d section of the act of June 2, 1864, there was granted to the Northern Pacific Railroad Company a right of way through the public lands, to the extent of 200 feet in width on each side of said railroad; that, in pursuance of said grant, the railroad company had constructed its road in 1873, including in its right of way the land in dispute; that, on November 24, 1873, commissioners, appointed under the 4th section of said act, reported that they had examined the Dakota division of said railroad (including that portion of the same which covered the land in controversy) and that they had found its construction and equipment throughout to be in accordance with the instructions furnished for their guidance by the Interior Department, and accordingly recommended the acceptance of the road by the government; that said report had been, on December 1, 1873, approved by the President; and that the company had maintained and operated said railroad since its said construction to the time of trial, undoubtedly *there was thus disclosed a prima facie title [268]
and right of possession of the disputed tract.

To overthrow the railroad company's case the plaintiff depended on an alleged conveyance made to him after July 21, 1879, by the city authorities of the city of Bismarck, of the lots in dispute in this suit, and gave evidence that the 80-acre tract on which these lots were situated was selected as a portion of a town site and surveyed prior to June 20, 1872, by the Lake Superior & Puget Sound Land Company, and that said land company made and, on February 9, 1874, recorded, a plat thereof, and that said town site and plat was afterwards adopted as the town site of the city of Bismarck under the town site act of the United States (§ 2387, Rev. Stat.) and was patented as such town site to John A. McLean, mayor of said city, on July 21, 1879. The congressional township embracing the premises in question was surveyed in the months of October and November, 1872, and the plat thereof was filed in the General Land Office in March, 1873.

It is evident that when in 1873 the Northern Pacific Railroad Company took possession of the land in dispute, as and for its right of way, and constructed its road over and upon the same, if the tract so taken was then part of the public lands, only the United States could complain of the act of the company in changing the location of its tracks from that previously selected. But, so far as this record discloses, the United States did not object to such change of location, but rather, by having, through the commissioners and the President, approved and accepted this part of the road when constructed, must be deemed to have acquiesced in the change of location as properly made.

But was the land in question part of the public domain in the spring of 1873? It certainly was, unless the occupation, at that time, of those who afterwards, in 1879, obtained a patent for a tract of 80 acres, including the land in question as part thereof, for a town site, deprived it of that character.

It has frequently been decided by this court that mere occupation and improvement

[269] on the public lands, with a view *to pre-emption, do not confer a vested right in the land so occupied; that the power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts in cases where the land has ceased to be government property by reason of a right vested in some person or corporation, that such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser. *Frisbie* v. *Whitney*, 9 Wall. 187 [19: 668]; *The Yosemite Valley Case*, 15 Wall. 77 [21: 82]; *Buxton* v. *Traver*, 130 U. S. 232 [32: 920]; *Northern Pac. R. R. Co.* v. *Colburn*, 164 U. S. 383 [41:479].

If, then, one seeking to appropriate to himself a portion of the public lands cannot, no matter how long his occupation or how large his improvements, maintain a right of possession against the United States or their grantees, unless he has, by entry and payment of purchase money, created in himself a vested right, is one who claims under a town-site grant in any better position?

No cases are cited to that effect; nor does there seem to be any reason, in the nature of things, why rights created under a town-site settlement should be carried back, by operation of law, so as to defeat the title of a party who had, under color of right, taken possession and made valuable improvements before the entry under the town-site act.

It is one of the findings of fact that, in the year 1872, the Lake Superior & Puget Sound Land Company occupied a tract of land, including within its boundaries the land in dispute, but it is also found that no plat thereof was filed in the register's office until February 9, 1874, a year after the railroad company had gone into possession and constructed its road, and that the patent was not granted to the mayor in behalf of the city of Bismarck till July 21, 1879. It is also one of the findings that the corporate authorities did not convey these lots to Patrick R. Smith till *after* the grant of the patent.

The record contains no copy of the deed to Smith, nor statement of any consideration paid by him, nor of the date when, if ever, he went into actual possession.

[270] *In such a state of facts will the law overturn the title of the railroad company by imputing to Smith the antecedent possession of the Lake Superior & Puget Sound Land Company? Whatever may be his rights to the land outside of that in possession of the railroad company, must it not be inferred that he bought subject to the public highway? It is found that in the month of June, 1873, the railroad had been constructed across this tract, and has since remained and been operated upon it; and it is hard to imagine what notice more distinct and actual could be given than that afforded by the operation of a railroad. Moreover, this record discloses that Smith on or about November 1, 1876 (more than three years after the completion of the railroad), went into possession of a portion of the land in dispute as a tenant of other parties, and that he was ousted therefrom by a final judgment in an action of ejectment at the suit of the railroad company on January 31, 1878.

Apart from the legal effect of that judgment as *res judicata*, it is thus quite apparent that Smith thereby was visited with notice of the claim of the railroad company.

But suppose it be conceded, for the sake of the argument, that the Lake Superior & Puget Sound Land Company made the first entry, and that the city of Bismarck and Smith as its grantee could avail themselves of such entry, still the proof is that the railroad company completed its road over the land before the town site was patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the government obtained a grant of the right of way, which was at least perfectly good as against the government. And be it further conceded, but not decided, that the railroad company when it changed its route, after the filing of its map of definite location, lost its priority of right under the grant of the act of 1864 as against subsequent grantees of the United States who obtained title before the actual construction of the railroad, and that the railroad company could only legally proceed under the exercise of its right of eminent domain, it still *remains, as we think, [271]
under the facts of this case, that Smith could not maintain his present action seeking to oust the company from possession of its right of way and railroad constructed thereon.

There is abundant authority for the proposition that, while no man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, yet that the property holder, if cognizant of the facts may, by permitting a railroad company, without objection, to take possession of land, construct its track, and operate its road, preclude himself from a remedy by an action of ejectment. His remedy must be sought either in a suit in equity, or in a proceeding under the statute, if one be provided, regulating the appropriating of private property for railroad purposes.

Such were the facts in the case of *McAulay* v. *Western Vermont R. R. Company*, 33 Vt. 311 [78 Am. Dec. 627], and where Chief Justice Redfield delivered the opinion of the court, a portion of which we quote:

"It being admitted, as it seems to be, that the plaintiff had full knowledge of the proceedings of the company to construct and locate their road upon his land, before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purposes of the road otherwise than by forbidding the hands working on the road until his damages were paid, and that only on one occasion, it becomes an important inquiry whether he can maintain ejectment for the land by reason of the nonpayment of his damages.

. . . It is undoubtedly true that, according to our general railroad statutes and the special charters in this state, the payment or deposit of the amount of the land damages assessed or agreed is a condition precedent to the vesting of the title, or of any right in the company to construct their road, and that if they proceed in such construction without this, they are trespassers. And this has been repeatedly so held by this court.

"This may have led to the misapprehension in the present case, but it certainly is a very
[272] serious misapprehension. In*these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire an important interest in its continuance. The party does not, of course, lose his claim or the right to enforce it in all proper modes. He may possibly have some rights analogous to the vendor's lien in England, and here till the legislature cut it off. But it is certain, according to the English decisions, that he cannot stop the work, and especially the trains upon the road, if he has in any sense, for the shortest period, clearly given to the company, either by his express consent, or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation. . . . If there was, then, a waiver in fact, either express or implied, by acquiescence in the proceedings of the company to the extent of not insisting upon payment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the roadbed, as the law may turn out to be, then it is impossible to regard the defendants in any sense in the light of trespassers or liable in ejectment."

Justice v. *Nesquehoning Valley R.R.Co.* 87 Pa. 28, was a case where a railroad company was a trespasser, and its entry upon land not in conformity with law, and it was held that these irregular proceedings did not operate as a dedication to the landowners of the property of the company, placed upon the land, so as to entitle said landowners to include said property in an assessment of damages under the railroad law, and recover their value as an accession to the value of the land taken by the company. In delivering the opinion of the supreme court, Chief Justice Agnew said:

"This is not the case of a mere trespass by one having no authority to enter, but of one representing the state herself, clothed with the power of eminent domain, having a right to enter, and to place these materials on the
[273] and taken for a public *use—materials essential to the very purpose which the state has declared in the grant of the charter. It is true the entry was a trespass, by reason of the omission to do an act required for the security of the citizen, to wit, to make compensation or give security for it. For this injury the citizen is entitled to redress. But his redress cannot extend beyond his injury. It cannot extend to taking the personal chattels of the railroad company. They are not his and cannot increase his remedy. The injury was to what the landholder had himself, not to what he had not. Then why should the materials laid down for the benefit of the public be treated as dedicated to him? In the case of a common trespasser the owner of the land may take and keep his structures, *nolens volens*, but it is not so in this case; for though the original entry was a trespass it is well settled that the company can proceed, in due course of law, to appropriate the land, and consequently to reclaim and avail itself of the structures laid thereon."

In *Provolt* v. *Chicago, R. I. & Pac. R. R. Co.* 57 Mo. 256, it was held that the conduct of a landholder in standing by while a railroad company constructed its road, precluded him from recovering physical possession of the land covered thereby. Judge Wagner, after quoting with approval the language of Chief Justice Redfield in *McAulay* v. *Western Vermont Railway Co.*, hereinbefore cited, said:

"The plaintiff did not attempt to obstruct or in any wise impede the progress of the work. The plain inference was that he waived his right for prepayment of his damages and only intended to follow his remedy on his judgment. His conduct surely led the company to believe such was his purpose and induced them to pursue a course and expend large sums of money which, otherwise, they would not have done. If plaintiff intended to rely on his rights and make present payment a condition precedent he should have objected and forbidden the company to interfere or to do any work on his land till the question of damage was settled. But this he did not do. He acquiesced in the proceedings of the company to the extent of not insisting upon the prepayment as a condition* precedent; and af- [274]
ter having done so, we do not think that he can maintain ejectment.

"If from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. 2 Redf. Am. Railw. Cas. 2d ed. 353. But the only question we are called upon to decide is whether under the facts and circumstances of this case ejectment will lie, and we think it will not."

A similar question was decided in the case of the *Omaha and Northern Nebraska R. W. Co.* v. *Redick*, 16 Neb. 313. This was an action of ejectment for the possession of a 40-

acre tract of land brought by a landowner against a railroad company, which had constructed its road over said tract. It seems that the plaintiff, as one of the directors of the railroad company, had known that the company was constructing its road across his lands and had remained quiet. The court said:

"It is true that under the Constitution and laws of this state the assessment of damages and payment or deposit of the amount is a condition precedent to the vesting of the title or of any right of the company to construct their road. But these conditions are susceptible of being waived. . . . Whatever right the plaintiff may have against the railroad company, growing out of this right of way question, and whether he is estopped *in pais* to assert any and all of them, it seems clear that he is not entitled to a judgment that would enable him to sever a line of commerce which by his assent, if not through his active agency in part, was constructed over this same property, and has enjoyed free passage over it for at least seven years."

[275] *The same conclusion was reached in *Lexington & Ohio R. R. Co.* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette, H. & O. R. R. Co.* 41 Mich. 336; *Cairo and Fulton R. R. Co.* v. *Turner*, 31 Ark. 494; *Pettibone* v. *La Crosse and Milwaukee R. R. Co.* 14 Wis. 443; *Chicago and Alton R. R. Co.* v. *Goodwin*, 111 Ill. 273 [53 Am. Rep. 622]; *Kanaga* v. *St. Louis, L. & W. Ry. Co.* 76 Mo. 207; *Dodd v. St. Louis & H. Ry. Co.* 108 Mo. 581; *Evansville & T. H. Ry. Co.* v. *Nye*, 113 Ind. 223.

This subject was fully considered by this court in the case of *Roberts* v. *Northern Pac. R. R. Co.* 158 U. S. 1 [39: 873], where, upon the foregoing authorities and others, it was *held* that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages.

Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the town site, nor its grantee Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending 200 feet on each side of its said road. The finding of the trial court, that only 25 feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only 25 feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within 200 feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise character of the business *carried on by such tenants [276] is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action.

These views dispose of the case, and render it unnecessary to determine whether the trial of the title of lots eleven and twelve, in the action between the railroad company and Smith, as a tenant of Browning & Wringrose, resulting in a final judgment, was well pleaded as *res judicata* in the present action.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to enter a judgment in favor of the defendants.

Mr. Justice **Gray** and Mr. Justice **White** concur in the judgment of the court only on the ground first stated in the opinion of the court, that is, the sufficiency of the title of the railroad company.

Mr. Justice **Harlan** dissents.

Brewer, J., concurring specially: I concur in a reversal of the judgments below but not in all the conclusions reached in the foregoing opinion, nor in the direction to enter judgment for the defendant. I think the estoppel relied on goes only to the ground actually occupied by the railroad company with its tracks, station houses, and other buildings used exclusively for railroad purposes, and does not extend to the entire 400 feet of the right of way which the company claims under the congressional grant. It may be that a large portion of this tract is in only the constructive possession of the company, or it may be occupied by buildings not used exclusively for railroad purposes, and as to all such ground I do not think any estoppel extends.

I am also of the opinion that the legal title conveyed by the town-site patent and the deed to plaintiff must prevail in this action at law over any equities the company may have acquired by occupancy.

JUAN PEDRO CAMOU, *Appt.*, [277]

v.

UNITED STATES.

(See S. C. Reporter's ed. 277-291.)

Authority of Mexican states to sell vacant public lands—decree of Santa Anna.

1. The several states in Mexico had in 1833 au-

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

thority to make sales of vacant public lands within their limits, which sales must be recognized by this government under the treaty of 1853.

2. The decree of Santa Anna on November 25, 1853, while he was temporary dictator, and shortly before the Gadsden treaty was made with him by the United States, whereby he declared that alienations of public lands by the several states without approval of the general government are null, will not preclude the recognition of such a claim which had become a vested right at the time of his decree, when the grantee was never disturbed in his possession, nor any adjudication made of the nullity of his grant on account of such decree.

[No. 28.]

Argued March 16, 1898. Decided May 31, 1898.

APPEAL from a decree of the Court of Private Land Claims in behalf of the United States, defendant, dismissing the petition of Juan Pedro Camou, plaintiff, to have confirmed to him a tract of land in the county of Cochise in the territory of Arizona, known as the San Rafael del Valle grant, and adjudging the petitioner's claim and title invalid. *Reversed,* and case remanded for further proceedings.

Statement by Mr. Justice **Brewer:**

On December 3, 1891, the appellant filed in the court of private land claims his petition praying to have confirmed to him a certain tract of land situate in the county of Cochise, in the territory of Arizona, known and designated as the San Rafael del Valle grant. Subsequent proceedings resulted in a trial and a decree in behalf of the government, dismissing the petition and adjudging petitioner's claim and title invalid. The title papers show that on March 12, 1827, Rafael Elias made application to the treasurer general of the state of Sonora for the purchase of "public lands adjacent to the ranch of San Pedro, within the jurisdiction of Santa Cruz, as far as the place called Tres Alamos." On July 1 of that year the treasurer general directed that proceedings be had in accordance with law under the supervision of the alcalde of Santa Cruz. The proceedings appear to have been regular. The survey was of a tract reported by the surveyors to contain four sitios. The property was appraised at $60 a sitio, or $240 altogether. The fiscal attorney approved the proceedings and advised that they "be continued to adjudication according to the forms and requisites in use." At the third auction, on April 18, 1828, the property was struck off to Don Rafael Elias, the petitioner, for the sum of $240. On April 21 the petitioner paid this sum into the treasury. Nothing further was done until April 29, 1833, at which time the then treasurer general of the state of Sonora issued the expedicnte, or title papers. This expediente opens with this preamble:

[278] *Jose Maria Mendoza, Treasurer General of the Free, Independent, and Sovereign State of Sonora, Greeting:

Inasmuch as article 11 of the sovereign decree number 70 of the general congress of the union, dated August 4th of 1824, concedes to the states the revenues which in said law it did not reserve for the federation itself, and one of them being that derived from the lands within their respective territories, which in consequence belongs to them, for the disposition of which the honorable constitutive congress of the state that used to be joined of Sonora and Sinaloa enacted the law No. 30 of May 20th of 1825, as well as the decrees relative thereto passed by other succeeding legislatures, and the citizen Rafael Elias, a resident of this capital, having made due application on the 12th of March of 1827, at the treasury general that was then of the United States, for the lands named San Rafael del Valle, located in the jurisdiction of the presidio of Santa Cruz, which was allowed according to law on the date of July 1st of the same year, and the petition of entry, the order for the commission, and the act of accepting the charge being as follows, to wit [and after reciting the various steps in the sale closes with the granting clause]:

In which terms I issue the present title of grant in due form in favor of the citizen Rafael Elias, his heirs and successors, delivering it to them for their protection, previous memorandum of the same being entered in the proper book.

Given at the capital of Arispe on the twenty-fifth day of the month of December of one thousand eight hundred and thirty-two.

Attested and signed by me, sealed with the seal of the treasury general, before the undersigned witnesses of my assistance, with whom I act in default of clerk, there being none, according to law.

Jose Maria Mendoza.

Assistant: Louis Carranco.

Assistant: Bartolo Miranda.

[Seal of the Free State of Sonora, Treasury General.]

*The amount of land within the tract as now surveyed, according to the testimony, is 20,034.62 acres. The petition did not state the area applied for, but as has been seen the survey and appraisement called the tract four sitios, or 17,353.85 acres. [279]

Mr. **Rochester Ford** for appellant.

Messrs. **Matthew G. Reynolds** and *John K. Richards*, Solicitor General, for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

This grant was made in the name of the state of Sonora and by the proper officer of that state, if it had power to make the grant.

The first question, therefore, is as to the power of the state. We held in *United States* v. *Coe*, just decided, 170 U. S. 687 [42: 1195], that from and after the adoption of the Constitution of 1836 no such power was vested in the separate states. But that case

called for no determination of the authority those states possessed prior thereto, and in respect to that matter no opinion was expressed. We have in this case, and that immediately following, *Perrin v. United States*, 171 U. S. 292 [*post*, 169]), elaborate discussions by counsel as to the title to the public lands within the limits of Mexico and the respective rights thereto of the general government and the separate states. On the one hand it is insisted that, as in the case of the thirteen colonies that formed the United States of America, the vacant lands were the property of the states; that as no express cession was made by any Mexican states to the general government the title to those lands remained in the states until at least the formation of the Constitution of 1836, and that each state had therefore the absolute right to dispose of all within its own limits. On the other hand, it is said that, prior to the separation of Mexico from Spain, the lands were the property of the King of Spain, that the separation created a new national government which succeeded to all the rights of the prior sovereign, including therein the ownership of
[280] all vacant lands. We deem *it unnecessary to review this discussion or attempt to settle the disputed question as to the location of the title. In this expediente the treasurer general refers to "article 11 of the sovereign decree number 70 of the general congress of the union," as conceding to the states the revenues derived from the sale of lands within their respective limits, and upon that and law number 30 of the congress of the state relies as the sources of his power to make the conveyance. The state having undoubtedly vested its authority in the treasurer general, the inquiry comes back to the effect of said article 11.

Preliminary thereto we must notice these matters:

The constitutive act of the Mexican federation, adopted January 31, 1824, in articles 5 and 6 declares:

"Art. 5. The nation adopts for the form of its government a popular representative and federal republic.

"Art. 6. Its integral parts are free, sovereign, and independent states, in as far as regards exclusively its internal administration, according to the rules laid down in this act, and in the general Constitution." White, New Recopilacion, p. 375.

On October 4, 1824, a Constitution was established. In it article 49 reads:

"The laws or decrees, which emanate from the general congress, shall have for their object:

"1. To sustain the national independence, and to provide for the preservation and security of the nation in its exterior relations.

"2. To preserve the federal union of the states, and peace and public order in the interior of the confederation.

"3. To maintain the independence of the states among themselves, so far as respects their government according to the constitutive act and this Constitution.

"4. To sustain the proportional equality of obligations and rights which the states possess in point of law." 1 White, p. 393.

And enumerating in article 50 the powers possessed by the general congress, subdivision 31 reads:

"To dictate all laws and decrees, which may conduce to accomplish *the objects spok- [281] en of in the forty-ninth article, without intermeddling with the interior administration of the states." 1 White, p. 395.

Article 137, defining the attributes of the supreme court, names among others:

"1. To take cognizance of disputes which may arise between the different states of the union, whenever there arises litigation in relation to the same, requiring a formal decree, and that arising between a state and one or more of its inhabitants, or between individuals in relation to lands under concessions from different states, without prejudice to the right of the parties to claim the concession from the party which granted it." 1 White, 405.

It cannot of course be pretended that these provisions either operated to transfer the title to vacant public lands from the nation to the respective states or amount to a declaration that the title to such lands is vested in the states. All that can fairly be inferred from them is that the supremacy of the several states in matters of local interest was recognized, and further, that conflicting cessions of lands from different states might be expected and that the settlement of disputes respecting them should be by the supreme court of the nation. These inferences are by no means determinative of the question here presented, and yet it must be conceded that they at least point to some control by the states over vacant lands within their limits, and suggest the exercise by those states of the right to make concessions of those lands.

Two prominent laws of the Mexican nation are the colonization law of August 18, 1824 (1 White, 601; Reynolds, p. 121), and the law in respect to general and special revenues, of August 4, 1824. Reynolds, p. 118. White's translation of articles 1, 2, 3, 10, 11, and 16 of the colonization law, differing slightly from that given by Reynolds, is as follows:

"Art. 1. The Mexican nation offers to foreigners, who come to establish themselves within its territory, security for their persons and property; provided they subject themselves to the laws of the country.

"Art. 2. This law comprehends those lands of the nation, *not the property of individu- [282] als, corporations, or towns, which can be colonized.

"Art. 3. For this purpose the legislatures of all the states will, as soon as possible, form colonization laws or regulations for their respective states, conforming themselves in all things to the constitutional act, general Constitution, and the regulations established in this law."

"Art. 10. The military who, in virtue of the offer made on the 27th of March, 1821, have a right to lands, shall be attended to by the states, in conformity with the di-

plomas which are issued to that effect by the supreme executive power.

"Art. 11. If, in virtue of the decree alluded to in the last article, and taking into view the probabilities of life, the supreme executive power should deem it expedient to alienate any portion of land in favor of any officer, whether civil or military, of the federation, it can do so from the vacant lands of the territories."

"Art. 16. The government in conformity with the provisions established in this law will proceed to colonize the territories of the Republic."

It is not pretended that the grant in question was made under this colonization law, and we only refer to it as showing a recognition by the general government of some authority on the part of the states in reference to the vacant lands. It will be seen that while article 2 speaks of "the lands of the nation," article 3 directs the states to enact colonization laws in conformity to the general provisions of the Constitution. So that the actual management of colonization affairs was put within the control of the states, subject, of course, to the superior dominion of the general government. Article 10 provides that military rights to lands, though created by the nation, shall be attended to by the states, thus implying at least that, for convenience, administration of the vacant lands was intrusted to the states. Obviously the thought here was that there should not be two places in which the administration of the public lands should be carried on, and so in article 11 it was provided that if in the
[283] judgment of the nation it was *expedient to grant to a military or civil officer any public lands, it was to be made from vacant lands in the territories. And, finally, in article 16, as though to separate the administration of the public lands in the states from those in the territories, it is distinctly declared that the national government will colonize the territories of the Republic. As heretofore said, all this, of course, amounts only to assigning to the states the administration of the vacant lands for purposes of colonization.

The other act to which we have referred, the one which is relied upon by the treasurer general as giving authority for this expediente, is that in reference to general and special revenues. It commences with the declaration that the following belong to the general revenues of the federation, and then in ten articles are named revenues derived from different sources, such as import and export duties, tobacco, and powder, etc. The 8th, 9th, 10th, and 11th articles are as follows (Reynolds, p. 118):

"8. That from the territories of the federation.

"9. National property, in which is included that of the inquisition and temporal property of the clergy, or any other rural or urban property that belongs, or shall hereafter belong, to the public exchequer.

"10. The buildings, offices, and the lands attached thereto, which belong or have belonged, to the general revenues and those that have been maintained by two or more of what were formerly provinces, are at the disposal of the government of the federation.

"11. The revenues not included in the foregoing articles belong to the states."

The 8th article gives to the national government all the revenues derived from the territories. Obviously the entire management of the affairs of the territories was reserved to the general government, and any revenue derived therefrom passed into the general treasury.

The 9th article is indefinite in that it fails to define what is national property. It assumes that certain things pass within the description of national property, and affirmatively includes within that description the property taken from *the clergy. The lan- [284]
guage used is broad enough to include all public lands within the limits of the nation, and yet if it was intended to include such lands it would seem scarcely necessary to add the clause, including those taken from the clergy. Certain is it that according to our methods of legislation, and our use of language, this article would not be considered as defining the property the revenues from which it assigns to the national government. The 10th article seems to have little significance in this connection, and refers obviously to public buildings and the grounds attached, and not to vacant public lands. While the 11th article concedes to the states revenues not included in the foregoing articles, it does not define those revenues, and depends for its scope upon the significance and force of the prior articles. If these articles were all that called for consideration it would be difficult to infer from them that the vacant public lands were given to the states for purposes of sale or for appropriation of the proceeds of such sales. But in the same statute is a provision that "the sum of $3,136,875, estimated as the deficit in the general expenses, shall be apportioned among the states of the federation," and following that is the apportionment. Other sections required delivery by the states every month of their part of the above apportionment and the final adjustment of the amount thereof between the government and the states. Of course this implies that within the limits of the state there were certain matters of revenue reserved, out of which the states were to collect the sums apportioned to them, and to return the same to the general treasury. Subsequent legislation throws light upon the meaning of this revenue law. Thus, on April 6, 1830, a decree was passed, the third article of which is as follows:

"The government shall have power to appoint one or more commissioners to visit the colonies of the frontier states, to contract with their legislatures for the purchase, in the name of the federation, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexican and of other nations, to enter into such arrangements with *the colonies already established [285]
as they may deem proper for the security of the Republic, to see to the exact compliance

with the contracts upon the entry of new colonists, and to examine as to how far those already entered into have been complied with.

"4. The executive shall have the power to take the lands he may consider suitable for fortifications and arsenals, and for new colonies, and shall give the states credit for their value on the accounts they owe the federation." Reynolds, p. 148.

The language of this decree is very significant, and clearly recognizes some title in the states, for why should commissioners be authorized to contract with the legislatures of the states for the purchase of lands which belonged to the nation? It also clearly recognizes the right of the states to sell these vacant lands and apply the proceeds in settlement of the demands made against them by the general apportionment of the revenue law of 1824. It declares that the executive may take the lands he considers suitable for fortifications, arsenals, and for new colonies, and at the same time provides that he shall give the states credit on the amount they owe the confederation. But why should any credit be given if these lands so taken by the executive where the property of the nation, and the states without authority to sell them or receive the proceeds of sales? If during all these years the lands were the property of the nation, were to be held and sold only by the nation, and the proceeds thereof to be accounted for directly to the nation, why should it be decreed that if the nation takes any part of them for arsenals and other public purposes, credit for the value thereof is to be entered upon the amounts due by the states to the nation? We find it difficult to escape the force of this decree of 1830. It indicates that although the language of the revenue decree of 1824 is indefinite, and does not in terms name vacant public lands, yet both the nation and the states understood that its effect was to grant authority to the states to sell such lands and appropriate the proceeds in settlement of the amounts charged against them
[286] by the nation. We see no other *way in which to give reasonable force to the language of this decree of 1830, and it must be held to be a national interpretation of the revenue decree of 1824.

But we are not limited to this authoritative national exposition of the meaning of the revenue law of 1824. The testimony in the several cases of a similar nature now before us, including therein the reports of the officers of this government sent to examine the archives of Mexico, discloses that the state of Sonora at least assumed that the revenue act of 1824 authorized its disposal of the vacant public lands, and acting on that assumption did in a multitude of cases make sales thereof. In this connection it may be observed that the Constitution of the state of Sonora, or State of the West, declares, article 47, that the right of selling lands belongs to the state. This Constitution bears date May 11, 1825. Law No. 30 of that state, of May 20, 1825, the law referred to by the treasurer general in the expediente, recites that "the congress has seen fit to decree the following provisional law for the purchase of the lands of the state." Subsequent legislation of the state is in the same line.

Further, §§ 8 and 9 of article 161 of the national Constitution of 1824 made it the duty of each Mexican state:

"To present annually to each one of the houses of the general congress a minute and comprehensive report of the amounts that are received and paid out at the treasuries within their limits, together with a statement of the origin of the one and the other, and touching the different branches of agriculture, commercial and manufacturing industries," etc.

And also,

"To forward to the two chambers (of the federal government) and when they are in recess, to the council of the government, a certified copy of their constitutions, laws, and decrees."

It may be assumed that these requirements of the national Constitution were complied with, and that the constitutions, laws and decrees of the state and the proceedings had in reference to these several sales of land were reported to the congress of the nation. We find no act of that congress setting aside
*such legislation or sales. This is significant, [287]
and it is not inappropriate to refer to *Clinton* v. *Englebrecht*, 13 Wall. 434, 446 [20:659, 662], in which it was said:

"In the first place, we observe that the law has received the implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

We are not insensible of the fact that the provisions of the act of September 21, 1824, creating the office of commissary general, an act which we had occasion to consider in *Ely's Administrator* v. *United States*, 171 U. S. 220 [*ante*, 142] seem to make against the idea of the administration of vacant lands by the states, and it is difficult to work out from all the statutes a consistent, continuous, and harmonious rule. We must in each case endeavor to ascertain what the Mexican government recognized as valid, and when that is done the duty of respecting and enforcing the grant arises. Other matters are referred to by counsel in their briefs, but it would needlessly prolong this opinion to refer to them. Our conclusion is that at the time of these transactions the several states had authority to make sales of vacant public lands within their limits, and that such sales, unless annulled by the national government, must be considered as grants to be recognized by this government under the terms of the treaty of 1853.

We pass, therefore, to a consideration of the effect of the decrees of Santa Anna. The

lands in controversy were obtained from Mexico under what is known as the Gadsden treaty of 1853. This treaty was concluded on December 30, 1853, and ratified June 30, 1854. At the time of the treaty Santa Anna was supreme executive and virtually dictator in Mexico, and the treaty was negotiated with him. On November 25, 1853, only about a month before the signing of the Gadsden treaty, he published this decree:

[288] *"Art. 1. It is declared that the public lands, as the exclusive property of the nation, never could have been alienated under any title by virtue of decrees, orders, and enactments of the legislatures, governments, or local authorities of the states and territories of the Republic.

"2. Consequently, it is also declared that the sales, cessions, or any other class of alienations of said public lands that have been made without the express order and approval of the general powers in the manner prescribed by the laws are null and of no value or effect.

"3. The officials, authorities, and employees upon whom devolves the execution of this decree, shall proceed as soon as they receive it to recover and take possession, in the name of the nation, of the lands comprehended in the provisions of article 1, and that may be in the possession of corporations or private individuals, whatever may be their prerogatives or position.

"4. The judicial, civil, or administrative authorities shall admit no claims of any kind nor petitions whose purpose is to obtain indemnifications from the public treasury for the damages the unlawful holders or owners may allege under the provisions of the preceding article; and they shall preserve their right only against the persons from whom they have the lands they are now compelled to return." Reynolds, p. 324.

On July 5, 1854, he published another decree, which was even more specific, containing these provisions:

"Art. 1. The titles of all the alienations of public lands made in the territory of the Republic from September, 1821, till date, whether by the general authorities or by those of the extinguished states and departments, shall be submitted to the revision of the supreme government, without which they shall have no value and shall constitute no right of property.

. . . .

"5. The alienations of public lands, of whatever nature they be, that have been made by the authorities and officials of the departments without the knowledge and approval of the general government, during the epoch when the central system was in force in the Republic, are void.

[289] *"6. Those made by said authorities in the epoch of the extinguished federation are likewise void; provided they were not made for the purpose of extending and promoting colonization, which was the purpose proposed by the law of August 18, 1824.

"7. Grants or sales of lands made to private individuals, companies, or corporations under the express condition of colonizing them, and the holders of which have not complied therewith in the terms stipulated, are declared to be of no value." Reynolds, p. 326.

Subsequently, on December 3, 1855, and after Santa Anna had been deposed and while Juan Alvarez was president *ad interim*, a decree containing the following provisions was entered:

"Art. 1. The decrees of November 25, 1853, and July 7th, 1854, which submitted to the revision and approval of the supreme government the grants or alienations of public lands made by the local governments of the states or departments and territories of the republic from September, 1821, to that date, are repealed in all their parts.

"Art. 2. Consequently, all the titles issued during that period by the superior authorities of the states or territories under the federal system, by virtue of their lawful faculties, or by those of the departments or territories, under the central system, with express authorization or consent of the supreme government for the acquisition of said lands, all in conformity with the existing laws for the grant or alienation respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government." Reynolds, p. 329.

And again, on October 16, 1856, a decree was passed while Ignacio Comonfort was president, the first article of which is as follows:

"Art. 1. The decrees of November 25, 1853, and July 7, 1854, are void." Reynolds, p. 331.

The court of private land claims was divided. Three of the justices were of opinion that as this government recognized *Santa Anna in negotiating with and purchasing [290] from him the territory within the Gadsden purchase, the courts must also recognize his declarations in respect to titles as authoritative, citing in support of these general propositions Wheaton's International Law, §§ 31 and 32, and Halleck's International Law, pages 47 and 62. Without questioning the general propositions laid down in these authorities, we are of opinion that too much weight was given to the decree of Santa Anna of November 25, 1853, the only one announced before the cession, and that that decree should not be considered as absolutely determinative of individual rights and titles.

While it is true that practically Santa Anna occupied for the time being the position of dictator, it must not be forgotten that Mexico, since its separation from Spain in 1821, was assuming to act as a republic subject to express constitutional limitations. While temporary departures are disclosed in her history, the dominant and continuous thought was of a popular government under a constitution which defined rights, duties, and powers. In that aspect the spasmodic decrees made by dictators in the occasional interruptions of constitutional government should not be given conclusive weight in the

determination of rights created during peaceful and regular eras. The devestiture of titles once legally vested is a judicial act. In governments subject to ordinary constitutional limitations a mere executive declaration disturbs no rights that have been vested, and simply presents in any given case to the judicial department the inquiry whether the rights claimed to have been vested were legally so vested. Undoubtedly this government dealing with Mexico, and finding Santa Anna in control, rightfully dealt with him in a political way in the negotiation of a treaty and the purchase of territory, and the judicial department of this government must recognize the action of its executive and political department as controlling. But when the courts are called upon to inquire as to personal rights existing in the ceded territory, a mere declaration by the temporary executive cannot be deemed absolutely and finally controlling. It is un-
[291] necessary *to rest this case upon the fact disclosed that these decrees of Santa Anna were immediately thereafter revoked. It is not significant that the substance of them was thereafter re-established. We are compelled to inquire whether prior to such decree there were rights vested, rights which the Mexican government recognized, and then determine whether those rights were by such decree absolutely destroyed.

Turning to the decree of November 25, 1853, the first and second articles are mere declarations of law. The third article directs the officials to proceed to the execution of the decree and to recover and take possession of the lands coming within the scope of the prior articles. It does not appear that any steps were taken by any officials to carry into execution this decree. Whether this particular grant came within the scope of the two declarations of law was a question to be considered and determined. On that question the grantee never was heard. There never was a judicial adjudication that his grant came within the scope of the first two articles. He was never dispossessed. His property was never taken possession of. It is going too far to hold that the mere declaration of a rule of law made by a temporary dictaor, never enforced as against an individual grantee in possession of lands, is to be regarded as operative and determinative of the latter's rights.

As for the reasons heretofore mentioned we are of opinion that a valid grant was made in this case, we think this arbitrary declaration by a temporary dictator was not potent to destroy the title. The decree of the court of private land claims must therefore be reversed. As shown by the statement of facts the survey of the land claimed in the petition is in excess of the four sitios granted and paid for. While the excess is not so great as in many cases, yet we think the rule laid down in *Ely's Administrator* v. *United States*, 171 U. S. 220 [*ante*, 142] should control, and that this government discharges its full duty under the treaty when it recognizes a grant as valid to the amount of land paid for. *The decree of the Court of Private Land Claims will be reversed*, and the case remanded for further proceedings.

ROBERT PERRIN, *Appt.*, [292]
v.
UNITED STATES, Crittenden Land & Cattle Company, *et al.*

(See S. C. Reporter's ed. 292.)

Camou v. *United States*, 171 U. S. 277 [*ante*, 163], followed.

[No. 30.]

Argued March 16, 17, 1898. Decided May 31, 1898.

APPEAL from a decree of the Court of Private Land Claims decreeing that the claim of the plaintiff, Robert Perrin, to a tract of land formerly in the state of Sonora in the Republic of Mexico, but now in the territory of Arizona, known and designated as the Rancho San Ygnacio del Babocomari, described in his petition, is invalid, and dismissing the petition. *Reserved*, and case remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Byron Waters, John T. Morgan,** and *J. H. Meredith* for appellant.

Messrs. **Matthew G. Reynolds** and *John K. Richards*, Solicitor General, for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

So far as the question of title is concerned this case is similar to the one immediately preceding. (*Camou* v. *United States*, 171 U. S. 277 [*ante*, 163]). For reasons therein stated *the decree of the court of private land claims will be reversed*, and the case remanded for further proceedings. It is true, as suggested in its opinion, the court of private land claims thought that there was no sufficient location of the tract in controversy, and that probably the grant was void for uncertainty in the description of the property. It may be that this conclusion was right. At the same time, in view of what has been recently said by this court in respect to boundaries, description and area, we think that justice requires that we reverse the judgment and remand the case for further proceedings. Perhaps the claimants may be able to satisfactorily identify a tract not larger than the area purchased and paid for which should equitably be recognized as the tract granted.

[293] AUSTIN WALRATH, *Appt.*,
v.
CHAMPION MINING COMPANY.

(See S. C. Reporter's ed. 293-312.)

Rights under mining claim—end lines—declarations of superintendent—end lines must be straight.

1. The right to follow a vein on the dip is limited by the end lines of the mining claim, in case of a patent under the act of 1866, as well as in case of a location under the act of 1872.
2. The end lines of a mining claim under the act of 1866 must be the end lines of all the veins found within the surface boundaries which are given to the locator by the act of 1872.
3. A corporation is not bound by the declarations of its superintendent outside the scope of his agency or authority, to the prejudice of its property rights.
4. The end lines of a lode mining claim under the act of 1866 must be straight, whether they need to be parallel or not.

[No. 230.]

Argued April 22, 1898. Decided May 31, 1898.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming as modified the decree of the Circuit Court of the United States for the Northern District of California, which was mainly in favor of the complainant, Austin Walrath, in an action brought by him against the Champion Mining Company, for a perpetual injunction, restraining defendants and their agents and servants from entering upon certain lands in the county of Nevada, state of California, and mining therein, and from extracting or removing therefrom any gold bearing quartz. *Affirmed.*

See same case below, 44 U. S. App. 291, 72 Fed. Rep. 978, 19 C. C. A. 323.

Statement by Mr. Justice **McKenna:**

This action, brought in the superior court of Nevada county, California, involves title to a triangular shaped section of what is known as the "Contact," "Ural" or "Back" ledge of gold-bearing ore, situated in the same county, claimed by appellant to be a portion of the Providence Mine, to which complainant has title through a patent from the United States, and by appellee, a corporation, to be a part of the New Years Extension Mine owned by it.

The relative situation of the two properties and the portion of the ledge in controversy is shown by the following figure No. 1; the disputed section being contained between the lines thereon marked "Line claimed by Providence" and "Line claimed by Champion."

[See cut on opposite page.]

The figures marked "New Years" and "New Years Extension" represent the surface of the mining properties owned by defendant. while that marked "Providence Mine" represents the surface of the patented ground of the plaintiff.

The action was brought May 24, 1892, to recover $300,000 damages for ore extracted from the ledge and carried away by the defendant, and for an injunction against further trespasses thereon.

Upon motion of appellee the action was removed to the United States circuit court, as involving a Federal question, where the complainant recast his pleadings so as to separate the action into a bill in equity, upon which the action is now proceeding, and an action at law for the damages alleged.

The suit in equity was tried in the circuit court and decided mainly in favor of the appellee.

From this decree the appellant appealed to the court of *appeals for the ninth circuit, [296]
where it was modified, and, as modified, affirmed.

The appellant now brings the case to this court upon writ of error from the court of appeals.

The appellant's title is deraigned as follows: In 1857, under the miners' rules and customs then in force, thirty-one locators located 3,100 feet of the Providence or Granite lode. By mesne conveyances the title to this location became vested in the Providence Gold & Silver Mining Company and on April 28, 1871, that company obtained a patent to 3,100 feet of the lode and for surface ground as described in the patent.

The title thus granted to the Providence Gold & Silver Mining Company was, before the commencement of this suit, vested in the appellant.

The ledge, as granted by the patent, extends 30 feet north of the north surface line of the location and some 680 feet south of the south surface line.

The patent conveyed only the Providence ledge and the surface ground. All other ledges contained within the surface lines were expressly reserved.

It is also contended by appellants that, by the act of Congress of May 10, 1872, exclusive possession of all the surface included within the lines of the location was granted to the owners of the Providence, together with all other lodes or ledges having their tops or apexes within such surface lines. This grant, of course, included the Contact vein, subsequently discovered within said boundaries, and now constituting the bone of contention in this action.

NOTE.—*As to ownership of mines; United States statutes as to; right of support of surface,*—see note to United States v. Castillero, 17 : 448.

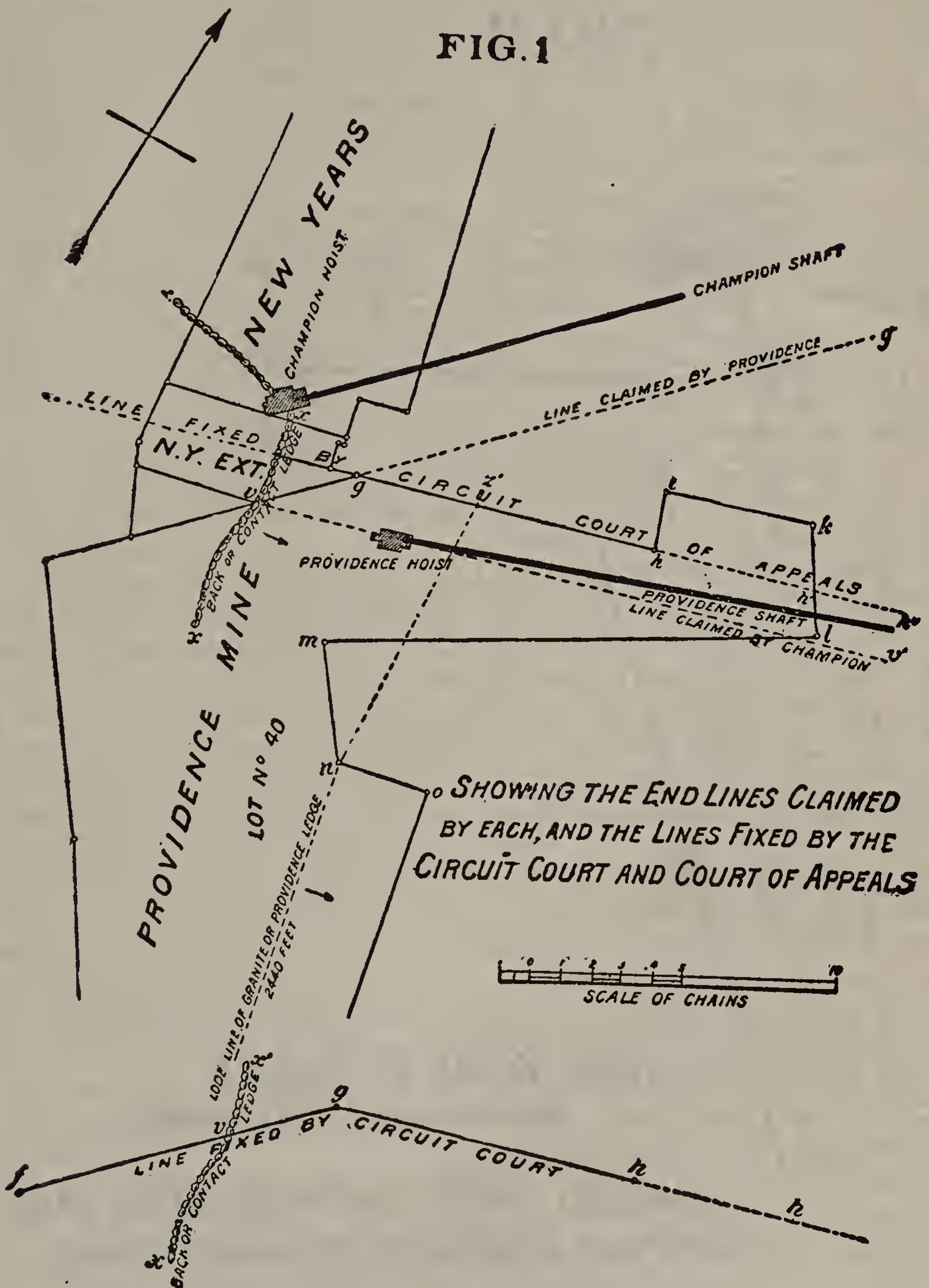
As to title to water by appropriation; common-law rule; rule of mining states,—see note to Atchison v. Peterson. 22 : 414.

The Contact vein is shown in the figure, and crosses the surface line f–g of the Providence location.

On September 29, 1877, the appellee and defendant, the Champion Mining Company, made a location upon the Contact vein called the New Years Extension Mine. This location overlapped, both as to surface ground

[295]

FIG. 1

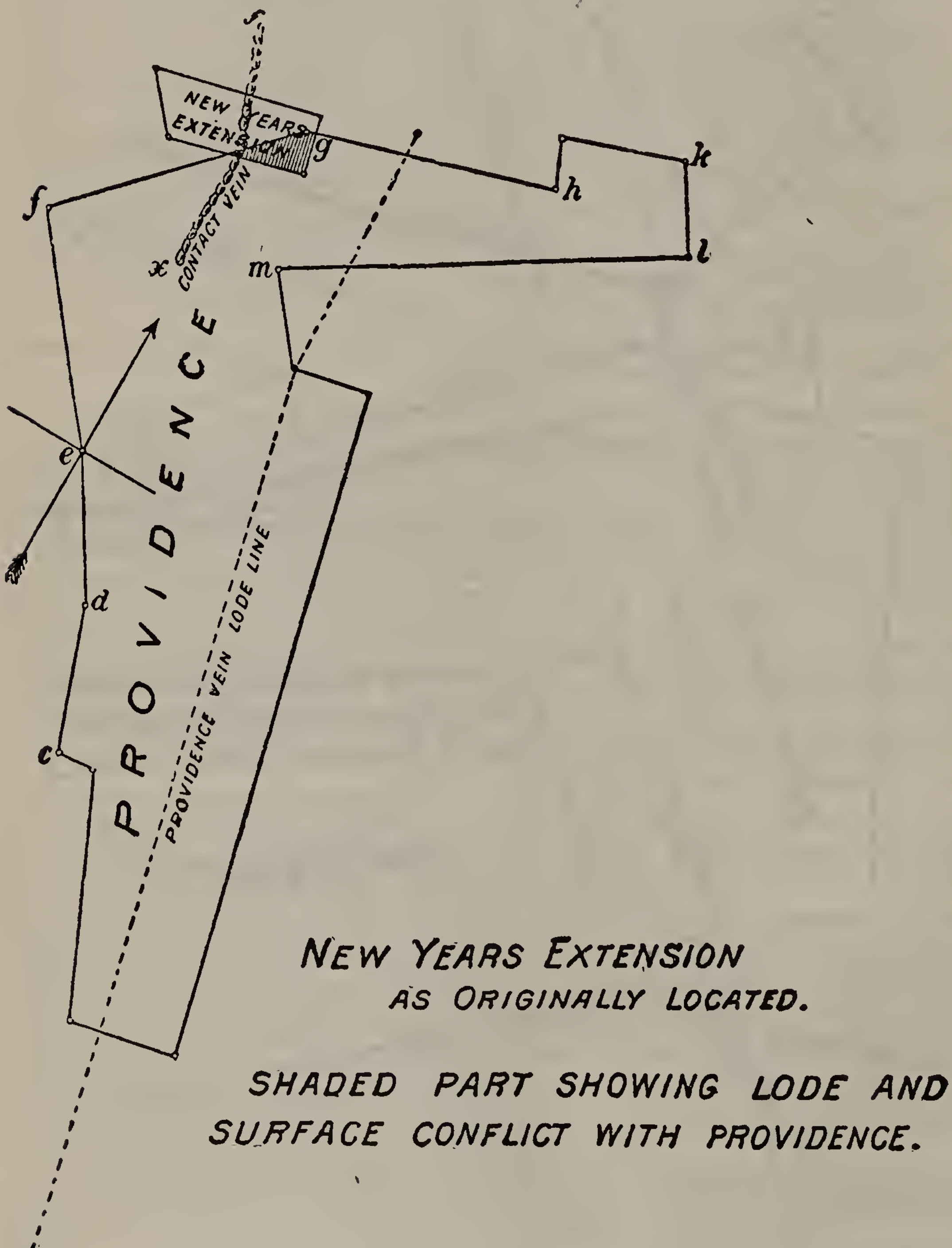


and lode, upon the Providence location; that is, the lode line and surface lines of the said New Years Extension extended to the south of the boundary line *f–g* of the Providence location.

*The New Years Extension Mine is shown [297] in the following figure No. 2, together with the conflict caused by the overlap; the conflicting surface portions being shaded, and showing the Contact vein passing through it.

[298]

FIG. 2



In the year 1884 the complainant and his co-owners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, above described. Thereupon, in the month of November, 1884, John Vincent, the superintendent of the defendant, the Champion Mining Company, under the authority and by the direction of the said company, relocated the New Years Extension Mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited, and the lines were readjusted so as to avoid the overlap and to conform to said line *f–g* of the Providence Mine, as shown on figure 1.

In the notice of relocation the lode line was particularly described as follows: "The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 60 feet S., 11 degrees 45 minutes east of the mouth of the New Years tunnel and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S. 46 degrees 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence Mine, patented designated as Mineral Lot No. 40 for the south end of said lode line."

It also contained the following statement: "And whereas, part of this claim, as originally described and as hereby relocated, conflicts with the rights granted by letters patent of said Providence Mine, said lot No. 40, now, therefore, so much of this claim, both for lode and surface ground, as originally conflicted or now conflicts with any portion of the surface or lode claims or rights granted by said patent, is and are hereby abandoned, which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension Claim for surface and lode which lies south of the
[299] northern boundary line of said *Providence Mine, which runs north 43 degrees 10 minutes east, across the southeastern corner of this claim."

The New Years Extension as relocated is conterminous with the Providence Mine on the northerly boundary line designated as the line *f–g*, running south 43 degrees west. (Fig. 1.)

That line is the only boundary between the two properties, and the only boundary of the Providence location which is crossed by the Contact ledge.

The first workings of the appellee involved no conflict with appellant. The shaft ran parallel with the Providence line, and none of the levels crossed that line until about three months before this suit was begun, when the 1,000-foot level was driven across it into the ground in dispute. Subsequently the eighth and ninth levels were driven across.

The work done by the Providence was carried on through a shaft sunk on the Providence or Granite ledge, from which shaft a crosscut was run back to the Contact vein on the 600 foot level, and another on the 1,250 foot level, and much of the ground now in controversy was thereby prospected and opened up by complainant and his co-owners. (See Fig. 1.)

The claims of the respective parties will be readily understood by reference to Figure 1, which shows the relative position of all the mining properties belonging to both, with the lines claimed by them.

The portion of the Contact vein in dispute is that upon the dip of the ledge lying between the line marked "Line claimed by Providence" and the line marked "Line claimed by Champion."

The apex of the Contact vein is represented by the dotted line x–x^1, and shows the vein as far as exposed in both the Champion and Providence ground. South of x, the course of the vein in the Providence ground is unknown.

The line *f–g* is the same line as that designated A–B by some of the witnesses.

Upon the trial the circuit court held that there could be but one end line for each end of the Providence location, and that the lines *g–h* and *a–p* constituted such end
lines; that *such lines constituted the end [300]
lines of not only the originally discovered Providence lode, but also of every other vein that might be discovered within the surface lines of the location. But, notwithstanding this holding, in entering the decree the line *f–g* was also established as an end line of the Contact vein, but for its length only, and then that from "*g*" the line *g–h*, and that line extended indefinitely eastwardly, constituted another end line for the same end of the lode, and constituted the line through which the plane determinative of all extralateral rights in the vein must be drawn.

From this decree the appellant here was allowed an appeal to the circuit court of appeals.

The latter court established the line g–h–h^1 as the sole line of the Contact vein, and reversed the decree of the circuit court in so far as it fixed the line *f–g* as an end line.

As a result of this decree the complainant was not only shut out of all extralateral rights in the Contact vein north of the line g–h–h^1, but also of that portion of the vein lying vertically beneath the surface lines of the Providence which extend north of that line, and which are marked upon the figures as constituting the parallelogram h–i–k–h^1, which was awarded to the Champion. (See figure 1, showing the end line fixed by the circuit court, and that line as subsequently fixed by the court of appeals with the latter line extended in its own direction both eastwardly and westerly.)

From the judgment of the circuit court of appeals the appellant has appealed to this court.

There are nine assignments of error. The first eight attack so much of the decree as establishes the line *g–h* as an end line, for the purpose of determining the extralateral

right, or fails to establish the line $f-g$, and that line produced indefinitely in the direction of g^1 as such end line. The last two assail so much of the decree as awards to appellee the right to pursue the vein on its downward course underneath the parallelogram $h-i-k-h^1$.

Messrs. **R. R. Bigelow**, *Daniel Titus*, and *James F. Smith* for appellant.

Messrs. **Curtis H. Lindley** and *Lindley & Eickhoff* for appellee.

Mr. Justice **McKenna** delivered the opinion of the court:

There are two questions presented by the assignment of errors:

(1) What are the extralateral rights of the appellant on the Contact vein?

(2) Is appellant entitled to that portion of the Contact vein within the Providence boundaries which lies north of the north end line fixed by the court, and which is described upon figure 1 as the parallelogram bounded by the lines marked $h-i-k-h$?

(1) The appellant contends that the patent of the Providence ledge was conclusive evidence of his title to 3,100 feet in length of that vein. If true, this carried the northern end of the ledge 30 feet beyond the line fixed by either the circuit court or the circuit court of appeals. It was truly said at bar: "If it is not the end line of the Providence location, then certainly there is no reason for holding it to be the end line of the Contact vein."

The language of the patent is: "It being the intent and meaning of these presents to convey unto the Providence Gold & Silver Mining Company, and to their successors and assigns, the said vein or lode in its entire width for the distance of thirty-one hundred (3,100) feet along the course thereof."

The patent was issued under the act of 1866, and it is necessary, therefore, to some extent to consider that act. By it, the appellant urges, the principal thing patented was the lode, and that the northern limit of that, and hence of his rights on that, was 30 feet north of the line fixed by the circuit court of appeals; and hence it is further contended that as the northern and southern surface lines *(g–h* and *a–p)* did not determine or limit his right to the lode under the act of 1866—in other words, did not become end lines—they do not become end lines upon the Contact ledge *(x′–x″)* acquired under the act of 1872, but that the surface line

[302] which crosses *the strike of that ledge must be held to be the end line, and the line which fixes the rights of the parties. This line is $f-g$, Fig. 1, and, if appellant is correct, determines the controversy in his favor.

The extent of the right passing under the act of 1866 has been decided by this court.

In *Flagstaff Silver Mining Co.* v. *Tarbet*, 98 U.S. 463 [25: 253], known as the *Flagstaff Case*, the superficial area of the Flagstaff Mine was 100 feet wide by 2,600 feet long. It lay across the lode, not with it, and the company contended, notwithstanding that, it had a right to the lode for the length of the location. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. The contention was presented and denied by the instructions which were given and refused by the lower court. That court instructed the jury that if they found Tarbet "was in possession of the claim, describing it, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute is within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways—by the length of the course of the vein within the surface; and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff *surface, and the dip of the vein for that [303]
length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

And the following instructions propounded by the owner of the Flagstaff:

"By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of his surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Commenting on the instructions, Mr. Justice Bradley, speaking for the court, said:

"These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how

far the location may extend in another direction."

And after stating that the act of 1872 was more explicit than that of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, he proceeded as follows:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the said lines is based on the hypothesis that the direction of [304]*these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his said lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their said lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56–58 and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it."

This law was followed and applied in *Argentine Mining Company* v. *Terrible Mining Company*, 122 U. S. 478 [30: 1140]; and in *Iron Silver Mining Company* v. *Elgin Min. & S. Co.* 118 U. S. 196 [30: 98]; *King* v. *Amy & Silversmith Consol. Min. Co.* 152 U. S. 222 [38:419]. The locations passed upon in these cases were made under the act of 1872, *but we have seen that the intent of that act [305] and the act of 1866, "as it respects end lines and side lines," was the same.

But appellant urges that "those cases are not in point here." We think that they are. The patent in the *Flagstaff Case* appears to have been the same as here, and besides, whatever the patent here it must be confined to the rights given by the statute which authorizes it.

In the *Flagstaff Case* the lode was claimed, and hence the right to follow it beyond the surface boundaries of the location was claimed. Here the lode is claimed and the right to follow it outside of the surface boundaries, that is, beyond the line *f–g* to the point x^1. In that case the right contended for was denied on the principle applicable to end and side lines. In this case the right contended for must be denied by the application of the same principle.

But, appellant asks, admitting for the argument's sake that it (the line *g–h)* does constitute an end line of the location within the meaning of the law of May 10, 1872, does it constitute the end line of the Contact vein? And in answering the question he says: "The end line of a lode is the boundary line which crosses it regardless of whether it was originally intended as an end line or side line. Four times has this principle been sustained by this court." He then cites the cases we have cited and claims that they "are of course conclusive of this controversy if they are in point."

Under the law of 1866 a patent could be issued for only one vein. 14 Stat. at L. 251. The act of 1872 gave to all locations theretofore made, as well as to those thereafter made, all veins, lodes, and ledges the top or apex of which lie inside of the surface lines. Section 3 of the act, which is also § 2322 of the Revised Statutes, is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, *and local regulations not [306] in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of

their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Act of May 10, 1872, § 3; § 2322, U. S. Rev. Stat.

Appellant's right upon the Contact vein is given by this statute. What limits this right extralaterally? The statute says vertical planes drawn downward through the end lines of location. What end lines? Those of and as determined by the original location and lode, the circuit court of appeals decided. Those determined by the direction of the newly discovered lodes, regardless whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The court of appeals was right. Against the contention of appellant the letter and spirit of the statute oppose, and against it the decisions of this court also oppose.

The language of the statute is that the "outside parts" of the veins or ledges "shall be confined to such portions thereof as lie between vertical planes drawn downwards . . . through the end lines of their locations . . ." And Mr. Justice Field, speaking for the court, said, in *Iron Silver Min. Co.* v. *Elgin Mining & S. Co.* 118 U. S. 196–198 [30: 98, 99]:

"The provision of the statute, that the lo-
[307] cator is entitled *throughout their entire depth to all the veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical."

The court, however, did not mean that the end lines, called such by the locator, were the true end lines, but those which "are crosswise of the general course of the vein *on the surface*."

This court in *Del Monte Mining Co.* v. *Last Chance Mining Co.*, decided at the present term, 171 U. S. 55 [*ante*, 72], reviewed the cases we have cited, and, speaking for the court, Mr. Justice Brewer said:

"Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that, in fact, the location has been placed not along but across the course of the vein. In such case, the law declares that those which the locator called his side lines are his end lines and those which he called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give *to the locator only so many feet of the [308]
length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Flagstaff Silver Mining Company* v. *Tarbet*, 98 U. S. 463–468 [25: 253–255].

These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries.

The appellant contends that by agreement, by acquiescence, and by estoppel the line *f–g* has become the end line between the two claims.

This contention is attempted to be supported by *(a)* A relocation of the New Years Extension claim by which it is asserted it recognized and designated the line *f–g* as the northerly end line of the Providence claim. *(b)* The testimony of the superintendent as to what took place between him and the directors before sinking the Champion shaft, and afterwards between him and a cotenant of complainant (appellant).

(a) The relocation does not in terms recognize the line *f–g* as the northern end line of the Providence. Its recitals are:

"And whereas, part of this claim as originally described and as hereby relocated conflicts with the rights granted by the letters patent of said Providence mine, said Lot No. 40, now, therefore, so much of this claim, both for lode and surface ground, as originally designated, conflicting, or now conflicts, with any portion of the surface or lode, claims or rights granted by said patent, is and are hereby abandoned."

"Which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension claim for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north 43 degrees, 10 minutes east, across the southeastern corner of this claim."

It will be observed by reference to figure 1 that the northern boundary *of the Provi- [309]
dence is not one line, but two lines, and it is

the one which runs north 43° 10′ east across the southern corner, which is designated in the relocation of the New Years claim.

In the notice of relocation, however, the northerly line of the Providence is called the south end line of the relocated ground. The description is as follows:

"The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 80 feet S., 11 deg. 45 minutes east, of the mouth of the New Years tunnel and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S. 46 deg. 15 minutes east, 200 feet more or less, to a point and stake on the northerly line of the Providence Mine, patented, designated as Mineral Lot No. 40 for the south end of said lode line. And that the contact vein crosses on its onward course the southerly end line of said New Years Extension claim and enters the lands and premises of plaintiff described in said bill of complaint."

It is hence contended that if the line *f–g* is the southerly end line of the New Years Extension it must necessarily be the northern end line of the Providence Mine. This does not follow, nor is there any concession of it. Coincidence of lines between claims does not make them side lines or end lines. Whether they shall be so regarded depends upon the legal considerations which we have already sufficiently entered into and need not repeat. We do not say that there may not be an agreement settling end lines. One example of such an agreement was exhibited in *Richmond Mining Co.* v. *Eureka Mining Co.* 103 U. S. 839 [26:557].

(b) The testimony relied on was admitted against the objection of defendants (appellees.) It was as follows:

"*Q.* Then you may go on, Mr. Vincent, and state how you started that work, and how you planned it, and what communications you had, if any, with the board of directors of the Champion Mining Company.

. . . .

[310] *"*A.* Well, I was sent up by the board of directors to do whatever work I thought was for the best of the company. I started that shaft down and had it down about 40 feet, and I reported to the board of directors in session about what work I had done, and they calculated to go to work and put up hoisting works and run that shaft down further.

"*Q.* What, if any, communication did you make, or was there any communication from the board to you concerning the direction of the shaft, and why any given direction was adopted for the shaft?

"*A.* There was none, but then I reported to the board that such was the case, that the shaft was laid out so it would never interfere with this line."

The witness further testified that he sank the shaft 540 feet and was discharged on the 1st of August, 1889, and he was further questioned as follows:

"*Q.* State whether at the time you were sinking that shaft you were called upon by Mr. Walrath, the complainant in this action, or his brother, Mr. Richard Walrath, to make any inquiry of you concerning the construction of that shaft and what the intention was, whether to cross the Providence line or not, as marked on the map?

. . . .

"*A.* Well, Mr. Walrath he happened to come along, and he made a remark to me that he wished for us, of course, to keep his line and not to cross it as he didn't want any more trouble as he did have with some other mining properties adjoining; that he didn't want any more holes in his ground, and so I answered him that I would respect his line as long as I am here.

"The Court—That you would respect his line as long as you were there?

"*A.* As long as I was superintendent of the mine.

"*Q.* Where did this conversation take place?

"*A.* Right on the premises.

"*Q.* You were then acting as superintendent, were you?

"*A.* Yes, sir.

"*Q.* What line was referred to at that time as the Providence line; can you point it out on the map?

"*A.* Yes, sir; it is the line marked 'A B' on the map, Exhibit 4." [311]

This testimony does not establish an equitable estoppel, nor is the corporation bound by the declarations of the superintendent. They were without the scope of his agency or authority.

(2) The right to that portion of the Contact ledge within the boundaries of the parallelogram *h–i–k–h*[1] presents an interesting question. It does not appear to have been submitted to either of the lower courts, but the right by the decree of the circuit court is given to appellee by adjudging to it that portion of the vein on its dip which lies northeasterly of the line *g–h* and its continuation.

The question is a new one in this court, but we think it is determined by the principles hereinbefore laid down. It may be true that under the act of 1866 the patenting of the Providence Mine in its irregular shape was in all respects legal and proper, and that the act did not require the location to be made in the form of a parallelogram or in any particular form, and that there was no requirement that the end lines should be parallel. It is also true that under that act only one vein could be included in a location, no matter how much surface ground was included in the patent, but that under the act of 1872 possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes, and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, were given.

But rights on the strike and on the dip of the original vein and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location. In other words, it is the end lines alone, not they and some other lines, which

define the extralateral right, and they must be straight lines, not broken or curved ones. The appellant, under his contention, would get the right such lines would give him and something more besides outside of them. To specialize, he would get all within a plane drawn through the line *g–h*, and all within the planes drawn through the sides of the parallelogram *h–i–k–h¹* (Fig. 1.)

[312] *It may be that the end lines need not be parallel under the act of 1866: may converge or diverge, and may even do so as to new veins, of which, however, we express no opinion, but they must be straight—no other define planes which can be continuous in their own direction within the meaning of the statute. It may be that there was liberty of surface form under that act, but the law strictly confined the right on the vein below the surface. There is liberty of surface form under the act of 1872. It was exercised in *Iron Silver Mining Co.* v. *Elgin Mining & S. Co. supra*, in the form of a horseshoe; in *Montana Co. Limited* v. *Clark*, 42 Fed. Rep. 626, in the form of an isosceles triangle.

The decree is affirmed.

CITY OF NEW ORLEANS, *Appt.*,
v.
TEXAS & PACIFIC RAILWAY COMPANY and the Fidelity Insurance, Trust, & Safe Deposit Company.

(See S. C. Reporter's ed. 312-344.)

Ordinance to extend railroad tracks in New Orleans—resolutory condition—lease by the city—suspensive condition.

1. An ordinance of the city council of New Orleans giving the right to extend railroad tracks from a depot at a designated terminus in said city to certain points, in consideration of the obligation to establish its terminus at the place designated, creates a suspensive condition, or a condition precedent.
2. A provision that certain rights granted to a railroad company on condition of its establishing a terminus at a certain point shall cease if the terminus is abandoned creates a resolutory condition.
3. A lease by a city of batture to a railroad company in order to permit the extension of its tracks from a terminus which it had contracted to establish under an ordinance which made that a suspensive condition is subject to the same condition.
4. The mere payment of rent under a lease by a city of batture, which is subject to a suspensive condition, does not change the nature of the condition or work an estoppel.

[No. 1.]

Argued January 3, 4, 1898. Decided May 31, 1898.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of the Texas & Pacific Railway Company *et al.*, complainants, against the city of New Orleans decreeing certain ordinances invalid and perpetually restraining the city from executing such ordinances and from interfering with complainants in building a track in said city, etc. *Reversed* and cause remanded for further proceedings.

Statement by Mr. Chief Justice **Fuller:**

The New Orleans Pacific Railway Company became duly incorporated under the general laws of the state of Louisiana on June 29, 1875. By article 1 of its charter, it was given corporate existence for the term of twenty-five years from that date. By article 3 it was empowered among other things: "To lay, construct, lease, own, and use a railroad with one or more tracks and suitable turntables upon such course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi river at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay *via* Vermilionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point within the limits of this state, and running thence toward and to the city of Shreveport, or the city of Marshall or Dallas, in the state of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the state of Louisiana as may be deemed proper; to locate, construct, lease, own, maintain, and use such branch railroads and tracks as the majority of the directors of said company may from time to time deem proper and expedient and for the interest of said company to own and to use, and lease, with the right to connect their main line with any other line or lines in other states, which shall authorize the exercise of said privilege within their limits; to establish and maintain in the city of New Orleans proper freight and passenger depots, and to connect them by tracks and ferries with the left bank of the Mississippi river at such point or points as may be deemed most convenient for the public interest, and to use in such ferries, steamboats, and other vessels, and for the purposes of such depots, tracks,

NOTE.—*As to liability of grantee upon conditions in deed poll,*—see note to Hickey v. Lake Shore & M. S. R. Co. (Ohio) 23 L. R. A. 396.

As to forfeiture of estate by breach of condition,—see note to Royal v. Aultman-Taylor Co. (Ind.) 2 L. R. A. 526.

As to condition in deed that land is to be used for a specified charitable public or quasi-public purpose: (1) *Express conditions or stipulations for reversion;* (2) *language merely specifying or restricting the use; grants for school purposes; for municipal purposes; for cemeteries; for railroad uses; for other business purposes;* (3) *conveyance so long as used for purpose named;* (4) *breach of condition,*—see note to Greene v. O'Connor (R. I.) 19 L. R. A. 262.

and ferries to acquire property by expropriation; to acquire, construct, maintain, and use suitable wharves, piers, warehouses, yards, steamboats, harbors, depots, stations, [314] and other *works and appurtenances connected with and incidental to said railway and its connections, and to run and manage the same as the directors of the said company may deem to be most expedient and to the welfare of said corporation; to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike, or canal within the state of Louisiana which the course of said railways may intersect, touch, or cross, provided that said company shall preserve any water course, street, highway, turnpike, or canal which its railways may so pass upon, along, or intersect, touch, or cross, so as not to impair its usefulness to the public unnecessarily; to obtain by grant or otherwise from any parish, city, or village within the state any rights, privileges, or franchises that any of said parishes, cities, or villages, may choose to grant in reference to the construction, maintenance, management, and use of the railroads of said company, its depots, cars, locomotives, and its business within the limits of such or any of said parishes, cities, and villages; to purchase or lease from any railroad company or corporation, at any authorized sale, any railroad and the charter, franchises, property, and appurtenances thereof, and to maintain and use the same as a part of the property of said company."

On February 19, 1876, the general assembly of the state of Louisiana passed act No. 14 of 1876, to confirm said charter of the Railway Company, with amendments thereto, which among other things declared "that the term of existence of the said New Orleans Pacific Railway Company shall be so extended that said company by its name and under the aforesaid mentioned articles of incorporation shall have perpetual succession, and that Shreveport in Louisiana shall be the northwestern terminus of said New Orleans Pacific Railway Company, and that the main line shall be completed to Shreveport before any branches shall be constructed."

The city council of New Orleans on November 9, 1880, adopted ordinance No. 6695, entitled "An ordinance granting to the New Orleans Pacific Railway Company or its assigns, [315] *the right to establish its terminus within its city limits, and to construct, maintain, and operate a railroad to and from such terminus with one extension for passenger purposes and another one for freight purposes into and through certain streets and places in the city of New Orleans."

This ordinance read:

"Whereas, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana state laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: 'To locate, construct, lease, own, and use a railroad, with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient, and to and between the points and places mentioned and implied in said act, and is hereby authorized 'to establish and maintain in the city of New Orleans proper freight and passenger depots,' and to construct wharves, piers, warehouses, yards, depots, and stations; and to 'construct and maintain its said railroads or any part of the same, and to have the right of way therefor across and along and upon any street, highway, turnpike, or canal in the state of Louisiana which the course of said railways may intersect, touch, or cross. Provided the said company shall preserve any street, highway, turnpike, or canal which its said railways may so pass upon, along, or intersect, touch, or cross so as not to impair its usefulness to the public unnecessarily;' and,

"Whereas it is for the interest of the city of New Orleans that the southern terminus of said railroad shall be fixed and established within the city limits; and,

"Whereas the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississippi, from a crossing near Baton Rouge to some point in the city of New Orleans, between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street, for passenger purposes; and *shall also grant the right to extend its [316] tracks from such terminus north of Claiborne street by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the city of New Orleans.

"Now, therefore, for the purpose of permanently securing to the city of New Orleans the advantages that will result from locating and maintaining the terminus of the said New Orleans Pacific Railway within the city limits:

"Sec. 1. Be it ordained by the council of the city of New Orleans, That the New Orleans Pacific Railway Company be, and it is hereby authorized and empowered to locate construct, and maintain a railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company as its terminus, between the new canal, Claiborne canal, and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, yards, warehouses, and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.

"Sec. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct, and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; Provided, That should it become necessary
[317] for the building of depot *or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of waterworks and public buildings.

"Sec. 3. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct, and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind, convenient and useful and appurtenant to said railroad upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through such street as may hereafter be lawfully selected, to the river front, with the right to extend its tracks through Front street, Water and Jackson streets, connecting with the depots of the Louisville & Nashville Railroad Company, Morgan's Louisiana & Texas Railroad, and the Chicago, St. Louis, & New Orleans Railroad. and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise, and other freight; or the said company may purchase, lease, control, maintain, and operate by steam or otherwise any railway or railway tracks now existing in the streets of the city of New Orleans.

"Sec. 4. Be it further ordained, That the right of way, franchises, and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way privileges shall last, and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate, and be without force and effect from the date of such abandonment, and the further condition that all construction work within the city limits shall be executed under the di-
[318] rection *and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

"Sec. 5. Be it further ordained, That the rights herein granted on Claiborne street shall apply only to a railroad for passenger purposes; that the rights to be granted from north of the Claiborne canal to the river front, and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without the consent of this council."

On December 3, 1880, the following ordinance, numbered 6732, was adopted:

"Whereas, on the ninth day of November, 1880, the ordinance No. 6695 (administration series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain, and operate a railroad to and from such terminus; with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

"Sec. 1. Be it ordained by the city council of the city of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby authorized and empowered to locate, construct, and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river *front, and [319]
to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise, and other freight; or the said company may purchase, lease, control, maintain, and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall be but one track laid on Thalia street, from Claiborne to Water street.

"Sec. 2. Be it further ordained, That the right of way, franchises, and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus

within the city limits, then this grant shall cease and terminate and be without force or effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street from Pilie street to Rampart street, including all intersections of said Thalia street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches in thickness; they shall be well quarried, having parallel sides and ends, and the upper side free from lumps. The blocks adjoining the gutterstones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobblestone pavement, laying with gutterstones the gutters of said street, from the end of the block paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobblestones removed from that part of the street to be paved with square block—the rails to be laid in the pavement so that the top of the
[320] rails shall be flush with the surface *of the pavement; and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

"Sec. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction."

In 1881 the New Orleans Pacific Railway Company purchased a railroad already constructed by the New Orleans, Mobile & Texas Railroad Company on the west bank of the Mississippi river, extending from Bayou Goula, a point near Baton Rouge on the west bank, to Westwego, also on the west bank, and just opposite New Orleans. Subsequently on March 29, 1881, the city council passed an ordinance, No. 6938, as follows:

"Whereas the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile, & Texas Railroad Company, on the west bank of the Mississippi River, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of ordinance No. 6695, administration series, passed on the ninth day of November, 1880; such line to cross the Mississippi river from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property; thence to extend by the best and most practicable *route to the [321]
designated terminus, between the new canal, Claiborne canal and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as herinabove recited;

"Sec. 1. Be it ordained by the council of the city of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and are hereby, authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, sidings, and structures of every kind convenient, useful, and appurtenant to said railroad, from such point on the river front as its crossings from Westwego shall be located at in the vicinity of the Upper City Park, along the western border of the said city park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

"Sec. 2. Be it further ordained, etc., That the city of New Orleans agrees to lease unto the New Orleans Pacific Railway Company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City Park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators, and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent shall be exempt from the payment of levee or wharf dues to the city of New Orleans; the proceeds of such lease shall *be applied by the city to the im- [322]
provement of said park.

"Sec. 3. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend its tracks from the said ground so leased between the Upper City Park and the river front, easterly along said river

front to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by section 3 of ordinance 6695, administration series, adopted November 9, 1880, and by ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street the trains of said company shall be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

"Sec. 4. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter and from and after the expiration of the existing lease of the city wharves, to inclose and occupy for its purposes and uses, that portion of the levee batture, and wharf in the city of New Orleans in front of the riparian property acquired or to be acquired between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the city of New Orleans.

"Said wharves and other structures shall be lighted and policed by said company at its own expense.

"Any vessel lying at these wharves with
[323] the consent of the company, *but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

"Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier shall pay usual wharfage dues to the city.

"In consideration of the permission herein given the company will build three hundred feet of new wharf at such point between Terpsichore and Jackson streets, for the city, as the administration of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and Front with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

"The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

"Sec. 5. Be it further ordained, etc., That the mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

"Sec. 6. Be it further ordained, etc., That the right of way, franchises, and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are and were granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants, and privileges shall last and continue; and should the said railway company at any time hereafter remove its terminus from within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of public improvements and the administrator of commerce; and the further condition *that said railway company shall con- [324]
struct or control a line of road, ready for public use, from a crossing of the Mississippi river to its designated terminus in this city, within two years from the promulgation of this ordinance."

The New Orleans Pacific Railway Company, on June 20, 1881, entered into a written agreement with the Texas & Pacific Railway Company, a corporation organized under the laws of the United States, by the terms whereof the New Orleans Pacific Railway Company consolidated itself with the Texas & Pacific Railway Company on the terms and conditions specified in the agreement, "by granting, bargaining, selling," etc., "unto the Texas & Pacific Railway Company all the franchises, corporate rights, or privileges of the New Orleans Pacific Railway Company, together with its track, roadbed, buildings, rolling stock, engineer's tools, bonds, stocks, grants, privileges, property (real and personal), and every right, title, and interest in and to any franchises or property, real or personal, and all rights of every name and kind in which the New Orleans Pacific Railway Company had any right, privilege, or interest, situated and being in the state of Louisiana or in the state of Texas, or elsewhere, it being declared by the agreement that the object of the agreement was to so merge the rights, powers, and privileges of the New Orleans Pacific Railway Company into the Texas & Pacific Railway Company that the Texas & Pacific Railway Company under its own chartered name and organization should, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges, and franchises and own and control all the properties that the New Orleans Pacific Railway Company then exercised and owned, or by its charter and by-laws it had the right to exercise, own or control."

Thereafter, on July 11, 1882, the city council adopted ordinance No. 7946, as follows:

"An Ordinance Supplementary to Ordinances 6695, 6732 and 6938, Administration Series, Granting certain Rights to the New Orleans Pacific Railway Company and its Assigns, and Providing for the Selection of a Site for the Claiborne Market.

[325] *"Whereas by section 2 of ordinance 6695, administration series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct, and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense on such lots as the city shall designate; and

"Whereas, by ordinances Nos. 6732 and 6938, administration series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New Orleans, crossing Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City Park, and thence to Claiborne street; now, therefore,

"Sec. 1. Be it ordained by the council of the city of New Orleans, that the administrator of improvements, the administrator of commerce, and the administrator of waterworks and public buildings, be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a proces verbal thereof in the office of the administrator of waterworks and public buildings.

"Sec. 2. Be it further ordained, That whenever said company or its assigns shall find it necessary to remove said building it shall be rebuilt on said lots so selected and as prescribed in said original ordinance.

"Sec. 3. Be it further ordained, That in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge."

[326] *The company also sent its officers with certain city officers in the summer of 1882 to inspect lots thought suitable at that time for the Claiborne market, when the removal of the market might be decided upon; and stated by its officers that the lots would be purchased, the market taken down and another market put up, but that if this was not satisfactory to the city, the city should remain silent for a while, because if it were known the railroad wanted the lots, too much would be asked for them. In the summer of 1883, the company demanded from the city surveyor lines and levels for a track on the river front from Louisiana avenue to Jackson street, and the city surveyor not furnishing them, instituted suit June 11, 1883, in the civil district court for the parish of Orleans, where the same is still pending, to compel the city surveyor by writ of mandamus to furnish such lines and levels. The company also paid $1,000 rent for the two years ending March 8, 1882 and 1883, under an alleged lease of the batture in front of the upper city park and made a tender of $500 for rent under said alleged lease for the year ending March, 1884, and acquired by private ownership four squares of ground adjoining the upper city park, two squares fronting the river and two in the rear thereof.

The record showed that the railroad company did not establish its terminus in the rear of the city of New Orleans at the place designated by ordinance 6695 of November 9, 1880, and referred to in ordinance 6732 of December 3, 1880; that the company did not as stated or required in ordinance 6938 of March 29, 1881, make its terminus on the west bank of the Mississippi river at Westwego, and there erect its wharves, inclines, and structures, necessary for the purpose of crossing the river at that point so as to reach the east bank on the batture in front of the City Park; and that the company did not build its road from the batture along the edge of the park through the designated streets to the point in the rear of the city where the proposed terminus was to be located under and in accordance with the provisions of the city ordinances, which have already been stated. And the record also disclosed that instead of making Westwego its terminus on the west *bank of the river, the [327]
railroad was prolonged nine miles further down the bank of the river to a point designated as Gouldsboro; and this latter point being approximately opposite the foot of Thalia street on the east bank of the river, wharves and inclines were constructed at Gouldsboro, whence the traffic of the road was carried across the river to the foot of Thalia street in the city of New Orleans, where depots and structures have been established by the company.

On the 15th of April, 1884, the city council adopted an ordinance, No. 685, council series, as follows:

"An Ordinance Repealing certain Sections of the Ordinance No. 6938, A. S., Granting Privileges to the New Orleans Pacific Railway Company.

"Be it ordained, That § two (2) of the ordinance No. 6938, A. S., passed March 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be, and the same is, hereby repealed and revoked."

June 16, 1886, the city council adopted an ordinance, No. 1828, council series, as follows:

"An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under ordinance 6695, A. S., adopted November 9, 1880; No 6732, A. S., adopted

December 3, 1880; No. 6938, adopted March 29, 1881; No. 7946, adopted July 11, 1882; and

"Whereas the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street near Canal street, construct tracks from Claiborne street to and through Thalia street to the river; and

"Whereas the original grantee company has merged its identity with that of an alien corporation, which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

"Whereas such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

"Whereas by the acts of said New Orleans
[328] Pacific Railway *Company such rights have been abandoned, and it is necessary for the public good that Claiborne street, between Common street and the Old Basin, shall be used for steam and horse railway and depot purposes:

"Therefore, be it ordained by the council of the city of New Orleans, That all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whethe racquired through or by the ordinances above enumerated or through or by any other ordinance of the council of the city of New Orleans, he and the same are hereby repeal ed and revoked."

July 2, 1886, the receivers of the Texas & Pacific Railway Company, and the Fidelity Insurance Trust and Safe Deposit Company, filed a bill of complaint in the circuit court of the United States for the eastern district of Louisiana, which alleged the incorporation of the Texas & Pacific Railway Company under certain acts of Congress, the acquisition by the Texas & Pacific Railway Company of all the property and franchises of the New Orleans and Pacific Railway Company, the appointment of receivers of the Texas and Pacific Railway Company, the adoption by the city of New Orleans of ordinance No. 6695, on November 9, 1880; of ordinance No. 6732, on December 3, 1880; of ordinance No. 6938, on March 29, 1881; the full and fair compliance by said New Orleans & Pacific Railway Company and the Texas & Pacific Railway Company with the conditions imposed by said ordinances; the adoption of ordinance No. 7946; the repealing ordinance, No. 685, council series, adopted April 24, 1884, and No. 1828, council series, adopted June 8, 1886; the violation by the adoption of said ordinances of the contract created by ordinances Nos. 6695, 6732, and 6938, administration series, and prayed that ordinances No. 685 and No. 1828, council series, be adjudged and decreed to be illegal and injurious to complainants, and be canceled, and the right of the Texas & Pacific Railway Company, under ordinance No. 6695, to lay its tracks and build a passenger depot on the neutral *ground of [329]
Claiborne street, near Canal street, and to remove the Claiborne market, be declared and decreed, and its right to the lands of said Park batture, under the second section of ordinance No. 6938, be declared and decreed; and its right to have lines furnished by the proper official of the city for its route from Louisiana avenue to Jackson street, along the river front, under the third section of said ordinance, be declared and decreed and specifically enforced.

That the city of New Orleans be enjoined and restrained from in anywise executing ordinance No. 685 and ordinance No. 1828, council series, and from granting to any other person or corporation the rights sought to be taken away by said ordinances Nos. 685 and 1828.

The city of New Orleans filed its answer, November 1, 1886, which admitted the incorporation of the Texas & Pacific Railway Company; the incorporation of the New Orleans Pacific Railway Company; the contract entered into between the New Orleans Pacific Railway Company and the Texas & Pacific Railway Company, averring, however, the effect of said contract to be that the Texas & Pacific Railway Company was held and bound to all the obligations imposed upon the New Orleans Pacific Railway Company, and was affected by all the equities existing between the New Orleans Pacific Railway Company and the city of New Orleans; the appointment of the receivers; the adoption of ordinance No. 6695, on the 9th of November, 1880; ordinance No. 6732, on December 3, 1880; ordinance No. 6938, on March 29, 1881; the failure on the part of complainants to comply with the obligations imposed by said ordinances; the nullity of the lease of the batture in front of the Upper City Park purported to be granted by ordinance No. 6938, and the nullity of the grant of the right to build a depot on the neutral ground of Claiborne street, said batture in front of said park and said neutral ground being dedicated to public use; and the legality of the repealing ordinances 685 and 1828, council series.

On the 3d of February 1887, complainants filed a supplemental bill which alleged that under the ordinance set forth in the original bill of complaint, the wharf of the Texas &
*Pacific Railway Company, its transfers and [330]
incline between Thalia and Terpsichore streets, at New Orleans, had been duly constructed and used for about five years, and in like manner and during the same time the tracks of said railway, connecting its transfer facilities and its depots and sheds at its Thalia street terminus, had been laid and used in Pilie and Water streets, and along the river front from Thalia street up to about Race street; that it had become necessary for the business of said railway to lay a small spur track to connect said wharf above the transfer slip with the said tracks on Pilie and Water streets; that the complainants had applied to the city surveyor for lines and levels of said spur track; that the city surveyor refused to grant said lines and levels

under a certain resolution of the council of September 15, 1885, prohibiting him from giving any lines for such work in the street without submitting the question to the council; that said resolution was illegal and a breach of complainant's contract, and that interference by the mayor of the city with complainant's building said spur track was apprehended.

Upon these allegations a writ of injunction was prayed for, restraining the city from interfering with complainants in the work of building said spur track to connect the wharf above the transfer incline between Thalia and Terpsichore streets with the tracks of the railway between Thalia and Water streets, along the river front, and in the work of strengthening and filling up said wharf and driving piling to reach the same with said spur, and for a decree as prayed for in their original bill.

Upon this supplemental bill a restraining order was granted which, by agreement, was to stand as an injunction pending suit.

On the 23d day of June, 1891, a final decree in favor of complainants, granting in full the prayer of their bill, was rendered.

From this decree the city of New Orleans appealed.

Mr. **Samuel L. Gilmore** for appellant.
Messrs. **W. W. Howe** and *J. F. Dillon* for appellees.

[331] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The assignments of error relate to three subjects: First, the batture or space in front of the City Park, embraced in the lease made by the city to the railroad company in execution of the terms of the city ordinance; second, the construction of a track on Claiborne and Canal and the building on Claiborne near Canal of a passenger depot; and, lastly, the wharfage rights claimed by the railroad company by ordinances 6695, 6732, in virtue of § 4 of ordinance No. 6938.

The argument as to the first and second assignments is, that the right granted to the railroad company by ordinances 6695, 6732, and 6938, to extend its track from the point designated as its terminus, in the rear of the city along Claiborne to Canal, and there to build a passenger depot, as also the lease, which, to carry out the ordinance, empowered the railroad company to use the batture in front of the park, and to construct its railroad along the edge thereof through certain designated streets to the rear of the city, were all granted to the railroad company as accessory rights, depending for their existence upon the crossing at Westwego and the location by the railroad company of its terminus in the rear of the city. In other words, that these rights were given to the railroad company, subject to conditions precedent, or, to use the language of the law of Louisiana, subject to suspensive conditions. It is further contended: First, that in consequence of the failure of the railroad company to cross at Westwego and to locate its terminus as aforesaid, and its election, on the contrary, to continue its road down the river to Gouldsboro and there cross the river, it never acquired the right to enjoy the privileges above mentioned, and hence that the repealing ordinances are valid. Second, that even if the rights in favor of the company above mentioned were not granted to it on a suspensive condition, they were clearly subject to a resolutory or dissolving condition arising from the obligation to cross at Westwego and to locate the terminus in the rear of the city at the point designated in the original *ordinance, the con- [332]
tention being that the failure to do so within the period named in the ordinance authorized the city to treat the contract as dissolved and pass the repealing ordinances in question. The railroad company meets these propositions by denying that crossing at Westwego and the location of the terminus in the rear of the city, at the point named in the original ordinance, was made a condition suspending the operation of the grant of the rights above stated, and argues that even if it be conceded that the location of the terminus at the point originally pointed out created a condition, it was not a suspensive but a resolutory one. Although it is admitted that the happening of a resolutory condition dissolves the contract, yet such consequences, it is asserted, do not arise from the mere happening of the condition, and cannot be availed of by one of the contracting parties of his own will, since before the resolutory condition can be invoked it must be established by a suit brought that such condition has arisen and that the effect of its existence has been to dissolve the contract. That is, the claim is that under the law of Louisiana a dissolving or resolutory condition does not operate upon the contract *proprio vigore*, but requires the judgment or decree of a court to give it effect, and that before finding a contract dissolved in consequence of a resolutory condition, the court has the power to obviate the effect of the condition by giving further time to perform the act from which the condition is claimed to have arisen, if, in its judgment, the equities of the case so require.

The question which first arises is, Was the right of the railroad company to the property in front of the park and to the track on Claiborne street, including the construction of a passenger depot on Claiborne near Canal, subject to suspensive conditions? The Louisiana Civil Code provides as follows:

"Art. 2021. Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.

*"Art. 2022. Conditions, whether suspensive [333]
or resolutory, are either casual, potestative, or mixed."

"Art. 2024. The potestative condition is that which makes the execution of the agreement depend on an event which it is in the

power of the one or the other of the contracting parties to bring about or to hinder."

In defining the suspensive condition the Louisiana Code says:

"Art. 2043. The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties."

These provisions of the Louisiana Code are like those of the Code Napoleon on the same subject. Arts. 1168, 1170, 1181.

In *Cornell* v. *Hope Insurance Company*, 3 Mart. N. S. 223, 226, the supreme court of Louisiana said, in respect of conditions precedent:

"They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional when it depends on a future or uncertain event, says our Code. The event then must be shown to make the obligation binding on the party against whom it is presented. For until it takes place, he is not bound to perform what he has promised. Civ. Code, 272, art. 68. There is an exception to this rule in regard to the dissolving condition. But in relation to all others it is true, and it is a matter of no moment whether we say the obligation is suspended until the condition is performed—or that the performance of the condition must precede the execution of the obligation. Civ. Code, 274, art. 81 and 3; Toullier, Droit Civil Francaise, liv. 3, tit. 3, chap. 4, No. 472; Pothier, Traité des Ob. No. 202."

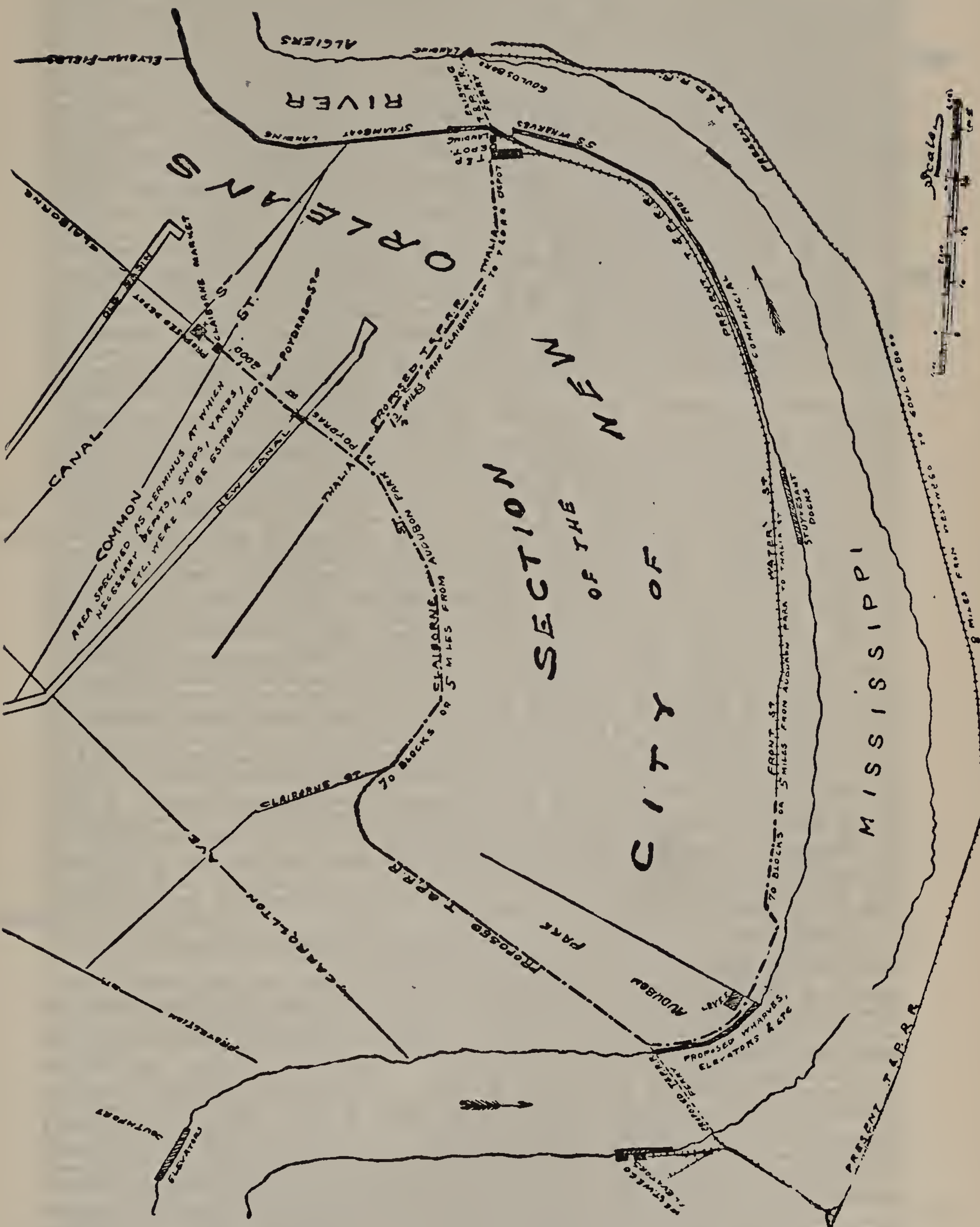
"The effect of a suspensive condition, as its name necessarily implies, is to suspend the obligation until the condition is accomplished or considered as accomplished; till then nothing is due; there is only an expectation that what is undertaken will be due; *pendente conditione nondum debetur, sed spes est debitum iri.*" Pothier, Traité des Ob. 218.

[334] *The suspensive condition under the Louisiana Code is the equivalent of the condition precedent at common law.

The general principles in respect of conditions precedent are set forth sufficiently for the purposes of this case by Chief Justice Shaw in *Proprietors of Mill Dam Foundery* v. *Hovey*, 21 Pick. 440, cited by appellant. Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The nonperformance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. See *Cutter* v. *Powell*, 2 Smith, Lead. Cas. [7th Am. ed.] 17, and notes.

In examining the contract embodied in the ordinances it is essential to have in mind the particular territory to which the ordinances relate, and we therefore insert an outline sketch extracted from a map of the city of New Orleans contained in the record.

[See following page.]


SECTION
OF THE
CITY OF
NEW
ORLEANS
MISSISSIPPI
RIVER
ALGIERS
CANAL
COMMON
NEW CANAL
AREA SPECIFIED AS TERMINUS AT WHICH NECESSARY DEPOTS, SHOPS, YARDS, ETC. WERE TO BE ESTABLISHED
CLAIBORNE ST.
POYDRAS ST.
THALIA
PROPOSED T.& P.R.R.
AUDUBON PARK
CARROLLTON AVE
PRESENT T.& P.R.R.
PROPOSED WHARVES, ELEVATORS & ETC.
STUYVESANT DOCKS
WATER ST.
FRONT ST.
COMMERCIAL
SS WHARVES
STEAMBOAT LANDING
WESTWEGO
ELEVATOR
Scale

The original ordinance 6695 contemplated that the proposed railroad would be built upon the west bank of the Mississippi river, New Orleans being upon the east bank, and that the road would cross that river to the
[335] east bank some hundred *or more miles above New Orleans, coming to that city on the east bank, and entering in the rear of the city, that is, in that portion of the city lying a considerable distance back from the river. The purpose of the ordinance was clearly indicated by its title, which declared that it was intended to grant "to the New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city limits and to construct, maintain, and operate a
[336] railroad *to and from such a terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans." The preamble to the ordinance recited the desire of the railroad to enter the city at about a certain point, and to construct its terminus between the new Canal and Melpomene street, providing the city would grant the right to extend its tracks "*from such terminus* into and through Claiborne street to Canal street for passenger purposes; and shall also grant the right to extend its tracks *from such terminus* north of Claiborne Canal by the most convenient and practicable route through the public streets to the river front for freight purposes." The 1st section of the ordinance grants the railroad the right to enter the city to the point stated in the preamble, and to construct and maintain at the terminus necessary depots, shops, yards, warehouses, and other structures, convenient and useful for the transaction of its business. The point at which the right to construct this terminus was given by the ordinance is embraced within the triangular space in the rear of the city as marked on the sketch above given. The 2d section of the ordinance empowered the company to "locate, construct and maintain *an extension* of its railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, . . . into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street." A glance at the sketch will make clear the fact that Claiborne street thus designated was in the rear of the city, quite near the point where the railroad had contracted to establish its terminus, depots and structures, and that the route thus mapped out in the very nature of things and in the language of the ordinance was a mere right granted to the railroad to extend its tracks from the terminus, which the railroad was under the obligation to build, to and along the designated route to the point indicated on Claiborne and Canal. The 3d section of the ordinance obligated the city to designate a street from the point where the ter-
[337] minus *was selected, and where the company was to establish itself, through which it could build an extension for the purposes of its freight business to the river front. On the face of this ordinance it is apparent that the rights thus given the railroad to extend along Claiborne to Canal for passenger purposes, and along a street to be designated to the river for freight purposes, were mere accessories to the obligation imposed by the ordinance upon the railroad to build its depots, structures, warehouses, etc., at the point indicated, and that the incidental rights of extension from the terminus to the other points could have no existence if no terminus was established from which the extensions could be made. Reading the provisions of the ordinance with the preamble and the title, it cannot reasonably be controverted that the rights of extension were granted upon the suspensive condition that the railroad should terminate at the point indicated, and there build the shops and depots from which the right to extend its tracks was conceded. And this is, if possible, made more certain by considering the 4th section, which, in express words, provides that the privileges of extension granted were dependent upon the establishment of the terminus at the point indicated, and would cease to exist if, after the establishment of the terminus, the railroad company should abandon it. The language of the 4th section is as follows:

"That the right of way, franchises, and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate, and be without force or effect from the date of such abandonment; . . . and it is still made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its *terminus in this city [338]
within two years from the promulgation of this ordinance."

The words "the terminus of said road" and said "terminus" used in the 4th section clearly refer to the terminus fixed by the ordinance, and where the railroad agreed to establish its shops, roundhouses, etc. It follows, then, that the ordinance granted a right to the railroad company to enter the city to reach a designated point, and imposed upon the company the obligation to erect its depots, shops, warehouses, etc., at that point; that in consideration of this obligation assumed by the company, to be performed within two years, a right was given to it to *extend* from the depot so designated a passenger track to a given point, and a freight track to another point; that the two rights of extension were the mere resultants of the principal obligation imposed upon the company, in consideration of which the rights to the extensions were

conceded; and that the ordinance, in addition, in order to remove all question that the incidental rights of extension were dependent upon the principal obligation to establish a terminus at the point named, provided that, even after the fixed terminus was established, if it were abandoned, the company should cease to enjoy the right of extension along Claiborne to Canal which the original ordinance granted. Thus there were plainly created, first, a suspensive, and, after the work was done, a resolutory condition.

Nor is there anything in ordinance 6732, adopted on December 3, 1880, which changed the rights of the parties. That ordinance reiterated and reasserted the nature of the privilege covered by the concession made by the previous ordinance, and designated Thalia street, which is marked on the sketch, as the one through which the railroad company should build the track for freight purposes in compliance with the obligations assumed by it under the first ordinance.

This brings us to the consideration of the ordinance numbered 6938, passed in March, 1881. The purpose of that ordinance, and the change in condition which rendered its adoption necessary, is stated with great clearness in the preamble thereof:

[339] *"Whereas, the New Orleans Texas Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile & Texas Railway Company on the west bank of the Mississippi river, beyond Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of ordinance No. 6695, administration series, passed on the 9th day of November, 1880; such line to cross the Mississippi river from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Fouche, property; thence to extend by the best and most practicable route to the designated terminus between the new canal, Claiborne canal, and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as hereinabove recited."

The ordinance then proceeds in § 1 to authorize the railroad to maintain wharves, inclines, etc., on the river front at the Upper City Park from such point on the river front "as its crossings" from Westwego shall be located at, and from this point to build a track along the western border of said city park, and from thence by the best and most practicable route to "its *designated terminus* east of Carrollton avenue." The second section grants to the railroad land in front of the city park belonging to the city, on the borders of the river, for the purpose of establishing the crossing of the road as recited in the 1st section. The 3d section gives the company the right to lay certain tracks down the river front, in other words, to connect the newly authorized tracks with those existing at or near Thalia street. The 4th section granted the company the right to make certain structures at the foot of Thalia street, the point to which the extended freight track referred to in the previous ordinances was to terminate, and at which, as we shall hereafter see, the company actually made its crossing from the west bank, and where *it now maintains [340]
its terminal facilities. The rights covered by this section are those to which the third assignment of error relates and are not involved in the inquiry now being pursued. The 5th section authorized the mayor of the city to enter into a contract of lease with the railroad for the piece of ground in front of the city park referred to in the ordinance, and the 6th section declared that the grant referred to was made upon the condition of the establishment of "its terminus within the city limits."

Referring to the sketch and considering the record and the terms of this ordinance, the situation was this: The railroad company having obtained a concession from the city of a right to enter the city on the east bank in a particular direction and to build its terminus at a point designated, and having received authority, if it did the foregoing things, to make certain extensions, found it necessary, in consequence of its change of route, to obtain a further consent from the city. The change of line was this: Instead of building its road on the west bank to a point one hundred or more miles above New Orleans, and there crossing the river and coming thence into the city in the rear thereof, as designated in the original ordinance, the company having bought a road on the west bank, the terminus of which was Westwego, about opposite the city park, asked and was allowed that it be exempted from reaching its designated terminus by entering the city in the rear thereof, and that it be granted the right to establish a crossing from Westwego to the land in front of the city park, so that from the land thus conceded the railroad might reach the point where it had contracted that it would make its permanent establishment. The argument that this ordinance gave the railroad the power to establish a new or different terminus from that referred to in the original ordinance, because the place where the terminus was to be is referred to indefinitely in the ordinance as between the new canal, Claiborne canal, and Carrollton avenue, is untenable. Indeed the ordinance contains not a word relieving the railroad from the obligation to establish and maintain the terminus indicated in the previous ordinances. On the contrary, the preamble declares *that the new route was grant- [341]
ed to the railroad to enable it to reach "the designated terminus between the Claiborne canal and Carrollton avenue," which is the situation originally described. It further recites that it is passed for the purpose of enabling the railroad to locate and permanently maintain "the terminus . . . within the

limits of the city of New Orleans, *as hereinabove* recited."

In stating the purpose of the grant of the new right of way from the point of landing at the city park opposite Westwego along the line of the park over the route indicated, the first section in the ordinance declares it to be given to afford the railroad the "most practicable route to its designated terminus east of Carrollton avenue." True it is that in § 6, in referring to the previous obligations of the company to establish its terminus, the words used are that the grantee shall permanently establish "its terminus within the city limits." But, manifestly, the words "its terminus" as used there refer to its terminus as defined not only in the ordinance in question but in the prior ordinances by which the grant was made.

It being shown by the record that the terminus from which the extension along Claiborne street to Canal was to be made was never constructed, and that the crossing from Westwego to the land in front of the park was also never established, but, on the contrary, that the company extended its road down the river to Gouldsboro where it made its main crossing, it needs no reasoning to demonstrate that the right to the extension down Claiborne street and the right to the use of the batture in front of the city park no longer obtains. The claim of the corporation really amounts to this: That, having had certain accessory rights conferred upon it in the event it discharged particular obligations, it can disregard the obligations, escape the burdens resulting therefrom, and yet hold on to all the rights which depended for their existence upon the performance of the obligations which the company has disregarded. The ordinances cannot be properly construed as authorizing an extended track to be built when the point from which the extension was to be made has never come into existence. They cannot be read as dedicating
[342] to the use of the *railroad, under the terms of the ordinances, the land in front of the city park, when such use was accorded to the railroad solely to enable it to accomplish a purpose which it has declined to effectuate by carrying its main crossing to another and a far distant point. In reaching these conclusions we are not unmindful of the argument predicated on the supposed effect of ordinance numbered 7946, A. S. The title of this ordinance indicates its purpose. It is as follows:

"An ordinance supplementary to ordinances 6695, 6732 and 6938, administration series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market."

The preamble of this ordinance recites the two ordinances conferring the right to build the extension on Claiborne street and states this right to be one of maintaining "an extension of its railroad through Claiborne street," and after reciting the fact that the railroad had crossed at Thalia street, and established its terminus there, declares that the railroad is preparing also to cross from Westwego to the city park, and thence to Claiborne street. The ordinance then proceeds to provide for arrangements for removing the market from Claiborne street in order to allow the extension on that street to be built. The argument which is based upon this ordinance is this, as at the time this ordinance was passed, the railroad had crossed from Gouldsboro to Thalia street and established its terminus there, as is recited in the ordinance, hence it is asserted the ordinance recognizes the fact that the railroad was entitled to the extension on Claiborne street despite the fact that it had not established its terminus as required by the ordinances from which the right to the extension on Claiborne street arose. But this overlooks the fact that in the very sentence upon which reliance is placed reference is made to the ordinance giving the corporation the right to build from the city park to the "designated" terminus. One portion of the sentence cannot be separated from the other. The most that can be said of the argument advanced, from the text of this ordinance, is that it seeks by implication and remote deduction to absolve the company from the obligation imposed *upon it when the acces- [343]
sory right of extension down Claiborne street was granted, and thus to enable the company to retain the incidental right, when it had relieved itself of the obligation upon which the right rested. It is not to be doubted that the rule is that contracts are not to be so violently construed as to destroy rights in consequence of suspensive conditions, but it is also equally obvious that they are not to be so interpreted as to relieve one of the parties to a contract from the obligations resulting therefrom and thereby destroy the suspensive condition plainly written therein. Corporations do not take public grants and privileges by implication, and where express and positive obligations are imposed in making a grant, these obligations cannot, without violating an elementary canon of interpretation, be frittered away in consequence of loose implications made by way of reference in subsequent municipal ordinances. The formal contract of lease executed by the city of the batture in front of the city park took its origin from and was sanctioned by the ordinance granting the right to cross the river from Westwego to the land covered by the lease in order to enable the corporation to carry its tracks from thence to the terminus which it contracted to establish under the original ordinance. It follows, therefore, that the suspensive condition by which the rights of the company under the original ordinance were held in abeyance operates also upon the lease in question.

The mere payment of rent did not change the nature of the suspensive condition or work an estoppel. The right to use the property was limited to the destination stated in the contract. La. Civ. Code, 2711. But this right to use was covered by the suspensive condition, and the contract of lease only evidenced the agreement to use the prop-

erty for the purposes stated, when the suspensive condition ceased to operate by the discharge of the obligations on which it rested, that is, the establishment of the terminus at Westwego, the crossing therefrom, and the location of the shops, etc., at the place fixed in the original ordinance. The case is aptly illustrated by Roy De L'Ecluse et autres, Cassation, 4 Jan. 1858; Journal du Palais, 1858, 452. There a promise to sell on
[344]a suspensive *condition was entered into, but the prospective buyer was allowed to take possession pending the condition. The claim was that this fact destroyed the suspensive nature of the condition. But the court held to the contrary, considering that the fact of possession was subject to the suspensive condition, as it was upon such condition that the contract had been entered into. Laurent, vol. 17, No. 33, p. 53.

Concluding that the rights on Claiborne street and to the batture in front of the park were subject to suspensive conditions, it is manifest from the facts which we have stated that the railroad company was not entitled to possess or enjoy the same. This renders it unnecessary to consider the resolutory condition and leaves only for consideration the subject-matter of the third assignment of errors. This asserts that the rights conveyed by the 4th section of ordinance No. 6938 to wharfage, etc., at Thalia street are not validly held by the corporation. This is based not on the claim of a condition either suspensive or resolutory, but because it is asserted that the grant was *ultra vires*. The repealing ordinances, however, do not embrace this grant, and except for the argument at bar it does not appear that the city has repudiated the grant. Since this case was argued a suggestion has been made that this grant has been, in effect, ratified by a provision of a new Constitution said to have been recently adopted by the state of Louisiana. As we must reverse the decree rendered for the reasons above stated, we deem that the ends of justice will best be subserved by not passing on this assignment, thus leaving the rights of both parties in relation thereto open for further consideration in the court below.

Decree reversed, and cause remanded for further proceedings consistent with this opinion.

---

[345]PATAPSCO GUANO COMPANY, *Appt.*,
v.
BOARD OF AGRICULTURE OF NORTH CAROLINA, W. R. Williams *et al.*, Commissioners.

(See S. C. Reporter's ed. 345-361.)

Repealing parts of a statute—inspection charge—inspection laws, when valid—interstate commerce.

1. The intention, in repealing parts of the Code of a state, to revive earlier laws which might render the amended law liable to the same objection as the parts repealed, cannot be imputed to the legislature.
2. An inspection charge of 25 cents per ton on commercial fertilizers is not so in excess of what is necessary to pay cost of analysis, salaries of inspectors, cost of tags, and other charges, as to justify the imputation of bad faith and show that it is not a proper exercise of the police power.
3. Inspection laws are valid when they act on a subject before it becomes an article of commerce, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.
4. Interstate as well as foreign commerce is subject to a state inspection law.

[No. 9.]

Argued May 7, 8, 1896. Ordered for Reargument May 24, 1897. Reargued March 3, 4, 1898. Decided May 31, 1898.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of North Carolina dismissing a suit in equity brought by the Patapsco Guano Company to enjoin the Board of Agriculture of North Carolina *et al.* from the collection of an inspection charge on fertilizers, etc. *Affirmed.*

See same case below, 52 Fed. Rep. 690.

The facts are stated in the opinion.

Messrs. **Thomas N. Hill** and *John W. Hinsdale* for appellant on first argument.

Messrs. **F. H. Busbee** and **R. H. Battle** for appellees on first argument.

Messrs. **Thomas N. Hill** and **John W. Hinsdale** for appellant on reargument.

Messrs. **R. H. Battle, F. H. Busbee,** and **J. C. L. Harris** for appellees on reargument.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill filed in the circuit court of the United States for the eastern district of North Carolina, April 1, 1892, seeking to enjoin the collection of an inspection charge of 25 cents per ton on commercial fertilizers, as prescribed by an act of the general assembly of North Carolina of January 21, 1891, and from taking any steps whatever to enforce that act, on the ground of its unconstitutionality.

The court entered a restraining order, but, on the coming in of the answer, a motion to

NOTE.—*As to power of Congress to regulate commerce,*—see notes to Gibbons v. Ogden, 6 : 23, and Brown v. Maryland, 6 : 678.

As to tonnage tax, see note to Inman S. S. Co. v. Tinker, 24 : 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29 : 158.

As to police power of state, see note to People v. Budd (N. Y.) 5 L. R. A. 559.

As to power of state to levy taxes; state inspection laws,—see note to American Fertilizing Co. v. North Carolina Bd. of Agrl. (C. C. E. D. N. C.) 11 L. R. A. 179.

[346]continue the injunction until the hearing *was heard on bill, answer, affidavits and exhibits, and denied, and the temporary injunction dissolved. The opinion of the circuit court by Seymour, J., is reported in 52 Fed. Rep. 690. Proofs were taken, and a final hearing had at June term, 1893, at Raleigh; the bill was dismissed; and complainants thereupon prosecuted this appeal.

By § 14 of article 9 of the Constitution of North Carolina of 1875–76, it was provided that, as soon as practicable after the adoption of that instrument, the general assembly should "establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction."

By an act of March 12, 1877 (Laws N. C. 1876–77, 506, chap. 274), such a department was established, and, among other things, the subject of commercial fertilizers dealt with. By the 8th section, manipulated guanos, superphosphates, or other commercial fertilizers were forbidden to be sold, or offered for sale, until the manufacturer or person importing the same had obtained a license therefor on payment of a privilege tax of $500 per annum for each separate brand or quality.

By § 9 every bag, barrel, or other package of such fertilizer offered for sale was required to have thereon a label or stamp setting forth the name, location, and trademark of the manufacturer; the chemical composition of the contents, and the real percentage of certain specified ingredients; and that the privilege tax had been paid. By § 10, the Board was empowered to collect samples for analysis; by § 11, to require railroad and steamboat companies to furnish monthly statements of the quantity of fertilizers transported; and by § 12, to establish an agricultural experiment and fertilizer central station in connection with the chemical laboratory of the University, and the trustees of the University, with the approval of the board, were directed to employ an analyst, skilled in agricultural chemistry, whose duty it should be "to analyze such fertilizers and products as may be required by the department of agriculture, and to aid as far as practicable in suppressing fraud in the sale of
[347]commercial fertilizers;" *and whose salary was to be paid "out of the funds of the department of agriculture."

The sections bearing on this subject were carried forward in the Code of 1883, volume 2, chap. 1, §§ 2190 *et seq.*

In August, 1890, the circuit court for the eastern district of North Carolina, Bond and Seymour, JJ., held that § 2190 of the Code, declaring that no commercial fertilizers should be sold or offered for sale until the manufacturer or importer obtained a license from the treasurer of the state, for which should be paid a privilege tax of $500 per annum for each separate brand, was in violation of the Federal Constitution and void. *American Fertilizer Co.* v. *North Carolina Bd. of Agri.* 43 Fed. Rep. 609 [11 L. R. A. 179, 3 Inters. Com. Rep. 532.]

Thereupon, by the act of January 21, 1891 (Laws 1891, 40, chap. 9), chapter 1 of volume 2 of the Code was amended, and §§ 2190, 2191, and 2193 were made to read as follows:

"Sec. 2190. For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this state there shall be a charge of twenty-five cents per ton on such fertilizers and fertilizing material for each fiscal year ending November thirtieth, which shall be paid before delivery to agents, dealers, or consumers, in this state: Provided, the board shall [have] the discretion to exempt certain natural material as may be deemed expedient. Each bag, barrel, or other package of such fertilizers or fertilizing materials shall have attached thereto a tag stating that all charges specified in this section have been paid, and the state board of agriculture is hereby empowered to prescribe a form for such tags, and to adopt such regulations as will enable them to enforce this law. Any person, corporation, or company who shall violate this chapter, or who shall sell or offer for sale any such fertilizers or fertilizing material contrary to the provisions above set forth, shall be guilty of a misdemeanor, and all fertilizers or fertilizing materials so sold or offered for sale shall be subject to seizure and condemnation in the same manner as is provided in this chapter for the seizure and condemnation of spurious fertilizers, subject, however, *to the discretion of the board of [348]
agriculture to release the fertilizers so seized and condemned upon the payment of the charge above specified and all costs and expenses incurred by the department in such proceeding: Provided, that tags shall be attached by manufacturers, agents or dealers to all fertilizers now in the state; those protected under license previously issued shall be furnished free of charge.

"Sec. 2191. Every bag, barrel, or other package of such fertilizers or fertilizing materials as above designated offered for sale in this state shall have thereon plainly printed a label or stamp, a copy of which shall be filed with the commissioner of agriculture, together with a true and faithful sample of the fertilizer or fertilizing material which it is proposed to sell, at or before delivery to agents, dealers or consumers in this state and which shall be uniformly used and shall not be changed during the fiscal year for which tags are issued, and the said label or stamp shall truly set forth the name, location, and trademark of the manufacturer; also the chemical composition of the contents of such package, and the real percentage of any of the following ingredients asserted to be present, to wit, soluble and precipitated phosphoric acid, which shall not be less than eight per cent.; soluble potassa, which shall not be less than one per cent.; ammonia, which shall not be less than two per cent.; or its equivalent in nitrogen; together with the date of its analyzation, and that the requirements of the law have been complied with; and any such fertilizer as shall be ascertained by analysis not to contain the ingredients and percentage set forth as above

provided shall be liable to seizure and condemnation as hereinafter prescribed, and when condemned shall be sold by the board of agriculture for the exclusive use and benefit of the department of agriculture."

Section 2192 refers to the proceedings to condemn.

"Sec. 2193. Any merchant, trader, manufacturer, or agent who shall sell or offer for sale any commercial fertilizer or fertilizing material without having such labels, stamps, and tags as hereinbefore provided attached thereto, or shall use the required tag the second time to avoid the payment of the ton-
[349]nage *charge, or if any person shall remove any such fertilizer, (he) shall be liable to a fine of ten dollars for each separate bag, barrel, or package sold, offered for sale, or removed, to be sued for before any justice of the peace and to be collected by the sheriff by distress or otherwise, one half less the costs to go to the party suing and the remaining half to the department; and if any such fertilizer shall be condemned as herein provided it shall be the duty of the department to have an analysis made of the same and cause printed tags or labels expressing the true chemical ingredients of the same put upon each bag, barrel or package, and shall fix the commercial value thereof at which it may be sold; and any person who shall sell, offer for sale or remove any such fertilizers, or any agent of any railroad or other transportation company who shall deliver any such fertilizer in violation of this section shall be guilty of a misdemeanor."

Section 2196, which corresponded to § 12 of the act of March 12, 1877, was amended by the substitution of the word "control" for the word "central," and read as follows:

"The department of agriculture shall establish an agricultural experiment and fertilizer control station, and shall employ an analyst, skilled in agricultural chemistry. It shall be the duty of said chemist to analyze such fertilizers and products as may be required by the department of agriculture, and to aid as far as practicable in suppressing fraud in the sale of commercial fertilizers. He shall, also, under the direction of said department, carry on experiments on the nutrition and growth of plants, with a view to ascertain what fertilizers are best suited to the various crops of this state; and whether other crops may not be advantageously grown on its soil, and shall carry on such other investigations as the said department may direct. He shall make regular reports to the said department, of all analyses and experiments made, which shall be furnished, when deemed needful, to such newspapers as will publish the same. His salary shall be paid out of the funds of the department of agriculture."

The following was substituted for § 2205:
[350]"Whenever *any manufacturer of fertilizers or fertilizing materials shall have paid the charges hereinbefore provided his goods shall not be liable to any further tax whether by city, town, or county."

Section 2208 remained unamended, and provided: "All moneys arising from the tax on licenses, from fines and forfeitures, fees for registration and sale of lands not herein otherwise provided for, shall be paid into the state treasury and shall be kept on a separate account by the treasurer as a fund for the exclusive use and benefit of the department of agriculture."

The various errors assigned question the decree on the grounds, in general, that the court should have held the act of January 21, 1891, to be in violation of the third clause of § 8, and of the second clause of § 10, of article 1 of the Constitution of the United States; that the charge required to be paid was so excessive that the act could not be sustained as a legitimate inspection law; or as a valid exercise of the police power; and that it was neither, because it was not limited to articles produced in the state, and because it did not relate to the health, morals, or safety of the community.

The second clause of § 10 of article 1 of the Constitution reads: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The words "imports" and "exports," as therein used, have been held to apply only to articles imported from, or exported to, foreign countries. *Woodruff* v. *Parham*, 8 Wall. 123 [19: 382]; *Pittsburg & S. Coal Company* v. *Louisiana*, 156 U. S. 590, 600 [39: 544, 549.]

The clause recognized that the inspection of such articles may be required by the states, and that they may lay duties on them to pay the expense of such inspections, but as it would *be difficult, if not impossible to de- [351]
termine the necessary amount with exactness and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of Congress, it has been suggested that whether inspection charges are excessive or not might be for Congress to determine and not the courts, which would also be so where inspection laws operate on interstate as well as foreign commerce. *Neilson* v. *Garza*, 2 Woods, 287; *Turner* v. *Maryland*, 107 U. S. 38 [27: 370].

Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce. Counsel for plaintiff in error insists that this result is deducible from the legislation of North Carolina making appropriations from the funds of the department of

agriculture received from the charge on fertilizers or fertilizing materials; as also from the evidence submitted on the hearing.

It will be more convenient to first dispose of the latter contention.

By § 2206 of the Code of 1883, the board of agriculture was directed to "appropriate annually, of the money received from the tax on fertilizers, the sum of five hundred dollars for the benefit of the North Carolina Industrial Association, to be expended under the direction of the board of agriculture."

By chapter 308 of the laws of 1885 (Laws N. C. 1885, 553), the establishment of an industrial school was provided for, to the establishment and maintenance of which the board was directed by the 4th section to apply their surplus funds, not exceeding $5,000 annually.

By chapter 410 of the laws of 1887 (Laws [352]N. C. 1887, 718), *the name of the industrial school was changed to "The North Carolina College of Agriculture and Mechanic Arts," and the board was required by § 6 to turn over to that institution annually "the whole residue of their funds from licenses on fertilizers remaining over and not required to conduct the regular work of that department."

But by chapter 348 of the laws of 1891 (Laws N. C. 1891, 404), the provision last above given was stricken out, and by § 5 of the act $10,000 for the year 1891 and $10,000 for the year 1892 were appropriated to the college; and by chapter 426 of the laws of 1891 (Laws N. C. 1891, 491) an annual appropriation of five hundred dollars was made to the North Carolina Industrial Association. These appropriations were made from the state treasury, and both acts contained the usual repealing clauses.

By § 2198 and subsequent sections of the act of 1883, the geological survey of the state, the geological museum, the appointment of the state geologist, and matters pertaining thereto, were dealt with, and various expenditures connected therewith were authorized to be paid out of the general fund of the agricultural department, the sources of which were apparently not confined to what might be derived from the license tax in respect of fertilizers.

By chapter 409 of the laws of 1887 (Laws 1887, 714), so much of the sections of the act pertaining to the state geologist as required the department to fix the compensation, to regulate the expenditures, or pay out of their funds the salary and expenses of the state geologist, was repealed.

Section 14 of this act empowered the department to expend from the amount arising from the tax on fertilizers for 1887-88, the expenses for the completion of the oyster survey; but by chapter 338 of the laws of 1891 (Laws 1891, 369), provision was made for defraying the expenses of the regulation of the oyster industries of the state from other sources.

We agree entirely with the circuit court that the legislation of 1891 not only amended the Code in the matter of the requirement of [353]the privilege tax of $500, *but repealed all laws making any substantial diversion of the money to be derived from the charge on fertilizers of 25 cents per ton, to any other purposes than those connected with the necessary expenses of inspection. It is ingeniously argued that as § 6 of chapter 410 of the laws of 1887 repealed by substitution § 4 of chapter 308 of the laws of 1885, the repeal thereof by chapter 348 of the laws of 1891 revived the latter section, and hence that $5,000 of the amount arising from the present charge on fertilizers became appropriated to the industrial school, it being asserted that the funds of the department were in fact derived therefrom; and also that the appropriation out of the state treasury of $500 to the industrial association by chapter 426 of the laws of 1891 was an additional appropriation, and did not repeal § 2206 of the Code, which directed the board of agriculture to appropriate that sum to that association.

These positions do not commend themselves to our judgment. As to the appropriation of $500, we think, under the circumstances, that it was intended to be in lieu of the former appropriation of that amount; and as to the revival of the act of 1885 by the repeal of the repealing act of 1887, we regard the doctrine that the repeal of a repealing act revives the first act as wholly inapplicable. In our opinion such a conclusion would be opposed to the obvious legislative intention in the enactment of the law of 1891. This act imposed a charge of 25 cents per ton on commercial fertilizers, and the purpose of the charge was declared to be to defray the expenses of inspection only. The previous laws had imposed a tax of $500 per brand upon every brand and description of fertilizer, and declared the same to be a privilege tax. It is impossible to impute to the general assembly the intention, in repealing parts of the Code which had been declared unconstitutional, to revive earlier laws which might render the amended law liable to the same objections.

Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that *money collected [354] from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of this act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge. But treating the question whether the charge of 25 cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act.

Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state.

Clause two of § 10 expressly allows the state to collect from imports as well as exports the amounts necessary for executing its inspection laws, and Chief Justice Marshall expressed the opinion in *Brown* v. *Maryland* that imported as well as exported articles were subject to inspection.

The observations of Mr. Justice Bradley, on circuit, in *Neilson* v. *Garza*, are quite apposite on this and other points under discussion, and may profitably be quoted.

That case involved the validity of a law of the state of Texas, providing for the inspection of hides, and Mr. Justice Bradley said:

"If the state law of Texas, which is complained of, is really an inspection law, it is
[355] valid and binding unless it interferes *with the power of Congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by Congress. The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, impose any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question whether a duty is excessive or not is to be decided may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the Constitution which prescribes the limit goes on to provide that 'all such laws shall be subject to the revision and control of Congress,' it seems to me that Congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it.

"Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

*"No doubt the primary and most usual [356]
object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons* v. *Ogden*, says: 'The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestic use.' 9 Wheat. 203 [6: 71]; Story, Const. § 1017. But in *Brown* v. *Maryland*, he adds, speaking of the time when inspection takes place: 'Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land.' 12 Wheat. 419 [6: 678] Story, Const. § 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation.

"All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article. Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict. *verb*, '*Inspection*.' The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown* v. *Maryland*, *supra;* Story, Const. § 1024. 'The object of the inspection laws,' says Justice Sutherland, 'is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.' *Clintsman* v. *Northrop*, 8 Cow. 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well."

But in *Turner* v. *Maryland*, 107 U. S. 38 [27:370], which related only to the laws of Maryland so far as providing for the preparation *for exportation of tobacco grown in the [357]
state, any opinion as to the provisions of those laws referring to the inspection of tobacco grown out of Maryland was expressly reserved.

In *Voight* v. *Wright,* 141 U. S. 62, 66 [35: 638, 640], a statute of Virginia relating to the inspection of flour brought into that commonwealth was held to be unconstitutional, because it required the inspection of flour from other states when no such inspection was required of flour manufactured in Virginia, an objection to which the act under consideration is not open, for the inspection and payment of its cost are required in respect of all fertilizers, whether manufactured in the state or out of it, and it is conceded that fertilizers are manufactured in North Carolina, as indeed, their many laws incorporating companies for the purpose of so doing plainly indicate. Mr Justice Bradley in that case remarked that the question was "still open as to the mode and extent in which state inspection laws can constitutionally be applied to personal property imported from abroad, or from another state, whether such laws can go beyond the identification and regulation of such things as are strictly injurious to the health and lives of the people, and therefore not entitled to the protection of the commercial power of the government, as explained and distinguished in the case of *Crutcher* v. *Kentucky,* 141 U. S. 47 [35: 649] just decided."

Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. *Minnesota* v. *Barber,* 136 U. S 313 [34·455, 3 Inters. Com. Rep. 185]. And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.

In *Plumley* v. *Massachusetts,* 155 U. S. 461 [39:223], it was decided that a statute of Massachusetts "to prevent deception in the
[358] manufacture *and sale of imitation butter," in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, was not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several states. That decision explicitly rests on the ground that the statute sought to prevent a fraud upon the general public. It is true that an article of food was involved, but the sole ground of the decision was that the state had the power to protect its citizens from being cheated in making their purchases, and that thereby the commercial power was not interfered with. *Schollenberger* v. *Pennsylvania,* 171 U. S. 1 [*ante,* 49].

Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the state to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope.

It is apparent that there is no article entering into common use in many of the states, and particularly the southern states, the inspection of which is so necessary for the protection of those citizens engaged in agricultural operations, as commercial fertilizers. Certain ingredients, as ammonia or nitrogen, phosphoric acid, and potash, make up the larger part of the value of these fertilizers, and without the aid of scientific analysis, the amount of these ingredients cannot be ascertained nor whether the fertilizer sold is of a uniform grade. The average farmer was compelled, without an analysis, to depend on his sense of smell, or his success, or failure, during the previous year with the same brand or name, to determine the relative amounts of the essential ingredients, and the value of the materials. To protect agricultural interests against spurious and low grade fertilizers was the object *of this law, which simply [359]
imposed the actual cost of inspection, necessarily varying with the agricultural condition of the various years. The label or tag could only be furnished after an analysis, the result of which was therein stated. In that light, the law practically required an analysis in every case, and was sustained as so doing by the supreme court of North Carolina in *State* v. *Norris,* 78 N. C. 443.

The act of 1877, requiring the obtaining of a license to sell fertilizers on the payment of a privilege tax of $500, was considered in that case, at January term, 1878, of that court, and held valid under the state Constitution as intended to protect the public from being imposed on by adulterated fertilizers, and to keep the traffic in the hands of responsible parties, making the means to that end self-sustaining by the license tax. And it was also decided that the law was not in conflict with the Federal Constitution on the authority of *Woodruff* v. *Parham,* 8 Wall. 122 [19: 382], and *Hinson* v. *Lott,* 8 Wall. 148 [19: 387].

As before remarked, the sections of the act of 1877 relating to this subject were carried forward into the Code of 1883, and § 2190 required the license and imposed the privilege tax.

In *Stokes* v. *Department of Agriculture,* 106 N. C. 439 (1890) the supreme court held that § 2190, in prohibiting the sale, or the offering for sale, of fertilizers in North Carolina until the manufacturer or person importing the same should obtain a license, did not prohibit the use of them in the state, nor the purchase of them in another state, to be used for fertilizing purposes by the purchaser himself in North Carolina; and that, where a person acting for himself and others, resident farmers of the state, ordered from a nonresident manufacturer a number of bags of

fertilizer, a given number being ordered for each purchaser, and the same was shipped in separate parcels, addressed to different purchasers separately, and separate bills sent to each purchaser, there being no intent to evade the statute, the transaction did not come within the inhibition of § 2190, and the goods were not liable to seizure at the instance of the department of agriculture.

[360] *Similar laws of other states, regulating the sale of fertilizers, have been sustained on the same ground.

In *Steiner* v. *Ray*, 84 Ala. 93, it was held that a statute regulating the sale of commercial fertilizers, when its controlling purpose was to guard the agricultural public against spurious and worthless compounds sometimes sold as fertilizers, and to furnish to buyers cheap and reliable means of proving the deception and fraud, should such be attempted, was strictly within the pale of police regulation and was constitutional. And this case was cited with approval in *Kirby* v. *Huntsville Fertilizer & M. Co.* 105 Ala. 529, where it was ruled that the sale of commercial fertilizers was void unless each sack, parcel, or package was tagged as required by statute at the time the right of property passed from the vendor to the vendee.

In *Vanmeter* v. *Spurrier*, 94 Ky. 22, an act of Kentucky, "to regulate the sale of fertilizers in this commonwealth, and to protect agriculturists in the purchase and use of the same," was sustained; and it was held that the statute could not be fairly construed to authorize the levy of an impost on interstate commerce beyond what was necessary to inspection. The court said: "The statute, as its title indicates, was enacted for protection of farmers of this commonwealth against fraud and imposition of those having for sale commercial fertilizers. To accomplish that object, each one selling, or offering for sale, any fertilizer is required to submit a sample for analysis and test of its quality at the experimental station. For that purpose only can the fees collected by the director be used, and in that way and to that extent only can farmers of the commonwealth be benefited by the statute. In our opinion the law is valid in every respect."

In *Faircloth* v. *De Leon*, 81 Ga. 158; *Goulding Fertilizer Company* v. *Driver* [99 Ga. 623], 25 S. E. 922, and other cases, the supreme court of Georgia has held that the seller of commercial fertilizers, which had not been inspected as the law required, could not maintain against the buyer an action for the price; but in *Martin* v. *Upshur Guano Company*, 77
[361] Ga. 257, *that the statute was not applicable where sale and delivery were without the state.

The act of January 21, 1891, must be regarded, then, as an act providing for the inspection of fertilizers and fertilizing materials in order to prevent the practice of imposition on the people of the state, and the charge of 25 cents per ton as intended merely to defray the cost of such inspection. It being competent for the state to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of § 10 of article 1 expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce. In any view, the effect on that commerce is indirect and incidental, and "the Constitution of the United States does not secure to anyone the privilege of defrauding the public."

Decree affirmed.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

CONSTANTINE J. SMYTH, Attorney General, *et al.*, Constituting the Board of Transportation of Nebraska, *Appts.*,
v.
OLIVER AMES *et al.*

SAME
v.
GEORGE SMITH *et al.*

SAME
v.
HENRY L. HIGGINSON *et al.*

(See S. C Reporter's ed. 361-365.)

Decrees modified—reasonableness of rates—when to be determined.

1. The decrees of this court are modified, in these cases, by striking out certain restraining words.
2. This court did not in its prevous decree pass judgment upon the reasonableness of the rates on any particular article.
3. The reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation.

[Nos. 49-51.]

Submitted May 9, 1898. Decided May 31, 1898.

APPEALS from decrees of the Circuit Court of the United States for the District of Nebraska. On application for rehearing and modification of decrees. *Decrees in the several cases modified and as modified, affirmed.*

The facts are stated in the opinion.

See same case, 169 U. S. 466 [42: 819].

Mr. **C. J. Smyth**, Attorney General of Nebraska, for appellants.

Mr. **J. M. Woolworth** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

These cases were determined in this court during the present term and are reported in

NOTE.—*As to rates, regulation of, by statute,* see note to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177.

169 U. S. 466 [42: 819]. The decree in each case was affirmed. The cases are now before us upon an application by the appellants—the attorney general of Nebraska and his colleagues constituting the State Board of Transportation and its secretaries—for a modification of the decree of the circuit court in the respective cases.

The decree in *Smyth et al.* v. *Ames et al.*, No. 49, which this court affirmed, was as follows:

"That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this state from one point to another therein, whereby such rates shall be reduced to those prescribed by the act of the legislature of this state, called in the bill filed therein, 'House Roll 33,' and entitled 'An Act to Regulate Railroads, to Classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freight upon each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of this Act,' approved April 12, 1893, *and below those now charged by said companies or either of them or their receivers*, or in anywise obeying, observing or conforming to the provisions, commands, injunctions and prohibitions of said alleged act; and that the board of transpor-
[363]tation of said state *and the members and secretaries of said board be in like manner perpetually enjoined and restrained from entertaining, hearing or determining any complaint to it against said railway companies or any or either of them *or their receivers*, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants, or employees done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered, or omitted, which may be forbidden or commanded by said act, *and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act*, and that the attorney general of this state be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining, and restraining them as hereinbefore set forth, which injunction shall be perpetual save as is hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this state, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed, that the defendants, members of the board of transportation of said state, may hereafter, when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It
*is further ordered, adjudged and decreed that [364]
the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The appellants now ask that the decree of the circuit court in that case be modified by striking therefrom the words, "and below those now charged by said companies or either of them or their receivers," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act."

The decree of the circuit court in *Smyth et al.* v. *Smyth et al.*, No. 50, and the decree in *Smyth et al.* v. *Higginson et al.*, No. 51, are substantially the same as the decree in the case of *Smyth et al.* v. *Ames et al.* The appellants in *Smyth et al.* v. *Smith et al.* now ask that the words in the decree "and below those now charged by said companies or either of them," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act." be stricken out; and the appellants in *Smyth et al.* v. *Higginson et al.* ask that the words "and below those now charged by said company," and the words "and particularly from reducing its present rates of charges for transportation of freight to those prescribed by said act," be stricken from the decree in that case.

The court is of opinion that the present application by the appellants in each of the above cases should be granted. The general question argued before us on the original hearing was, whether the rates established by the Nebraska statute, looking at them as an entirety, were so unreasonably low as to prevent the railroad companies from earning such compensation as would be just, having due regard to the rights both of the public and of the companies. In our examination of that question it was appropriate and necessary to inquire as to the earnings of the respective companies under the rates which they had established—looking at those rates, also, as an entirety. In this way we ascertained the probable effect of the statute in question. We did not intend, by an affirmance of the several decrees, to adjudge that the railroad companies should not, at any time in the future, if they saw proper, reduce the rates, or any of them, under which they were conducting *business at the time [365]
the final decrees were rendered, nor that the state board of transportation should not

reduce rates on specific or particular articles below the rates which the companies were charging on such articles when the decrees were entered. It may well be that on some particular article the railroad companies may deem it wise to make a reduction of the rate, and it may be that the public interests will justify the state board of transportation in ordering such reduction. We have not laid down any cast-iron rule covering each and every separate rate. We only adjudged that the enforcement of the schedules of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive. We did not pass judgment upon the reasonableness or unreasonableness of the rates on any particular article prescribed by the statute or by the railroad companies. If the state should by statute, or through its board of transportation, prescribe a new schedule of rates, covering substantially all articles, and which would materially reduce those charged by the companies respectively, or should by a reduction of rates on a limited number of articles make its schedule of rates as a whole, produce the same result, the question will arise whether such rates, taking into consideration the rights of the public as well as the rights of carriers, are consistent with the principles announced by this court in the opinion heretofore delivered. Of course, the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation.

The decrees in the several cases are hereby modified by striking therefrom the words referred to in the application of the appellants.

The decree in each case being thus modified is affirmed.

---

[366] A. B. WHITE, Collector of Internal Revenue for the District of West Virginia, *et al.*, *Appts.*,

v.

H. C. BERRY.

(See S. C. Reporter's ed. 366-378.)

Distinction between common law and equity—equity jurisdiction over removal of public officers—distillery gauger—removal from office.

1. Under the Constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, is maintained, although both jurisdictions are vested in the same courts.
2. A court of equity has no jurisdiction over the appointment and removal of public officers. To sustain a suit in equity to restrain or relieve against proceedings for the removal of a public officer would invade the domain of the courts of common law, or of the executive and administrative departments of the government.
3. A court of equity ought not to assume to control the discretion which under existing statutes the executive department has to assign some one to duty as gauger at a distillery in the place of the plaintiff, although that does not work the removal of the latter from office.
4. Proceedings for the removal from office of a United States gauger, although in violation of law, cannot be restrained by a court of the United States, sitting in equity.

[No. 539.]

Argued March 21, 22, 1898. Decided May 31, 1898.

APPEAL from a decree of the Circuit Court of the United States for the District of West Virginia restraining the defendants, A. B. White, collector, etc., *et al.*, from interfering with the plaintiff, H. C. Berry, in his office and in the discharge of his duties as gauger at the Hannis distillery at Martinsburg, West Virginia, and to permit him to discharge the duties of his office, etc. *Reversed*, and cause remanded with direction to dismiss the suit.

Statement by Mr. Justice **Harlan:**

This suit in equity was brought by H. C. Berry in the circuit court of the United States for the district of West Virginia against A. B. White, United States collector of internal revenue for that district, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer.

The bill alleged that in 1893 the plaintiff, Berry, was duly appointed by the Secretary of the Treasury to the position of United States gauger, and from that time to the commencement of this suit he had acted in that capacity at the Hannis distillery at Martinsburg, West Virginia;

That he was appointed through the recommendation of E. M. Gilkeson, late collector of internal revenue for the above-named district;

That he was paid at the rate of $100 per month directly from the Treasury Department, and was an officer of the United States government, having taken the required oath of office and executed bond as required by law;

*That his oath of office and bond continued [367] good and in force regardless of the personnel of the collector of internal revenue, and he did not hold his position at the discretion of that officer;

NOTE.—*As to equity jurisdiction after trial at law*, see note to Smith v. M'Iver, 6 : 152.

As to what remedy at law will prevent remedy in equity, see note to Tyler v. Savage, 36 : 83.

As to when injunction to restrain acts of public officers will be granted, see note to Mississippi v. Johnson, 18 : 437.

As to right to remove officers summarily; particular officers; particular provisions; implications; where term of office is fixed; removals for cause; nature of proceeding,— see note to Trainor v. Wayne County Auditors (Mich.) 15 L. R. A. 95.

That he had honestly, faithfully, and impartially discharged his duties, being especially well equipped and qualified to discharge all the duties appertaining to his office;

That the defendant White, collector of internal revenue, had declared his intention to appoint a gauger and three storekeepers to fill the place of the plaintiff and others employed at the distillery at an early date;

That the defendants Hoult, Sutton, Staubley, and Thayer had been reinstated, or would be appointed and commissioned, and one of them would be assigned to duty in place of the plaintiff at the Hannis distillery through White, who had openly declared his intention to reinstate the defendants in place of the plaintiff and others;

That the plaintiff is a Democrat in politics, was assigned to said office as a Democrat, and had voted the ticket of that political party, while the defendant White was a Republican;

That White had declared his intention to place one of the other four defendants in plaintiff's position because of the latter's political affiliation, and for no other reason, and to appoint and recommend Republicans to fill such places for no other reason than that they were of that political faith;

That the plaintiff's office is in the classified service, and belongs to what is known as the Civil Service, and as such he could not be removed, except for cause shown and proved;

That by a circular issued by the Secretary of the Treasury it was provided that no removals should be made from any position subject to competitive examination except upon just cause and upon written charges filed with the head of the department or the appointing officer, of which the accused should have full notice and opportunity to make defense;

That in department circular No. 119, which was an executive order, the same provisions were made, together with others, and were signed by the Acting Commissioner of Inter-
[368] nal *Revenue and approved by the Secretary of the Treasury;

That the plaintiff was one of the employees of the Treasury Department, was included in the classified service, and was protected from removal for political or religious reasons under the Civil Service laws and rules of the United States, as fully appears from a communication received from the acting president of the Civil Service Commission of date September 10, 1897;

That if the defendant White be permitted to remove the plaintiff from his office and position or supplant him by others, the same would be illegal and in violation of law;

That rule 2 of § 3 of the Civil Service rules provides that "no person in the executive Civil Service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations;" while § 1 of those rules provides that any person in the executive Civil Service of the United States who should wilfully violate any provision of the Civil Service act or of the rules established by the Civil Service Commission should be dismissed from office;

That under the law the plaintiff had a vested interest in his office, and if White should remove him therefrom or assist in so doing it would be in violation not only of the Civil Service rules but of the plaintiff's vested interest in his office, for which he would not have an adequate remedy at law;

That he is able, competent, and willing to discharge the duties of his office, and is unwilling to be summarily dismissed therefrom for no other reason than that he is of opposite politics to those of the defendant White, collector of internal revenue;

That the said collector has no power, right, or authority to remove the plaintiff from his office, or to appoint any other to take his place and thereby effect his removal; that the defendants Hoult, Sutton, Staubley, and Thayer have no right or authority to take the oath of office and otherwise qualify and appear to take the position, and thereby assist in the removal *of the plaintiff, and as [369]
there were no vacancies created either by removals or resignations, and there being 15 per cent now commissioned more than sufficient to perform the duties of storekeepers and gaugers in that district, if they were permitted so to do it would be in violation of law as well as of the rights and vested interests of the plaintiff; and,

That unless White be enjoined from so doing he will remove the plaintiff, and unless his codefendants are enjoined from qualifying as officers of the United States to take the place of the plaintiff at the distillery they would in that manner effect the removal of the plaintiff from his office, they having expressed their intention to accept such appointment and assignments.

The relief asked was an injunction restraining and prohibiting the defendant White, collector, and all others by and through him, "from removing him from the position of gauger until a vacancy is created according to law, as an officer of the United States aforesaid, and also from recommending, assigning, and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with your complainant;" and also, that Hoult, Sutton, Staubley, and Thayer and all other persons be enjoined, restrained, and prohibited "from qualifying as gauger to take the place of your complainant at said distillery, or in any other way aid or assist in the removal of your said orator, or performing or discharging any of the duties of said office," and for such other and general relief as to equity might seem just and right.

In conformity with the motion by the plaintiff for a temporary restraining order, it was adjudged, ordered, and decreed "that A. B. White, United States collector of internal revenue for the district of West Virginia, be and is hereby restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L.

Hoult, John D. Sutton, Anthony Stroubley, or any other person, to said position, and from removing the said complainant Berry aforesaid, until a vacancy therein is created by law, and from assigning and appointing any
[370] *person to the same position, and from proceeding in the attempt to make such removal and in any other manner interfere with the said complainant Berry in the said office, as aforesaid." It was further adjudged, ordered, and decreed "that A. L. Hoult, John D. Sutton, Anthony Stroubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as gauger in the place and stead of the said complainant Berry, as aforesaid, or in discharging any of the duties of the said office, until the further order of this court."

The answer of the defendants states that on the 30th day of September, 1897, the Commissioner of Internal Revenue made an order relieving plaintiff from assignment to duty as gauger at the Hannis distillery, and on the same day telegraphed the plaintiff to that effect; that on the same day the commissioner telegraphed defendant Thayer, assigning him to duty as gauger at that distillery, and on the 1st day of October, 1897, he took charge as such gauger, and was in charge when defendant White, collector, visited the distillery on that day; that Thayer took charge before 8 o'clock in the morning of October 1, and before the granting of the injunction, and before any service upon or other notice of any kind of the granting of or application for the injunction to Thayer, White, or any of the defendants; that the recommendation of defendant White to the commissioner, that the plaintiff be relieved from duty as aforesaid, was made prior to the institution of this suit; that it has been the general policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and gaugers for the purpose of securing to such storekeepers and gaugers a fair proportion of employment and for the purpose of preventing collusion between distillery officials, and otherwise protecting the interests of the government; that plaintiff having been on duty for a long time prior to the 30th day of September, 1897, as gauger, it was deemed by the Commissioner fair and right among the several gaugers, and for the best interests of the public service, to relieve plaintiff from assignment to duty at the Hannis distillery.

Admitting in their answer that the plain-
[371] tiff was an officer *of the United States, duly appointed and commissioned, and that he did not hold his position at the discretion of the collector of internal revenue, the defendant White denied that the plaintiff was well equipped and qualified to discharge all the duties of gauger, but that from the records of his office and of the department for the previous three months, during which he has been collector, the plaintiff was not a first-class gauger, and was culpably careless in his work, and that it was largely because of information he had received that defendant White recommended to the commissioner that the plaintiff be relieved from duty as gauger at that distillery: that the defendant White as collector had never declared his intention to appoint any one of the other defendants or anyone else a storekeeper or gauger, knowing full well and recognizing the fact that storekeepers and gaugers are and can be appointed by the Secretary of the Treasury only; that the Secretary of the Treasury reinstated Hoult as gauger, Staubley as storekeeper, and Thayer as gauger in 1897, in accordance with the laws of the United States and in accordance with the civil service law, each having first been certified as eligible to such reinstatement by the Civil Service Commission; and that Hoult, Sutton, Staubley, and Thayer had all been duly commissioned and executed bonds and qualified prior to the institution of this suit; and that defendant White never declared his intention to reinstate any of said officers or assign them to duty in the place of the plaintiff, recognizing fully that he had no such authority, and that neither Hoult nor Staubley had been assigned to duty since their reinstatement.

The defendant White admitted that he was a Republican in politics, and the defendants admitted that the plaintiff was a Democrat in politics. White denied that he ever signified or declared his intention to remove the plaintiff from office or put the defendants or anyone else in his place, for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican; that in fact and in law he could have nothing to do with the removal or appointment of a storekeeper or a gauger unless it be to recommend the same: that in short the appointments of *storekeep- [372]
ers and gaugers and their removals could be made only by the Secretary of the Treasury.

The defendants alleged that the revocation of assignment complained of by the plaintiff was made by the Commissioner, whom the defendants understood was a Democrat.

The defendants admitted that the office of gauger held by the plaintiff was in the classified service, and belonged to what was known as the Civil Service; but alleged that so far as they knew the plaintiff had not been removed, but on the contrary still held the position of United States gauger; that the fact that he had been relieved from assignment to duty at the Hannis distillery did not remove him from office; that he might be assigned to duty or transferred or nonassigned at any time by the Commissioner of Internal Revenue; that the plaintiff could not in this manner question the right of the commissioner to assign a United States gauger at a distillery or relieve one who has already been assigned; that the Commissioner had the right to assign to duty a United States gauger, and to determine how long he shall remain on duty under such assignment; and that no law, executive order, or rule or regulation of the Civil Service Commission was violated by the commissioner doing as he had done in this case in exercising the authority conferred upon him by the acts of Congress by assigning

a gauger to duty at the said distillery and relieving from duty the plaintiff, who had been theretofore assigned to duty at the same distillery by the commissioner and by the same act of Congress.

The defendants admitted that the plaintiff was willing to continue in office, but the defendant White charged that he was a careless officer, and that if any attempt was or should be made to remove or dismiss him from the service, it would not be for the reason that he was of opposite politics to those of the collector.

The answer concludes:

"Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint anyone in his place, and that he
[373] never has claimed any such *authority. The defendants say that the defendants Hoult, Sutton, Staubley, and Thayer, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury, that the right to hold said positions cannot be questioned in this or any other collateral proceeding; that the question of whether there were or were not vacancies at the time these appointments were made cannot be determined in this suit. Neither of said defendants Hoult, Sutton, Staubley, or Thayer was appointed in place of the plaintiff. The appointment of neither could affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law is not a question which can be raised by the plaintiff in this suit. It cannot be ascertained in this proceeding whether or not 15 per cent or any other number of officers are now in commission more than are sufficient to perform the duties of storekeepers or gaugers in this collection district. This court, it is respectfully suggested, will not undertake to ascertain the number of distilleries in operation and to be placed in operation in said collection district and the number of storekeepers and gaugers to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendants Hoult, Sutton, Staubley, and Thayer more storekeepers and gaugers were placed in commission than were sufficient to perform the duties of such officers in said district.

"The defendants deny that the appointment and qualification of said Hoult, Sutton, Staubley, and Thayer will make necessary the removal of the plaintiff. The defendants, further answering, say that the defendant Hoult was on the — day of ——, 1889, appointed a United States gauger; that on the — day of ——, 1893, after having served about four years, and there having been a change of administration, he was removed from said position through no delinquency or misconduct *of his; that during the late war [374]
of the Rebellion he served in the military service of the United States, and was honorably discharged therefrom; that availing himself of rule 9 of the Civil Service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and his eligibility having been properly certified by said commission, he was reinstated and reappointed by the Secretary of the Treasury. Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with the recommendation of said collector, forwarded to the Commissioner of Internal Revenue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton, Staubley, and Thayer were similarly reinstated and reappointed as storekeepers and gauger. The defendant A. B. White says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to or on the 29th day of September, 1897, and the said recommendation was made in part because the said plaintiff had been on duty for some time, and in part for the reasons hereinbefore stated. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, Staubley, and Thayer were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff relieved from duty as aforesaid at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, nor the said Thayer assigned to duty at the said distillery for political reasons."

The cause having been heard upon the bill, the demurrer to the bill, the answer and a general replication thereto, the affidavits filed by the parties, and upon the plaintiff's motion to perpetuate the injunction theretofore granted, a final order was made "restraining and inhibiting the defendant White, *the col- [375]
lector of the district, the appointing power, the defendant Thayer, and all others, from in anywise interfering with the plaintiff H. C. Berry in the possession of his office and in the discharge of his duty as gauger at the Hannis distillery, located in the town of Martinsburg, West Virginia, until he shall be removed therefrom by proper proceedings had under the civil service act and the rules and regulations made thereunder or by judicial proceedings at law; and the said collector having applied heretofore to the court for leave to the commissioner to appoint temporarily a gauger pending this litigation, he, the said collector, is required and directed to recommend and the Commissioner of Internal Revenue to transfer the temporary gauger heretofore assigned, and to permit the said gauger

Berry undisturbed to discharge the duties of his office as gauger, unless hereafter removed as hereinbefore provided."

Messrs. **James E. Boyd,** Assistant Attorney General, and **Joseph H. Gaines** for appellants.

Mr. **Charles J. Faulkner** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

In the opinion delivered by the learned district judge, who heard this and other cases involving the same questions as those now presented, it was held: 1. That the act known as the "Civil Service act" was constitutional. 2. That Congress has not delegated to the President and the commission legislative powers. 3. That by rule 3, § 1, the internal revenue service has been placed under the Civil Service act and rules made in pursuance of it. 4. That the plaintiffs in these actions are officers of the government in the internal revenue service. 5. That they cannot be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the Civil Service act and the
[376] rules promulgated under it, *which, under the act of Congress, became a part of the law. 6. That the attempt to change the position and rank of the officers in these cases was in violation of law. 7. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the Civil Service act. 83 Fed. Rep. 578.

On behalf of the government it is insisted that the circuit court of the United States, sitting in equity, was without jurisdiction to entertain this suit and to grant the relief asked in the bill. If this position be well taken, it will be unnecessary to consider the other questions discussed in the able and elaborate opinion of the district judge.

In *Sawyer's Case*, 124 U. S. 200, 223 [31: 402, 410], Chief Justice Waite in a dissenting opinion said that he was not prepared to hold that an officer of a municipal government could not, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without authority of law; that there might be cases when the tardy remedies of quo warranto, certiorari, and other like writs would be entirely inadequate. In that view of the jurisdiction of equity the writer of this opinion concurred at the time the court disposed of that case.

But the court in its opinion in that case observed that under the Constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, had been maintained, although both jurisdictions were vested in the same courts, and held that a court of equity had no jurisdiction over the appointment and removal of public officers, and that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the government.

After referring to numerous authorities, American and English, in support of the general proposition that a court of chancery had no power to restrain criminal proceedings, unless they had been instituted by a party to a suit already pending *before it, and to try the [377]
same right that was in issue there, the court proceeded: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow School within its undoubted jurisdiction over public charities was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: 'This court, I apprehend, has no jurisdiction with regard either to the election or amotion of corporators of any description.' *Attorney General* v. *Earl Clarendon*, 17 Ves. Jr. 491. In the courts of the several states the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases,"—citing *Tappan* v. *Gray*, 3 Edw. Ch. 450, reversed by Chancellor Walworth on appeal, 9 Paige, 507, 509, 512, whose decree was affirmed by the court of errors, 7 Hill, 259; *Hagner* v. *Heyberger*, 7 Watts. & S. 104 [42 Am. Dec. 220]; *Updegraff* v. *Crans*, 47 Pa. 103; *Cochran* v. *McCleary*, 22 Iowa, 75; *Delahanty* v. *Warner*, 75 Ill. 185 [20 Am. Rep. 237]; *Sheridan* v. *Colvin*, 78 Ill. 237; *Beebe* v. *Robinson*, 52 Ala. 66; and *Moulton* v. *Reid*, 54 Ala. 320.

The rule established in *Sawyer's Case* was applied in *Morgan* v. *Nunn*, 84 Fed. Rep. 551, in which Judge Lurton said that "a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." Similar decisions have been made in other circuit courts of the United States; *by Judges Par- [378]
dee and Newman in *Couper* v. *Smyth*, northern district of Georgia, 84 Fed. Rep. 757; by Judge Kirkpatrick in *Page* v. *Moffett*, district of New Jersey, 85 Fed. Rep. 38; by Judge Jenkins, northern district of Illinois, in *Carr* v. *Gordon*, 82 Fed. Rep. 373, 379, and by Judge Baker, district of Indiana, in *Taylor* v. *Kercheval*, 82 Fed. Rep. 497, 499.

If the assignment of some one to duty as gauger at the Hannis distillery, in the place

of the plaintiff, did not work his removal from office, a court of equity ought not to assume to control the discretion which under existing statutes the executive department has in all such matters. Interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs.

But the plaintiff contends that the assignment of some one to duty in his place at the Hannis distillery is, in effect, a removal of him from his office in violation of law, and that the object of the proceedings against him was to bring about that result. But, under the authorities cited, such proceedings cannot be restrained by a court of the United States, sitting in equity, and therefore the court below erred in passing the final decree which has been brought here for review.

Without expressing any opinion upon other questions so fully discussed by counsel, we hold that the circuit court, sitting in equity, was without jurisdiction to grant the relief asked.

The decree below is reversed and the cause remanded with direction to dismiss the bill.

Reversed.

Mr. Justice **McKenna** took no part in the decision of the case.

---

[379] A. B. WHITE, Collector, *et al., Appts.*,
v.
WILLIAM BUTLER.

A. B. WHITE, Collector, *et al., Appts.*,
v.
J. G. RUCKMAN.

(See S. C. Reporter's ed. 379.)

Removal of public officers—White v. *Berry, 171 U. S. 366* [*ante, 199*], *followed.*

1. Under the Constitution and laws of the United States a court of equity has no jurisdiction over the appointment and removal of public officers.
2. *White* v. *Berry*, 171 U. S. 366 [*ante*, 199], followed.

[Nos. 540, 541.]

Argued March 21, 22, 1898. Decided May 31, 1898.

APPEALS from decrees of the Circuit Court of the United States for the District of West Virginia restraining A. B. White, collector, etc., *et al.*, from interfering with the several plaintiffs, William Butler and J. C. Ruckman, in the possession of their offices and in the discharge of their duties at the Hannisville distillery, etc. *The decree in each case reversed*, and the causes remanded with directions to dismiss the bills.

The facts are stated in the opinion.

Messrs. **James E. Boyd**, Assistant Attorney General, and **Joseph H. Gaines** for appellants.

Mr. **Charles J. Faulkner** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

Butler, the appellee in the first of the above cases, was a storekeeper of the United States at the Hannis distillery at Martinsburg, West Virginia.

Ruckman, the appellee in the second case, was also storekeeper at the same distillery.

The bill in each case is substantially like that in *White*, Collector, etc., v. *Berry*, just decided 171 U. S. 366 [*ante*, 199]. The relief asked by Butler and Ruckman is the same as that asked by Berry, and the decree rendered in behalf of each was the same as that rendered in Berry's case.

For the reasons stated in the opinion just delivered in *White*, Collector, etc., v. *Berry*, *the decree in each of the above cases must be reversed*, and the causes remanded with directions to dismiss the bills.

It is so ordered.

GEORGE THOMPSON, *Plff. in Err.*, [380]
v.
STATE OF MISSOURI.

(See S. C. Reporter's ed. 380-388.)

State statute allowing comparison of handwritings—not an ex post facto law.

1. The Missouri statute of 1895 allowing a comparison by witnesses of a disputed writing with other writings proved to be genuine, and the submission to the court and jury of such writings and the evidence of the witnesses, as evidence of the genuineness or otherwise of the writing in dispute, is not an *ex post facto* law when applied to a prosecution for a crime committed prior to its passage.
2. Such statute is one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the guarantees of life and liberty secured to an accused by the supreme law of the land.

[No. 623.]

Submitted April 21, 1898. Decided May 31, 1898.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment of that court affirming the judgment of the St. Louis Criminal Court convicting George Thompson of the crime of murder. *Affirmed.*

See same case below, 132 Mo. 301, and 42 S. W. 949.

The facts are stated in the opinion.

Messrs. **Charles F. Joy** and *Marion C. Early*, for plaintiff in error:

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings under the provisions of § 8944a, Session Laws of Missouri 1895, because

NOTE.—*As to proof of handwriting or signature*, see note to Rogers v. Ritter, 20 : 417.

As to constitutionality of ex post facto laws, see notes to Calder v. Bull, 1 : 648, and Sturges v. Crowninshield, 4 : 529.

the said act was passed after the arrest, indictment, and first trial of defendant and is in violation of art. 1, § 10, Constitution United States.

Calder v. *Bull*, 3 Dall. 386 (1:648); *Kring* v. *Missouri*, 107 U. S. 221 (27:506); *State* v. *Bond*, 49 N. C. (4 Jones L.) 9; *State* v. *Johnson*, 12 Minn. 486, 93 Am. Dec. 241; Story, Const. § 1345; Cooley, Const. Lim. pp. 319, 325; 1 Bl. Com. §§ 45. 46; Kent, Com. p. 458; Miller, Const. p. 587; Hare, Am. Const. L. p. 565; Black, Constitutional Prohibitions, §§ 234 *et seq.*

It was error to admit in evidence for the purpose of comparison certain extraneous handwritings, under § 8944a, Sessions Laws of Missouri 1895, because in violation of art. 2, § 15, Constitution of Missouri, and in violation of §§ 6594, 6597, 6598, Revised Statutes of Missouri 1889.

State v. *Thompson*, 141 Mo. 408; *Pacific R. Co.* v. *Cass County*, 53 Mo. 17; *St. Louis* v. *Life Asso. of America*, 53 Mo. 466; *State* v. *Grant*, 79 Mo. 113, 49 Am. Rep. 218.

Mr. **Edward C. Crow**, Attorney General of Missouri, for defendant in error:

The law of 1895 (see Acts of Mo. 1895, p. 284), making the notes written by defendant while in jail and proved to be genuine and competent for the purpose of comparison with the disputed writing, to wit: the forged order to the druggist for strychnine, is not an *ex post facto* law in its relation to this case.

State v. *Thompson*, 141 Mo. 408; *Hopt* v. *Utah*, 110 U. S. 574 (28:262); *O'Bryan* v. *Allen*, 108 Mo. 227; *State* v. *Jackson*, 80 Mo. 175, 50 Am. Rep. 499; Cooley, Const. Lim. 3d ed. 367; *Hope Mut. Ins. Co.* v. *Flynn*, 38 Mo. 483, 90 Am. Dec. 438; *State* v. *Thompson*, 132 Mo. 301.

This law of 1895 relates solely to the procedure, and the rule is that remedies and procedure must always be under the control of the legislature.

Cooley, Const. Lim. 5th ed. p. 329.

Laws which change the rules of evidence relate to the remedy only, and may be applied to existing causes of action without infringing the constitutional guarantees against "*ex post facto*" legislation.

O'Bryan v. *Allen*, 108 Mo. 227; *Laughlin* v. *Com.* 13 Bush, 261; *Messim* v. *McCray*, 113 Mo. 382; *Mrous* v. *State*, 31 Tex. Crim. Rep. 597.

Mr. Justice **Harlan** delivered the opinion of the court:

The record suggests many questions of law, but the only one that may be considered by this court is whether the proceedings against the plaintiff in error were consistent with the provision in the Constitution of the United States forbidding the states from passing *ex post facto* laws.

Thompson was indicted in the St. Louis criminal court at its November term, 1894, for the murder, in the first degree, of one Joseph M. Cunningham, a sexton at one of the churches in the city of St. Louis. Having been tried and convicted of the offense charged, he prosecuted an appeal to the supreme court of Missouri, and by that court the judgment was reversed and a new trial was ordered. *State* v. *Thompson, Appellant*, 132 Mo. 301. At the second trial the accused was again convicted; and a new trial having been denied, he prosecuted another appeal to the supreme court of the state. That court affirmed the last judgment, and the present appeal brings *that judgment before us for **[381]** re-examination. *State* v. *Thompson, Appellant* (Mo.) 42 S. W. 949.

The evidence against the accused was entirely circumstantial in its nature. One of the issues of fact was as to the authorship of a certain prescription for strychnine, and of a certain letter addressed to the organist of the church containing threatening language about the sexton. The theory of the prosecution was that the accused had obtained the strychnine specified in the prescription and put it into food that he delivered or caused to be delivered to the deceased, with intent to destroy his life. The accused denied that he wrote either the prescription or the letter to the organist or that he had any connection with either of those writings. At the first trial certain letters written by him to his wife were admitted in evidence for the purpose of comparing them with the writing in the prescription and with the letter to the organist. The supreme court of the state, upon the first appeal, held that it was error to admit in evidence for purposes of comparison the letters written by Thompson to his wife, and for that error the first judgment was reversed and a new trial ordered. 132 Mo. 301, 324.

Subsequently, the general assembly of Missouri passed an act which became operative in July, 1895, providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Laws Mo. 1895, p. 284.

This statute is in the very words of § 27 of the English common-law procedure act of 1854 (17 & 18 Vict. chap. 125). And by the 28 Vict. chap. 18, §§ 1, 8, the provisions of that act were extended to criminal cases.

At the second trial, which occurred in 1896, the letters written by the accused to his wife were again admitted in evidence, over his objection, for the purpose of comparing them with the order for strychnine and the letter to the organist. *This action of the **[382]** trial court was based upon the above statute of 1895.

The contention of the accused is that as the letters to his wife were not, *at the time of the commission of the alleged offense*, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was *ex post facto* when applied to his case.

It is not to be denied that the position of

the accused finds apparent support in the general language used in some opinions.

Mr. Justice Chase, in his classification of *ex post facto* laws in *Calder* v. *Bull*, 3 Dall. 386, 390 [1:648,650] includes "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

In *Kring* v. *Missouri*, 107 U. S. 221, 228, 232, 235 [27:506.509,510,511], the question arose as to the validity of a statute of Missouri under which the accused was found guilty of the crime of murder in the first degree and sentenced to be hung. That case was tried several times, and was three times in the supreme court of the state. At the trial immediately preceding the last one Kring was allowed to plead guilty of murder in the second degree. The plea was accepted, and he was sentenced to imprisonment in the penitentiary for the term of twenty-five years. Having understood that, upon this plea, he was to be sentenced to imprisonment for only ten years, he prosecuted an appeal, which resulted in a reversal of the judgment. At the last trial the court set aside the plea of guilty of murder in the second degree—the accused having refused to withdraw it—and, against his objection, ordered a plea of not guilty to be entered in his behalf. Under the latter plea he was tried, convicted, and sentenced to be hanged. By the law of Missouri at the time of the commission of Kring's offense, his conviction and sentence under the plea of guilty of murder in the second degree was an absolute acquittal of the charge of murder in the first degree. But that law having been changed before the final trial occurred, Kring contended that the last stat-
[383] ute, *if applied to his case, would be within the prohibition of *ex post facto* laws. And that view was sustained by this court, four of its members dissenting.

In the opinion of the court in *Kring's Case* reference was made to the opinion of Mr. Justice Chase in *Calder* v. *Bull*, and also to the charge of the court to the jury in *United States* v. *Hall*, 2 Wash. C. C. 366, 373. In the latter case Mr. Justice Washington said: "An *ex post facto* law is one which, in its operation, makes that criminal or penal which was not so at the time the action was performed; or which increases the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage." He added: "If the enforcing law applies to this case, there can be no doubt that, so far as it takes away or impairs the defense which the law had provided the defendant at the time when the condition of this bond became forfeited, it is *ex post facto* and inoperative." Considering the suggestion that the Missouri statute under which Kring was convicted only regulated procedure, Mr. Justice Miller, speaking for this court, said: "Can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." In conclusion it was said: "Tested by these criteria, the provision of the Constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States."

A careful examination of the opinion in *Kring* v. *Missouri* shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree—the accused being charged with murder in the first degree—was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for murder *in the first degree which was given him [384]
at the time of the commission of the offense. The right to such protection was deemed a substantial one—indeed, it constituted a complete *defense* against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation. This is clear from the statement in *Kring's Case* that the question before the court was whether the statute of Missouri deprived "the defendant of any right of *defense* which the law gave him when the act was committed so that as to that offense it is *ex post facto*."

This general subject was considered in *Hopt* v. *Utah*, 110 U. S. 574, 588, 589 [28: 262, 268]. Hopt was indicted, tried, and convicted of murder in the territory of Utah, the punishment therefor being death. At the time of the commission of the offense it was the law of Utah that no person convicted of a felony could be a witness in a criminal case. After the date of the alleged offense, and prior to the trial of the case, an act was passed removing the disqualification as witnesses of persons who have been convicted of felonies. And the point was made that the statute, in its application to Hopt's case, was *ex post facto*.

This court said: "The provision of the Constitution which prohibits the states from passing *ex post facto* laws was examined in *Kring* v. *Missouri*, 107 U. S. 221 [27:506]. The whole subject was there fully and carefully considered. The court, in view of the adjudged cases, as well as upon principle, held that a provision of the Constitution of Missouri denying to the prisoner, charged with murder in the first degree, the benefit of the law as it was at the commission of the offense—under which a conviction of murder in the second degree was an acquittal of murder in the first degree, even though such judgment of conviction was subsequently reversed—was in conflict with the Constitution of the United States. That decision proceeded upon the ground that the state Constitution deprived the accused of a substantial right

which the law gave him when the offense was committed, and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage.
[385] By the law as established *when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree, and subjected to the punishment of death. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed. But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." The court added: "The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the
[386] *state, upon grounds of public policy, may regulate at its pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

At the present term, in *Thompson* v. *Utah*, 170 U. S. 343 [42: 1061], this court observed, generally, that a statute is *ex post facto* which, by its necessary operation and in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage. But it took care to add: "Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: 'But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.'" Chap. 9, *272.

Applying the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined—we adjudge that the statute of Missouri relating to the comparison *of writ- [387] ings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. If persons excluded, upon grounds of public policy at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the quality or degree of his offense. Nor can the new rule introduced by it be characterized as unreasonable—certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require "less proof, in amount or degree," than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to

be admissible, and did not disturb the fundamental rule that the state, as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality; for
[388]the rule established by it gave *to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writing upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of handwritings; and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.

Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the *ex post facto* clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land.

The judgment of the Supreme Court of Missouri is affirmed.

MARIANNE J. BALDY, by Her Next Friend, W. B. Pritchard, *Plff. in Err.*,
v.
JOHN H. HUNTER, Executor of Edward H. W. Hunter, Deceased.

(See S. C. Reporter's ed. 388–404.)

Investment in Confederate bonds by a guardian.

The mere investment during the civil war, of the Confederate funds or currency of a ward in bonds of the Confederate states by a guardian, when both were residents within the Confederate lines, should be deemed a transaction in the ordinary course of civil society, and not illegal as a transaction to aid in the destruction of the government of the Union.

[No. 241.]

Argued April 29, 1898. Decided May 31, 1898.

IN ERROR to the Supreme Court of the State of Georgia, to review a judgment of that court affirming the judgment of the state trial court in favor of the defendant, John H. Hunter, executor of E. H. W. Hunter, in an action brought by Marianne J. Baldy, to recover moneys invested in Confederate bonds. *Affirmed.*

See same case below 98 Ga. 170.

The facts are stated in the opinion.

Messrs. **Pope Barrow,** *Samuel R. Church,* and *Francis H. Stephens,* for plaintiff in error:

There was but one issue between the plaintiff and the defendant in this case. The sole question is whether it was lawful or unlawful for a guardian to invest his ward's money in Confederate bonds.

Every other question was eliminated from the case.

Pettitt v. *Macon,* 95 Ga. 645.

An investment by a guardian of money of his ward in bonds of the Confederate States of America was unlawful, and he is not entitled to a credit in a settlement with his ward for the sum so invested.

No act of the legislature of Georgia authorizing such investment, and no order of any court granted by authority of such act would make it a lawful investment.

Torn v. *Lockart,* 17 Wall. 570 (21 : 657); *Lamr* v. *Micou,* 112 U. S. 452, 476 (28 : 751, 760); *Chaneely* v. *Bailey,* 37 Ga. 532, 95 Am. Dec. 350; *Wallace* v. *Cannon,* 38 Ga. 199, 95 Am. Dec. 385.

NOTE.—*As to Confederate states; judgments of courts of; laws and authority of; status and relations with the Union; commercial intercourse,*—see note to Keene v. M'Donough, 8 : 955.

As to Confederate notes; contracts payable in; tender of,—see note to Thorington v. Smith, 19 : 362.

That dominion acquired over conquered or ceded territory does not devest vested rights of individuals to property; former laws continue until altered by new sovereign,—see note to Delassus v. United States, 9 : 71.

The fact that the guardian acted in good faith is irrelevant and immaterial.

Sprott v. *United States*, 20 Wall. 459, 463 (22:371, 372).

The guardian is bound to account for the money in gold. He has failed to show that the gold which he collected in 1857, 1858, and 1859, was changed into Confederate money.

King v. *Hughes*, 52 Ga. 600; *Johnson* v. *McCullough*, 59 Ga. 212.

Mr. **P. W. Meldrim,** for defendant in error:

The guardian had the right to invest Confederate money in his hands under the direction of the judge of the superior court having jurisdiction.

Ga. Acts 1861, p. 32; Ga. Acts 1863–64, p. 29; Ordinances of the Conventions of Georgia, 1865–1868; *Campbell* v. *Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Miller* v. *Gould*, 38 Ga. 465; *Westbrook* v. *Davis*, 48 Ga. 473; *Saxon* v. *Sheppard*, 54 Ga. 286; *McWhorter* v. *Tarpley*, 54 Ga. 291; *Nelms* v. *Summers*, 54 Ga. 605; *Venable* v. *Cody*, 68 Ga. 171; *McCook* v. *Harp*, 81 Ga. 236.

Mr. Justice **Harlan** delivered the opinion of the court:

William H. Baldy, a citizen of Georgia, died in that state prior to the civil war, leaving several children, one of whom was Marianne J. Baldy, who became of full age on the 21st day of February, 1875.

In 1857 Dr. E. H. W. Hunter was appointed
[390] her guardian, *and after duly qualifying as such took possession of the estate of his ward.

By an act of the legislature of Georgia, passed on the 16th day of December, 1861, guardians, trustees, executors, and administrators were authorized to invest any funds held by them in the bonds issued by the Confederate states or in lands and negroes—an order to that effect being first obtained from a judge of the superior court, who was empowered to consider and pass such applications, either in term time or vacation. Ga. Laws 1861, p. 32.

On the 25th day of April, 1863, the superior court of Jefferson county, Georgia, passed an order granting leave to the guardian of Miss Baldy to invest certain funds then in his hands in Confederate bonds. This order was granted upon the petition of the guardian, who expressed the opinion that such funds should be so invested. On the same day the investment was made.

The legislature of Georgia, by an act approved March 12, 1866, entitled "An Act for the Relief of Administrators, Executors, Guardians, and Trustees, and for Other Purposes," declared that all administrators, executors, guardians, and trustees, who, in pursuance of an order, judgment, or decree of any court having jurisdiction, or of any law of that state, bona fide invested the funds of the estate they represented in the bonds, notes, or certificates of the state of Georgia or of the Confederate states, "be and they are hereby relieved from all the penalties of mismanagement, misappropriation, or misapplication of the funds of the estates they represent, by reason of such investments;" and that all administrators, executors, guardians, and trustees, claiming the benefit of the provisions of that act, should, before their final settlement, make oath before the ordinary of the county in which they had theretofore made their returns, "showing what funds of the estates they represent they have so invested, and shall also swear that the notes, bonds, or certificates, so held by them, are the same kind of currency which they received for the estates they so represent." Ga. Laws 1865–66, p. 85.

On the 2d day of July, 1866, the guardian made a return *to the proper court of his acts [391]
for the years 1864 and 1865, showing the amount in his hands, and also made oath before the ordinary of Jefferson county, Georgia, "that in 1863, in pursuance of an order, judgment, or decree of the superior court of said county as guardian of M. J. Baldy, a minor, he did bona fide invest twelve hundred dollars of the funds of said minor in the eight per cent bonds of the Confederate states, and that the bonds so held by him are the same kind of currency which he received for said minor's estate."

In 1876 Hunter received from the ordinary of Jefferson county letters of dismissal as guardian of the several children of William H. Baldy. He died nine years thereafter, in 1885, and this suit was brought in 1893 against his executor in the name of Marianne J. Baldy by her next friend, she having become of unsound mind as far back at least as 1875, and being at the time this suit was brought in a lunatic asylum.

At the trial below the plaintiff asked the court to instruct the jury that "an investment by a guardian of money of his ward during the Confederate war, and while both guardian and ward were residing within the Confederate territory, in bonds of the Confederate states, was unlawful, and the guardian is responsible to the ward for the sum so invested;" and that no act of the legislature of the state "passed during the late war, authorizing the guardian to invest the funds of his ward in Confederate bonds, and no order of any court of the state granted in pursuance of said act of the legislature, would authorize such investment." Both of these instructions were refused.

It is not contended that the case involves any question as to the statute of limitations.

It was agreed at the trial that the only matter in issue was as to the liability of Hunter's estate by reason of his having invested the ward's money in 1863 in bonds of the Confederate states. This appears from the charge to the jury in which the trial court, after observing that its duty was to follow the decisions of the supreme court of Georgia, said: "In the present case I am authorized to say that it is agreed between counsel that the investment was made bona fide, and the *only question is whether it was lawful or un- [392]
lawful for the guardian to make this investment; and, further, that as I may decide the legal question, I shall instruct a verdict for

plaintiff or defendant, as upon that would depend his right to have credit for that amount in his settlement with his ward. Following the decision of the supreme court of Georgia, I charge you that the investment by Dr. Hunter, the guardian, in Confederate bonds, was a lawful investment. You are therefore instructed to find a verdict for the defendant." A verdict was accordingly returned for the defendant.

The verdict was made the judgment of the trial court, and that judgment was affirmed by the supreme court of Georgia. The latter court, after referring to some of its former decisions, held that "a guardian who, during the war between the states, in good faith invested the funds of his ward in bonds of the Confederate states, under an order of the judge of the superior court properly obtained under then existing laws, was protected thereby, and is not liable to the ward for the value of the money so invested."

The case is now before this court on writ of error to the supreme court of Georgia.

The plaintiff in error contends that the principles to be deduced from our former decisions require the reversal of the judgment. As this proposition is disputed, it is necessary to examine the cases heretofore determined by this court.

Referring to the government established in 1862 in Texas in hostility to the United States, and which at that time was in the exercise of the ordinary functions of administration, this court in *Texas* v. *White*, 7 Wall. 700, 733 [19: 227, 240] said: "It is not necessary to attempt any exact definitions within which the acts of such a state must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if
[393] emanating *from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful, government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

In *Thorington* v. *Smith*, 8 Wall. 1, 7, 10-12 [19: 361, 363, 364], the question arose whether a contract for the payment of Confederate notes, which was made during the civil war between parties residing within the so-called Confederate states, could be enforced in the courts of the United States. Upon that question, which was recognized as by no means free from difficulty, the court said: "It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the Rebellion." After referring to *United States* v. *Rice*, 4 Wheat. 253 [4: 563], relating to the occupancy of Castine, Maine, in the war of 1812 by the British forces, and *Fleming* v. *Page*, 9 How. 614 [13: 280], relating to the occupancy, during the Mexican war, of Tampico, Mexico, by the troops of the United States—they being described as "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part," and during which possession the obligations of the inhabitants to their respective countries were held to have been suspended, although not abrogated —the court said: "The central government established for the insurgent states differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations *of a [394]
belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be the enemy's territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority in civil and local matters not only a necessity, but a duty. Without such obedience civil order was impossible. It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent states. As contracts in themselves, except in the contingency of successful revolution, those notes were nullities; for, except in that event, there could be no prayer. They bore, indeed, this character upon their face, for they were made payable only 'after the ratification of a treaty of peace between the Confederate states and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded therefore as a currency, imposed on the community by irresistible force. It seems to follow as a necessary consequence from this actual suprem-

acy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded for that reason only as made in aid of
[395]the foreign invasion in the one *case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with *actual intent* to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation."

In *Delmas* v. *Merchants' Mut. Insurance Co.* 14 Wall. 661, 665 [20: 757, 759] upon writ of error to the supreme court of Louisiana, one of the questions presented was whether a judgment, which was otherwise conceded to be a valid prior lien for the party in whose favor it was rendered, was void because the consideration of the contract on which the judgment was rendered was Confederate money. This court said: "This court has decided, in the case of *Thorington* v *Smith,* 8 Wall. 1 [19: 361], that a contract was not void because payable in Confederate money; and, notwithstanding the apparent division of opinion on this question in the case of *Hanauer* v. *Woodruff,* 10 Wall. 482 [19: 991], we are of opinion that on the general principle announced in *Thorington* v. *Smith,* the notes of the Confederacy actually circulating as money at the time the contract was made may constitute a valid consideration for such contract." So, in *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 499 [21: 473, 480], it was a question whether Confederate treasury notes had and received by the defendants for the use of the plaintiffs were a sufficient consideration for a promise, expressed or implied, to pay anything; and it was held upon the authority of *Thorington* v. *Smith* above cited, that "a promise to pay in Confederate notes, in consideration of the receipt of such notes and of drafts payable by them, cannot be considered a *nudum pactum* or an illegal contract."

Horn v. *Lockhart,* 17 Wall. 570, 573, 575, 580 [21: 657, 660], was a suit for an accounting as to the funds in the hands of an executor, and to enforce the payment to legatees of their respective shares. One of the questions in the case was whether the defendant was
[396]*entitled to credit for a certain sum in Confederate notes which, in March, 1864, he had deposited "as executor in the Confederate states depository office, at Selma, Alabama, and received a certificate entitling him to Confederate states four per cent bonds to that amount." The receiving of money by the executor in Confederate notes, and the investment of such notes in Confederate bonds, were, it was said, in strict accordance with laws passed by the legislature of Alabama in November, 1861, and November, 1863, when that state was engaged in rebellion against the United States. The circuit court held that the executor could not exonerate himself from liability for the balance adjudged to be due the legatees by paying the same in Confederate bonds; that, as a general rule, all transactions, judgments, and decrees which took place in conformity with existing laws in the Confederate states between the citizens thereof during the late war, "except such as were directly in aid of the Rebellion, ought to stand good;" and that the exception of such transactions was a political necessity required by the dignity of the government of the United States and by every principle of fidelity to the Constitution and laws of our country. Upon these grounds it adjudged that the deposit by the executor of money of the estate in a depository of the Confederate states could not be sustained, as it was a direct contribution to the resources of the Confederate government. The decree, therefore, was that the executor should pay to plaintiff the sum so deposited by him in lawful money of the United States. Upon appeal the decree of the circuit court was affirmed, three of the members of this court dissenting. This court said: "We admit that the acts of the several states in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be *preserved, police regulations [397]
maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects where they were not hostile *in their purpose* or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution. The validity of the action of the probate court of Alabama in the present case in the settlement of the accounts of the executor we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executors in the courts of the United States."

In the *Confederate Note Case*, 19 Wall. 548, 555–557 [22: 196,199,200], in which it was held that parol evidence was admissible to prove that the word "dollars" in a contract made during the Civil War meant in fact Confederate notes, the court said: "The treasury notes of the Confederate government were issued early in the war, and, though never made a legal tender, tney soon, to a large extent, took the place of coin in the insurgent states. Within a short period they became the principal currency in which business in its multiplied forms was there transacted. The simplest purchase of food in the market, as well as the largest dealings of merchants, were generally made in this currency. Contracts thus made, not designed to aid the insurrectionary government, could not therefore, without manifest injustice to the parties, be treated as invalid between them. Hence, in *Thorington* v. *Smith* this court enforced a contract payable in these notes, treating them as a currency imposed upon the community by a government of irresistible force. As said in a later case, referring to this decision, 'It would have been a cruel and oppressive judgment if all the transactions of the many millions of people composing the inhabitants of the insurrectionary states, for
[398] the several years *of the war, had been held tainted with illegality because of the use of this forced currency, when those transactions were not made with reference to the insurrectionary government.' *Hanauer* v. *Woodruff*, 15 Wall. 448 [21: 227]." Again: "When the war closed, these notes, of course, became at once valueless and ceased to be current, but contracts made upon their purchasable quality, and in which they were designated as dollars, existed in great numbers. It was at once evident that great injustice would in many cases be done to parties if the terms used were interpreted only by reference to the coinage of the United States or their legal tender notes, instead of the standard adopted by the parties. The legal standard and the conventional standard differed, and justice to the parties could only be done by allowing evidence of the sense in which they used the terms, and enforcing the contracts thus interpreted."

Sprott v. *United States*, 20 Wall. 459, 460, 462 [22: 371,372], was a suit against the government in the court of claims under the captured and abandoned property act of March 12, 1863 (12 Stat. at L. 820, chap. 120), one of the provisions of which was that a claimant, before being entitled to recover the proceeds of the property, must prove that he had never given aid or comfort to the Rebellion. It appeared that the cotton in question was sold to the claimant by an agent of the Confederate states as "cotton belonging to the Confederate states, and it was understood by the claimant at the time of the purchase to be the property of the rebel government, and was purchased as such." After observing that the cotton had been in the possession and under the control of the Confederate government, with claim of title, and that it was taken by the Union forces during the last days of the existence of that government, sold, and the proceeds deposited in the Treasury, this court said: "The claimant now asserts a right to this money on the ground that he was the owner of the cotton when it was so captured. This claim of right or ownership he must prove in the court of claims. He attempts to do so by showing that he purchased it of the Confederate government and paid them for it in money. In doing this he gave aid and assistance to the Rebellion in the most efficient manner he possibly could. *He could not have aided that [399]
cause more acceptably if he had entered its service and become a blockade runner, or under the guise of a privateer had preyed upon the unoffending commerce of his country. It is asking too much of a court of law sitting under the authority of the government then struggling for existence against a treason respectable only for the number and the force by which it was supported, to hold that one of its own citizens, owing and acknowledging to it allegiance, can by the proof of such a transaction establish a title to the property so obtained. The proposition that there is in many cases a public policy which forbids courts of justice to allow any validity to contracts because of their tendency to affect injuriously the highest public interests, and to undermine or destroy the safeguards of the social fabric, is too well settled to admit of dispute. That any person owing allegiance to an organized government can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its exstence, and then in a court of that government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined unless treason be taken out of the catalogue of crimes." The court further said:

"The recognition of the existence and the validity of the acts of the so-called Confederate government, and that of the states which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations. The latter, in most, if not in all, instances, merely transferred the existing state organizations to the support of a new and different national head. The same Constitutions, the same laws for the protection of property and personal rights remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the state acknowledged allegiance to the true or the false Federal power. They were the fundamental principles for which civil society is organized
*into government in all countries, and must [400]
be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when in the use of these powers substantial aid and com-

fort was given or intended to be given to the Rebellion, when the functions necessarily reposed in the state for the maintenance of civil society were perverted into the manifest and intentional aid of treason against the government of the Union, that their acts are void."

From these cases it may be deduced—

That the transactions between persons actually residing within the territory dominated by the government of the Confederate states were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate states;

That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate states did not relieve those who were within the insurrectionary lines from the necessity of civil obedience nor destroy the bonds of society nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into *with actual intent* to further invasion or insurrection;" and,

[401] *That judicial and legislative acts in the respective states composing the so-called Confederate states should be respected by the courts if they were not "hostile *in their purpose* or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution."

Applying these principles to the case before us, we are of opinion that the mere investment by Hunter, as guardian, of the Confederate funds or currency of his ward in bonds of the Confederate states should be deemed a transaction in the ordinary course of civil society, and not, necessarily, one conceived and completed with an actual intent thereby to aid in the destruction of the government of the Union. If contracts between parties resident within the lines of the insurrectionary states, stipulating for payment in Confederate notes issued in furtherance of the scheme to overturn the authority of the United States within the territory dominated by the Confederate states, were not to be regarded, for that reason only, as invalid, it is difficult to perceive why a different principle should be applied to the investment by a guardian of his ward's Confederate notes or currency in Confederate bonds—both guardian and ward residing at that time, as they did from the commencement of the Civil War, within the Confederate lines and under subjection to the Confederate states.

As to the question of the intent with which this investment was made, all doubt is removed by the agreement of the parties at the trial that the investment was bona fide, and that the only question made was as to its legality. We interpret this agreement as meaning that the guardian had in view only the best financial interests of the ward in the situation in which both were placed, and that he was not moved to make the investment with the purpose in that way to obstruct the United States in its efforts to suppress armed rebellion. We are unwilling to hold that the mere investment in Confederate states bonds —no actual intent to impair the rights of the United States appearing—was illegal as between the guardian and ward.

*It is said, however, that any such conclusion is inconsistent with the decision in *Lamar* v. *Micou*, 112 U. S. 452, 476 [28: 751, 760]. That was a suit in the circuit court of the United States for the southern district of New York, having been removed thereto from the supreme court of that state. One of the questions arising in that case was as to the liability of a guardian for moneys belonging to his wards which were invested by him during the Civil War in bonds of the Confederate states. This court said: "Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf or from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate states, and of the state of Alabama. The investment in bonds of the Confederate States was clearly unlawful, and no legislative act or judicial decree or decision of any state could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington* v. *Smith*, 8 Wall. 1 [19: 361]; *Head* v. *Starke*, Chase, 312; *Horn* v. *Lockhart*, 17 Wall. 570 [21: 657]; *Confederate Note Case*, 19 Wall. 548 [22: 196]; *Sprott* v. *United States*, 20 Wall. 459 [22:371]; *Fretz* v. *Stover*, 22 Wall. 198 [22: 769]; *Alexander* v. *Bryan*, 110 U. S. 414 [28: 195]. An infant has no capacity by contract with his guardian or by assent to his unlawful acts to [402]

affect his own rights. The case is governed in this particular by the decision in *Horn* v. *Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds pursuant to a statute of the state, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate states, which became worthless in his hands."

It was, of course, intended that this lan-
[403]guage of the court *be taken in connection with the history of the guardian's transactions as disclosed in the full and careful statement of the case that preceded the opinion. It appears from that statement that the guardian was appointed prior to the war by the surrogate of Richmond county, New York, in which state he, at that time, 1855, resided; that immediately upon his appointment he received, in New York, several thousand dollars belonging to each of his wards, and invested part of it in 1856 in the stock of a New York bank and a part in 1857 in the stock of a Georgia bank, each bank then paying good annual dividends; that in 1861 he had a temporary residence in New York; that upon the breaking out of the Rebellion he removed all his property and voluntarily left New York, passing through the lines to Savannah where he took up his residence, sympathizing with the rebellion and doing all that was in his power to accomplish its success, until January, 1865; and that he took up his residence again in New York in 1872 or 1873, after which time he lived in that city. It further appeared that of the money of his wards accruing from bank stocks he, in 1862, invested $7,000 in bonds of the Confederate states and of the state of Alabama, and afterwards sold the Alabama bonds and invested the proceeds in Confederate state bonds. It thus appears that *Lamar* v. *Micou* was a case in which the guardian, becoming such under the laws of New York, in violation of his duty to the country, and after the war became flagrant, voluntarily went into the Confederate lines, and there gave aid and comfort to the Rebellion; and yet he asked that the investment of his ward's money in Confederate states bonds receive the sanction of the courts sitting in the state under the authority of whose laws he became and acted as guardian.

Besides it is distinctly stated in the opinion in that case that the sums which Lamar used in the purchase of bonds of the Confederate states were moneys of the wards in his hands "arising either from dividends which he had received in their behalf, or from interest with which he charged himself upon sums not invested" (112 U. S. 476 [28: 760]), which is a very different thing from reinvest-
[404]ing (as in the present case) in *Confederate currency moneys previously received in the like kind of currency. The present case is governed by considerations that do not apply to that case. We do not doubt the correctness of the decision in *Lamar* v. *Micou*, upon its facts as set out in the report of that case; but we hold, in the present case, for the reasons we have stated, that *the judgment of the Supreme Court of Georgia must be affirmed.*

It is so ordered.

HENRY C. KING, *Plff. in Err.*,
v.
M. B. MULLINS, Alexander McClintock, and John McClintock.

(See S. C. Reporter's ed. 404–437.)

State system of taxation—protection of lands against a forfeiture—summary remedies—due process of law—official duty—equal protection of the laws—West Virginia system for forfeiting lands for nonpayment of taxes—rule in ejectment.

1. The statutes and Constitution of the state must be looked at together for the purpose of determining whether a system of taxation is in its essential features consistent with due process of law, where it is claimed that the state Constitution provides for a forfeiture of property for nonpayment of taxes, without due process of law.
2. If the statutes of a state in connection with its Constitution give the taxpayer reasonable opportunity to protect his lands against a forfeiture, he has no ground to complain that his property has been taken without due process of law.
3. Summary remedies, which could not be applied to cases of a judicial character, may be used in the collection of taxes.
4. Due process of law in forfeiting lands for nonpayment of taxes and failure to place them on the land books is furnished under a constitution which provides that such failure for five years in succession shall, by operation of the constitution itself, forfeit the title to the state, where the statutes provide the taxpayer a reasonable opportunity to protect his lands in a judicial proceeding, of which he is entitled to notice, and in which the court has authority to relieve him, upon reasonable terms, from the forfeiture.
5. It cannot be assumed that the commissioner will neglect to discharge a duty expressly impressed upon him by law, or that courts are without power to compel him to act, where

---

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4: 518.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to when a judgment at law in ejectment will be enjoined by a bill in equity, see note to Davis v. Tilestou, 12: 366.

this is necessary for the protection of the rights of an individual.

6. The exemption by the Virginia Constitution of tracts of land of less than 1,000 acres, from a provision for forfeiture of larger tracts by failure for five successive years to have them charged on the land books with taxes due thereon, does not constitute such a discrimination against the owners of larger tracts as to deny them the equal protection of the laws.

7. The system of West Virginia, forfeiting to the state lands not placed by the owner on the land books for taxation for five years, and selling such lands for the benefit of the school fund, with liberty to the owner upon motion to intervene and redeem his lands by paying the taxes and charges,—is not inconsistent with due process of law.

8. Plaintiff in ejectment can recover only on the strength of his own title.

[No. 157.]

Submitted January 11, 1897. Orderd for Oral Argument October 18. 1897. Argued March 22, 23, 1898. Decided May 31, 1898.

IN ERROR to the Circuit Court of the United States for the District of West Virginia to review a judgment in favor of defendants M. B. Mullins *et al.* in an action of ejectment brought by Henry C. King, plaintiff, to recover lands in West Virginia. *Affirmed.*

The facts are stated in the opinion.

Mr. **Maynard F. Stiles** for plaintiff in error on submission and on oral argument.

Messrs. **James H. Ferguson, W. E. Chilton,** *John A. Sheppard,* and *Vinson & Thompson* for defendants in error on submission of case.

Messrs. **Z. T. Vinson** and **Holmes Conrad** for defendants in error on oral argument of case.

Mr. Justice **Harlan** delivered the opinion of the court:

This action of ejectment was brought to recover that part lying in the state of West Virginia of a tract of 500,000 acres of land patented by the commonwealth of Virginia in 1795 to Robert Morris, assignee of Wilson Cary Nicholas.

The persons sued were very numerous, but M. B. Mullins, Alexander McClintock, and John McClintock having elected to sever in their defense from other defendants, the case was tried only as between them and the plaintiff King.

At the trial in the circuit court the plaintiff introduced in evidence the patent to Morris showing that the lands therein described were granted without conditions. Evidence was also introduced tending to show that by sundry mesne conveyances and legislative and judicial proceedings the title of Morris became vested, in 1866, in Robert Randall, trustee; in John R. Reed, trustee, on the 29th day of June, 1886; and through sundry mesne conveyances by Reed, trustee, David W. Armstrong, and John V. LeMoyne in the plaintiff King on the 27th day of December, 1893.

The defendants resisted the claim of the plaintiff upon the general ground that prior to the date of the deed from LeMoyne, the lands embraced in the patent were absolutely forfeited to the state, and were so forfeited when the present action was instituted.

*To show an outstanding title in the state **[406]** to the lands in dispute by forfeiture, the defendants read in evidence a certificate of the auditor of the state, dated October 29, 1895, showing that neither Randall, trustee, nor Reed, trustee, nor LeMoyne, King, Armstrong, and others named, had entered on the land books of Wyoming, McDowell, Logan, Boone, or Mingo counties, or either of them, for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, and 1894, or either of them, a tract of 500,000 acres of land, nor paid taxes upon the land for any of those years. The certificate further stated that the tract of 500,000 acres was not entered on the books of the assessor in any of those counties for any of the years named; that no land was entered on the assessor's book in the name of any of said parties for any of those years; and that none of the above persons are charged on the land books with state taxes on any part of those lands.

We assume from the record that the greater part at least of the lands in West Virginia embraced in the Morris patent are in the above-named counties.

The defendants, further to maintain the issues on their part, offered in evidence—

1. A certified copy of the order of the circuit court of Wyoming county, West Virginia (in which county part of the original tract was situated), showing the appointment and qualification, on the 18th day of April, 1890, of E. M. Senter, commissioner of school lands for that county.

2. Also the annual report made by that officer to the circuit court of Wyoming county, March 31, 1894, and filed, of all tracts and parcels of land liable to be sold for the benefit of the school fund, as required by § 5 of chapter 105 of the Code of West Virginia, as amended by the act of the legislature of 1893, chapter 24. That report gives the list of various tracts in the county of Wyoming "heretofore purchased for the state at sales thereof for delinquent taxes and not redeemed within one year or within the time required by law, made up from the records in the auditor's office and certified by the auditor to the clerk of the circuit court to be sold by the commissioner of school lands." The report also *states: "Said commissioner of school lands **[407]** would further report that in the annual report of the commissioner of school lands for the year 1889 there was reported for sale for the benefit of the school fund 50,000 acres, forfeited in the name of the Pittsburgh National Bank of Commerce, and sold on the — day of — for the nonpayment of the taxes due thereon for the years 1883 and 1884, and purchased by the state. . . . The commissioner of the circuit court who was appointed to report upon proceedings heretofore instituted to sell the lands of said Pittsburgh

National Bank of Commerce and Smith and Fougeray reported them a part of 500,000-acre survey, Robert Morris patent, known as the 'Robert E. Randall land,' and that a suit was pending in the circuit or district court of the United States for the district of West Virginia, and that proceedings to sell the same under said formal proceedings had been enjoined. Said commissioner is advised that an error was made in said matter, and that no suit was pending in said United States court with reference to said 500,000-acre survey. The said commissioner of school lands would further report that it has come to his knowledge from Henry C. King, the present owner and claimant thereof, that a tract of 500,000 acres of land, lying partly in this county and partly in the counties of Logan and McDowell, and the greater portion in the states of Virginia and Kentucky, was at the April term, 1883, of the circuit court of this county redeemed from a former forfeiture by Robert E. Randall, trustee, and all the taxes thereon paid prior to and including the year 1883; that since said redemption the said land has been omitted from the land books of this county for five consecutive years, to wit, for the years 1884, 1885, 1886, 1887, and 1888, and thereby the same has been forfeited to the state in the name of Robert E. Randall, trustee. The said commissioner of school lands further reports that each of said tracts hereinbefore mentioned are liable to be sold for the benefit of the school fund of this state on account of the forfeiture herein stated; all of which is respectfully submitted."

3. A certified copy of an order of the cir-
[408]cuit court of *Logan county, West Virginia, made April 1, 1889, showing the appointment of U. B. Buskirk as commissioner of school lands of that county, and his annual report, as such commissioner, of all tracts and parcels of land in Logan county theretofore reported for sale for the benefit of the school fund to the clerk of the circuit court of that county under §§ 1 and 2 of chapter 105 of the Code of West Virginia, and all lands in that county not theretofore reported, which in his opinion were liable to sale for the benefit of that fund.

4. A certified copy of an order of the circuit court of Logan county, West Virginia, ordering suit to be brought in the name of the state for the sale of the lands mentioned in the report of commissioner Buskirk.

The defendants having rested their case, the plaintiff to prove that no forfeiture of the land or outstanding title thereto existed or was claimed by the state of West Virginia, and that there was no record of any forfeiture where the same would be found if it existed, introduced and read in evidence a certificate of the auditor of the state, dated October 30, 1895, certifying that he had carefully examined the record books of forfeited lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such books a tract of 500,000 acres of land, or any part thereof, or any other tract forfeited for any cause in the name of either Robert E. Randall, Robert E. Randall, trustee, A. D. Maupertures, Jno. R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong, or Henry C. King; that there were no lands from any of those counties entered on the record of forfeited lands of his office for either of those years in the name of either or any of those parties; that he had carefully examined the record books of delinquent lands returned and kept in his office, as required by law, for the counties of Logan, Mingo, Wyoming, and McDowell, West Virginia, from and including the year 1883 to date, and there did not appear on such record books a tract of 500,000 acres of land or any part thereof or any other tract delinquent for any cause *in the name of either Robert E. Ran- [409]
dall, Robert E. Randall, trustee, A. D. Maupertures, John R. Reed, John R. Reed, trustee, John V. LeMoyne, David W. Armstrong, or Henry C. King; and that there were no lands from any of those counties entered on the record of delinquent lands of his office for either or any of those years in the name of either or any of those parties.

The plaintiff further offered evidence tending to prove that all taxes of the state of West Virginia charged or chargeable upon said tract of land up to and including the year 1883 had been fully paid and discharged by Robert E. Randall, trustee, under whom plaintiff claimed title, and proved further that plaintiff was a purchaser of said tract for a valuable consideration and without knowledge or notice of any alleged forfeiture thereof or outstanding title thereto in West Virginia, or of any of the facts set out in the auditor's certificate, shown and referred to in plaintiff's bill of exceptions, except such notice as the land books and records duly kept, disclosed.

At the instance of the defendants the court instructed the jury "that the title to the land claimed by the plaintiff, granted to one Robert Morris by the commonwealth of Virginia, by patent dated June 23, 1795, was (prior to the date of the deed made by John V. LeMoyne to Henry C. King, under which the plaintiff now claims), under the provisions of the Constitution of the state of West Virginia, forfeited to and vested in said state, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

To this instruction the plaintiff objected upon the ground that the provisions of the Constitution of West Virginia for the forfeiture of lands were repugnant to the 14th Amendment of the Constitution of the United States, and to article 3, §§ 4, 5, 9, 10, 20, and article 5, § 1, of the state Constitution; and upon the further ground that if there were a forfeiture of said land to and an outstanding title in the state, such title could not be set up against the plaintiff in this action, he being a purchaser for value without knowledge

[410]*or notice of such forfeiture or of such outstanding title.

The plaintiff's objection having been overruled, and a verdict having been rendered by direction of the court for the defendants, judgment was entered that the plaintiff take nothing by his action.

The controlling question in this case relates to the validity under the Constitution of the United States of certain provisions in the Constitution and statutes of West Virginia for the forfeiture of lands by reason of the failure of the owners during a given period to have them placed upon the proper land books for taxation.

The Constitution of West Virginia provides that all private rights and interests in lands in that state derived from or under the laws of Virginia, and from or under the Constitution and laws of West Virginia prior to the time such Constitution went into operation, should "remain valid and secure, and shall be determined by the laws in force in Virginia prior to the formation of this state, and by the Constitution and laws in force in this state prior to the time this Constitution goes into effect." Art. 13, § 1.

In view of this provision it is proper to look at the legislation of Virginia and the decisions of its highest court touching the forfeiture of lands for noncompliance by the owners with the requirements of the law relating to taxation.

By the 1st section of an act of the general assembly of Virginia, passed February 27, 1835, further time was given until July 1, 1836, for the redemption of all lands and lots theretofore returned as delinquent for the nonpayment of taxes, *west of the Alleghany mountains*, and which had become vested on the previous 1st day of October in the president and directors of the literary fund; saving the title of any bona fide occupant claiming under a junior grant. whose rights were protected and secured under prior legislation.

That act further provided:

"And whereas it is known to the general assembly that many large tracts of lands lying west of the Alleghany mountains which were granted by the commonwealth before the [411]first day *of April, 1831, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof of no forfeiture for the nonpayment of taxes has occurred, or can accrue, under the existing laws, the commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

"2. Be it enacted, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, 1836, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March 10, 1832, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the commonwealth, after the 1st day of July, 1836, except only as hereinafter excepted.

"3. That all right, title, and interest which may hereafter be vested in the commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and absolutely vested in any and every person or persons other than those for whose default the same have been forfeited, their heirs or devisees, who are now in actual possession of said lands or any part or parcel of them, for so much thereof as such person or persons have just title or claim to, legal or equitable, bona fide claimed, held or derived from or under any grant of the commonwealth bearing date previous to the 1st day of April, 1831, who shall have discharged *all taxes duly as- [412] sessed and charged against him, her or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time when he, she or they acquired his, her, or their title thereto, whether legal or equitable; Provided, That nothing in this section contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the commonwealth for the same land and have regularly paid the taxes thereon, but in all such cases the parties shall be left to the strength of their original titles." Laws Va. 1834-35, pp. 11-13.

Other acts were passed in Virginia relating to delinquent and forfeited lands and extending the time for redemption, all of them proceeding upon the ground that the state had the power to forfeit lands for failure to have them charged with taxes as well as for failure to pay the taxes so charged.

The first case in which the supreme court of appeals of Virginia had occasion to pass upon the validity of the above statute of 1835, so far as it forfeited lands which the owner failed to have put on the proper land books and pay taxes upon, was *Staats* v. *Board*, 10 Gratt. 400, 402, decided in 1853. That court said: "It further seems to the court that, as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed from the 1st day of November, 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the act of February 27, 1835, the forfeiture became absolute from and after the 1st of November, 1836. That

the provision of the act of March 30, 1837, giving time for redemption until the 15th of January, 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming. And it further seems to the court that such forfeiture became *absolute* and *complete* by the failure to enter and pay the taxes thereon in the manner prescribed by the act of 27th of February, 1835. And *no inquisition or judicial proceedings* or *inquest*, or *finding of any kind, was required to consummate such forfeiture.*"

[413] *The same principle was announced in *Wild's Lessee* v. *Serpell*, 10 Gratt. 405, 408 (1853). The court said: "That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and, where they have been omitted from the books of the commissioners of the revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law, and, in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default (under the modifications and restrictions provided by the acts), are within the constitutional competency of the legislature, has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staat's Lessee* v. *Board*, 10 Gratt. 400; *Smith's Lessee* v. *Chapman*, 10 Gratt. 445; *Hale* v. *Branscum, infra.* The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case, no judgment or decree or other matter of record nor any inquest of office, is necessary, but that the statutes themselves, of *their own force and by their own energy*, work out their own purpose, and operate effectually to devest the title out of the defaulting owner, and perfectly to vest it in the commonwealth, *without the machinery of any proceeding of record, or anything in the nature of an inquest of office.* And as the title is thus in a proper case devested out of the owner and vested in the commonwealth by the operation of the statutes, so where the forfeiture inures to the benefit of a third person, claiming under the commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like manner, perfect and complete without any new grant from the commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have nothing therefore to say upon this occasion, except that considering the peculiar condition of things in that part of the state lying west of the Alleghany mountains, and the serious check to population and the improvement of the country

[414] *and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable." This case was cited in *Armstrong* v. *Morrill*, 14 Wall. 120, 134 [20: 765, 769], which was an action of ejectment brought prior to the adoption of the 14th Amendment of the Constitution of the United States, and in which therefore the rights of the parties must have been determined without reference to the prohibition in that Amendment against the deprivation of property without due process of law.

In *Levasser* v. *Washburn*, 11 Gratt. 572, 580, 581 (1854), it was said: "According to the decisions of this court in the cases just referred to, and also in the cases of *Wild* v. *Serpell*, 10 Gratt. 405, and *Smith* v. *Chapman*, 10 Gratt. 445, the circuit court also erred in its opinion as to the time at which the forfeiture under the Girond grant occurred or became complete. It appears to have proceeded on the notion that some inquest of office, or decree, or other proceeding should have been had in order to declare and perfect the forfeiture. Nothing of the kind was necessary. The act of the 27th of February, 1835 (Sess. Acts, p. 11), declaring that lands which had been omitted from the books of the commissioners of the revenue should be forfeited unless the owners should cause the same to be entered and charged with taxes, and should pay the same, except such as might be released by law, was intended *by its own force and energy to render the forfeiture absolute and complete, without the necessity of any inquisition, judicial proceeding, or finding of any kind, in order to consummate it.* It was perfectly within the competency of the legislature to declare such forfeiture and devest the title *by the mere operation of the act itself;* and the whole legislation upon the subject of delinquent and forfeited lands plainly manifests the intention to exercise its power in this form." See also *Usher's Heirs* v. *Pride*, 15 Gratt. 190, and *Smith* v. *Tharp*, 17 W. Va. 221.

In this connection it may be well to refer to *Martin* v. *Snowden*, 18 Gratt. 100, 135, 136, 139, 140 (1868), in which the supreme court of appeals of Virginia had occasion to determine, *as between the parties before it, the [415]
effect of the provisions in the acts of Congress of August 5, 1861 (12 Stat. at L. 292, chap. 45) and June 7, 1862 (12 Stat. at L. 422, chap. 98), relating to the direct taxation of lands. By the latter act it was provided that "the title of, in and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States," and that "upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, encumbrances, right, title, and claim whatsoever." § 4. One of the questions presented in that case was, whether the first of the clauses just quoted worked, *proprio vigore*, a transfer to the United States of the title to the land de-

clared to be forfeited. The court held that the acts of Congress did not and were not intended to create such a forfeiture of the land to the United States as that it ceased *ipso facto* to be the property of the former owner and became the absolute property of the United States; that Congress was without constitutional power to impose the penalty of forfeiture of lands for the nonpayment of taxes; that Congress had all the powers for enforcing the collection of its taxes that were in use by the Crown of England, or were in use by the states at the time of the adoption of the Constitution, but forfeiture of the land assessed with the tax was not then in use, either in England or the states, as a mode of collecting the tax. Referring to *Den, Murray's Lessee*, v. *Hoboken Land and Improvement Co.* 18 How. 272 [15: 372], the state court further said: "Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as 'due process of law,' upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law and without any process or proceeding whatever, except the ascertainment by the commissioners of the sum chargeable on the land. But that is probably immaterial. The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England at any period of its history for enforcing the payment of taxes or other debts to the Crown. If it had been, we
[416]should have *found such forfeitures treated of in the English law books; but we nowhere find them mentioned." Again: "These references will show what were the ordinary methods of enforcing the payment of taxes in use in Virginia about the time of the adoption of the Constitution. And it may be worth mentioning, that before the adoption of the Constitution of the United States the legislature of Virginia had re-enacted the provision of Magna Charta, that no freeman shall be taken or imprisoned, or be deprived of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the commonwealth pass upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land. 12 Hen. Stat. at Large, 186. Looking at the spirit which animated all this legislation, we cannot doubt as to what would have been thought, at that day, of a statute declaring an immediate and absolute forfeiture of the whole land as a penalty for the nonpayment of the tax within sixty days after the assessment of it, without notice to the owner, by advertisement or otherwise, of the assessment, and without any, even the least, effort to collect it."

The case of *Martin* v. *Snowden* was brought here and is reported under the title of *Bennett* v. *Hunter*, 9 Wall. 326, 335–337 [19: 672, 675, 676] (1869). This court did not deem it necessary in that case to decide whether the United States could constitutionally take to itself the absolute title to lands merely because of the nonpayment of taxes thereon within a prescribed time, and without some proceeding equivalent to office found. Speaking by Chief Justice Chase, it said: "We are first to consider whether the first clause of this section, *proprio vigore*, worked a transfer to the United States of the land declared to be forfeited. The counsel for the plaintiff in error have insisted earnestly that such was its effect. But it must be remembered that the primary object of the act was, undoubtedly, revenue, to be raised by collection of taxes assessed upon lands. It is true that a different purpose appears to have dictated the provisions relating to redemption after sale, and to the disposition of the lands purchased by the government; a policy which had reference to the suppression of rebellion rather *than to revenue. But this purpose [417]
did not affect the operation of the act before sale, for until sale actually made there could be, properly, no redemption. The assessment of the tax merely created a lien on the land, which might be discharged by the payment of the debt. And it seems unreasonable to give to the act, considered as a revenue measure, a construction which would defeat the right of the owner to pay the amount assessed and relieve his lands from the lien. The first clause of the act, therefore, is not to be considered as working *an actual transfer of the land to the United States*, if a more liberal construction can be given to it consistently with its terms. *Now, the general principles of the law of forfeiture seem to be inconsistent with such a transfer.* Without pausing to inquire whether, in any case, the title of a citizen to his land can be devested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found, it is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction. *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 625 [3: 460]. In the case of lands forfeited by alienage the king could not acquire an interest in the lands except by inquest of office. 3 Bl. Com. 258. And so of other instances where the title of the sovereign was derived from forfeiture." Again: "Applying these principles to the case in hand, it seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. It does not direct the possession and appropriation of the land. It was designed rather, as we think, to declare the ground of the forfeiture of title, namely, nonpayment of taxes, while the second clause was intended to work the actual investment of the title through a public act of the government in the United States, or in the purchaser at the tax sale. The sale was the public act, which is the equivalent of office found. What preceded the sale was merely preliminary, and, independently of the sale, worked no devestiture of title. The title, indeed, was forfeited by nonpayment of the tax; in other words, it became *subject to be vested in the United [418]
States, and, upon public sale, became actually vested in the United States or in any other

purchaser; but not before such public sale. It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States."

We come now to an examination of the West Virginia Constitution and statutory provisions relating to the forfeiture to the state of lands subject to taxation.

By article 13 of the Constitution of West Virginia of 1872 it was provided:

"4. All lands in this state, waste and unappropriated, or heretofore or hereafter for any cause forfeited or treated as forfeited or escheated to the state of Virginia or this state, or purchased by either and become irredeemable, not redeemed, released, transferred, or otherwise disposed of, the title whereto shall remain in this state till such sale as is hereinafter mentioned be made, shall, by proceedings in the circuit court of the county in which the lands or a part thereof are situated, be sold to the highest bidder.

"5. The former owner of any such land shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this state, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter.

"6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. *When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more shall not have been charged on such books with state tax on said land, then by operation hereof the land shall be forfeited and the title thereto vest in the state.* But if, for any one or more
[419] of such five *years the owner shall have been charged with state tax on any part of the land, such part thereof shall not be forfeited for such cause. And any owner of land so forfeited, or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all state and other taxes that shall be, and but for the forfeiture would be, chargeable on the land or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per centum per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land or interest therein: Provided, Such right to redeem shall in no case extend beyond twenty years from the time such land was forfeited." The duty imposed upon owners of land by the first clause of this section was also prescribed by the statutes of the state.

Such being the provisions of the Constitution of West Virginia in relation to the forfeiture of lands, the supreme court of appeals of that state had occasion in *McClure* v. *Maitland*, 24 W. Va. 561, 575-578, to determine their scope and effect. In that case it was said: "In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the commonwealth of Virginia now embraced within this state were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement and population of the state to an almost inconceivable extent. In this emergency and to remedy this calamitous evil, the general assembly of Virginia inaugurated the system of delinquent and forfeiture laws that form the basis of the provisions of our present Constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the legislature, the judiciary, and the people, speaking through our present Constitution, to destroy and annihilate the titles of such delinquent owners, *who should, after every reasonable [420]
opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and those not in default. The purpose of the statutes passed to enforce this system was not merely to create a lien for the taxes on these delinquent and unoccupied lands, but to effect *by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the state without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes.* The constitutional competency of the legislature to pass these laws and thus consummate the forfeiture and perfectly devest all the right, title, and interest of the former owner by the mere energy and operation of the statutes themselves, has been repeatedly affirmed by the court of appeals of Virginia" —citing *Staats* v. *Board*, 10 Gratt. 400; *Wild* v. *Serpell*, 10 Gratt. 405; *Levasser* v. *Washburn*, 11 Gratt. 572; *Usher* v. *Pride*, 15 Gratt. 190, and *Smith* v. *Tharp*, 17 W. Va. 221.

So in *Holly River Coal Co.* v. *Howell*, 36 W. Va. 489, 501, the court referred to its former decisions, above cited, and after observing that they had been adhered to with only a seeming exception, said: "The forfeitures became complete and absolute by operation of law—in the case of delinquent lands on the 1st day of October, 1834, and in case of omitted lands on 1st November, 1836, *and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such forfeiture.*"

Now, the plaintiff contends that the provision in the Constitution of West Virginia which forfeits and vests absolutely in the state without inquisition of record, or some public transaction equivalent to office found,

the title to lands which for five successive years after 1869 have not been charged with state taxes on the land books of the proper county, is repugnant to the clause of the 14th Amendment of the Constitution of the United States declaring that no state shall deprive any person of his property without due process of law.

In support of this contention numerous au-
[421] thorities have been *cited by the plaintiff, those most directly in point being *Griffin* v. *Mixon*, 38 Miss. 424 (1860), and *Marshall* v. *McDaniel*, 12 Bush, 378, 382-385 (1876). In the first of those cases, the high court of errors and appeals of Mississippi, speaking by Judge Harris, held a statute of that state declaring the forfeiture of lands on the failure simply of the owner to pay the taxes due thereon, without notice or hearing in any form, to be in violation of the constitutional provisions prohibiting the taking of private property for public use without just compensation being first made therefor, or the deprivation of property without due process of law. In the other case, the court of appeals of Kentucky held to be unconstitutional a provision in a statute of that state declaring "that in all cases where any lands shall hereafter be forfeited for failing to list for taxation, or stricken off to the state, the title of such lands shall vest in this commonwealth by virtue of this act without any inquest of office found, unless said lands shall have been redeemed according to law." That court, speaking by Chief Justice Lindsay, said: "In pursuing this inquiry we need not call in question the power of the legislature to provide for the levy and collection of taxes in the most summary manner. The right of the commonwealth, through its executive and ministerial officers, to assess property for taxation, to ascertain the sum payable by each taxpayer, and to seize and sell his property in satisfaction of such sum, is not open to doubt. It is equally clear the legislature may impose upon the taxpayer the duty of listing his property for taxation, and may prescribe, for the neglect of the duty so imposed, penalties reaching even to the forfeiture of the estate not listed. But when such laws are enacted, the forfeitures prescribed must be regarded as penalties, and they cannot be inflicted until inquiry has first been made and the commission of the offense ascertained by due course of law. . . . To enjoin what shall be done or what left undone, and to secure obedience to the injunction by appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty belongs to the judicial function.'
[422] *Gaines* v. *Buford*, 1 Dana, 481. *By the Magna Charta it is declared that no citizen shall be disseised of his freehold or be condemned but by the lawful judgment of his peers or by the law of the land. The substance of this declaration is contained in our Bill of Rights. Its meaning and intention is that no man shall be deprived of his property without being first heard in his own defense. . . . We conclude without hesitation that so much of the act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default even to manifest his innocence, be vested in the commonwealth, is unconstitutional and void."

The question of constitutional law thus presented is one of unusual gravity. On the one hand, it must not be forgotten that the clause of the national Constitution which this court is now asked to interpret is a part of the supreme law of the land, and that it must be given full force and effect throughout the entire Union. The due process of law enjoined by the 14th Amendment must mean the same thing in all the states. On the other hand, a decision of this court declaring that that Amendment forbids a state, by force alone of its Constitution or statutes, and without inquisition or inquiry in any form, to take to itself the absolute title to lands of the citizen because of his failure to put them on record for taxation, or to pay the taxes thereon, might greatly disturb the land titles of two states under a system which has long been upheld and enforced by their respective legislatures and courts. Under these circumstances, our duty is not to go beyond what is necessary to the decision of the particular case before us. If the rights of the parties in this case can be fully determined without passing upon the general question whether the clause of the West Virginia Constitution in question, *alone considered*, is consistent with the national Constitution, that question may properly be left for examination until it arises in some case in which it must be decided.

We come then to inquire whether, looking at the Constitution and the statutes of West Virginia together, a remedy *was not pro- [423]
vided which, if pursued, furnished to the plaintiff and those under whom he asserts title all the opportunity that "due process of law" required in order to vindicate any rights that he or they had in respect of the lands in question.

We have seen that the lands embraced by the patent of Robert Morris were not put upon the land books of the proper counties during the years 1883 to 1894, both inclusive. They were redeemed in 1883 from forfeiture by Randall, trustee, in whom, as we take it, the title was at that time vested. Let it be assumed that they were again forfeited to the state upon the expiration of the five consecutive years after 1883 during which they were not placed on the land books for taxation; in other words, that for that reason they were forfeited to the state after the year 1888. What, at the time of such forfeiture, were the rights of the owner? Did the statutes of the state give him any remedy whereby he could be relieved from such forfeiture? Was he denied all opportunity to hold the lands upon terms just and reasonable both to him and the state?

We pass by the act of November 18, 1873, providing for the sale of escheated, forfeited,

and unappropriated lands for the benefit of the school fund (Acts of W. Va. 1872-73, p. 449, chap. 134), and also, for the present, the act of March 25, 1882, on the same subject (Acts of W. Va. 1882, p. 253, chap. 95), because both of those acts are amendatory of the Code of West Virginia, and their provisions, so far as they directly or indirectly bear upon the present controversy, are preserved and extended in the Code published in 1887, which contained the law of the state in reference to forfeited lands as it was at that time.

From chapter 105 of the Code of West Virginia, published in 1887, it appears that all lands forfeited to the state for the failure to have the same entered upon the land books of the proper county and charged with the taxes thereon, as provided by law—so far as the title thereof was not vested in junior grantees or claimants under the provisions of the Constitution and laws of the state—were *required* to be sold for the benefit of the
[424] school fund—the auditor to certify *to the clerk of the circuit court a list of all such lands (which, or the greater part of which, were in his county), within sixty days after the title thereto vested in the state. The act made it the *duty* of the commissioner of school lands to file his petition in the circuit court and pray for the sale of the lands for the benefit of the school fund. He was required to state in his petition "all the tracts, lots, and parts and parcels of any tract or lot of land so liable to sale, in the circuit court of his county, praying that the same be sold for the benefit of the school fund," and, according to the best of his information and belief, the local situation, quantity or supposed quantity, and probable value of each tract, lot, or parcel, and part of a tract of land therein mentioned, together with all the facts at his command, in relation to the title to the same, and to each tract, lot, part, or parcel thereof, *the claimant or claimants thereof*, and their residence, if known, and, if not known, that fact shall be stated, and stating also how and when and in whose name every such tract, lot, and parcel, and part of a tract or lot, was forfeited to the state." Provision was made for the reference of the petition to a commissioner in chancery, "with instructions to inquire into and report upon the matters and things therein contained, and such others as the court may think proper to direct, and particularly to inquire and report as to the amount of taxes and interest due and unpaid on each tract, lot, and parcel, and part of a tract or lot of land mentioned in the petition, in whose name it was forfeited, and when and how forfeited, in whom the legal title was at the time of the forfeiture, and, if more than one person claimed adverse titles thereto at the date of the forfeiture, the name of each of such claimants and a reference to the deed book or books in which the title papers of any claimant thereof can be found; what portion or portions, if any, of such lands is claimed by any person or persons under the provisions of section three of article thirteen of the Constitution of this state, with the names of such claimants and the amount claimed by each as far as he can ascertain the same." If there were no exception to this report, or if there were any which were overruled, "the court *shall confirm the same *and decree a sale* of [425]
the lands, or any part of them, therein mentioned, which are subject to sale, for the benefit of the school fund, upon such terms and conditions as to the court may seem right and proper; and in any decree of sale made under this chapter, the court may provide that the commissioner of school lands, or other person appointed commissioner to make such sale, may receive bids for such lands, without any notice of sale; and if the former owner or owners, or person in whose name the land was returned delinquent and forfeited, or the heirs or grantee of such owner or person, or any person or persons holding a valid subsisting lien thereon, at the time of such forfeiture, bid a sum sufficient to satisfy such decree and the costs of the proceeding and sale, and such person or persons so bidding be the highest bidder, said commissioner shall sell the land on such bid, and report the same to the court for confirmation; but if the commissioner receive no bid from any such person, or if he shall receive a higher bid therefor from any other person not so mentioned, then and in either event the said commissioner shall sell the land at public auction to the highest bidder, after first giving such notice as may be provided by such decree." By the same act it was provided: "The former owner of any such land shall be entitled to recover the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this state, with interest at the rate of twelve per centum per annum and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter, as provided in the next succeeding section."

But the part of chapter 105 of the Code which has the most direct bearing on the question under consideration is § 14, which, after providing that the owner may, upon his petition to the circuit court, obtain an order for the payment to himself of the excess just mentioned, proceeds: "At any time during the pendency of the proceedings for the sale of any such land as hereinbefore mentioned, such former owner, or any creditor *of such former owner of such land, having [426]
a lien thereon, may file his petition in said circuit court as hereinbefore provided, and asking to be allowed *to redeem such part or parts of any tract of land so forfeited, or the whole thereof*, as he may desire, and upon such proof being made as would entitle the petitioner to the excess of purchase money hereinbefore mentioned, such court may allow him to redeem the whole of such tract if he desire to redeem the whole, or such part or parts thereof, as he may desire, less than the whole, upon the payment into court, or to the commissioner of school lands, all costs,

taxes, and interest due thereon, as provided in this chapter, if he desire to redeem the whole of such tract; or if he desire to redeem less than the whole of such tract, upon the payment as aforesaid, of so much of the costs, taxes, and interest due on such tract as will be a due proportion thereof for the quantity so redeemed. But if the petition be for a redemption of a less quantity than the whole of such tract, it shall be accompanied with a plat and a certificate of survey of the part or parts thereof sought to be redeemed. Whenever it shall satisfactorily appear that the petitioner is entitled to redeem such tract, or any part or parts thereof, the court shall make an order showing the sum paid in order to redeem the whole tract or the part or parts thereof which the petitioner desires to redeem, and *declaring the tract, or part or parts thereof, redeemed from such forfeiture*, so far as the title thereto was in the state immediately before the date of such order; which order, when so made, *shall operate as a release of such forfeiture so far as the state is concerned*, and of all former taxes on said tract, or part or parts thereof so redeemed, and no sale thereof shall be made. If the redemption be of a part or parts of a tract, the plat or plats and certificate of the survey thereof hereinbefore mentioned, together with a copy of the order allowing the redemption, shall be recorded in a deed book, in the office of the clerk of the county court. Provided, That such payment and redemption shall in no way affect or impair the title to any portion of such land transferred to and vested in any person, as provided in section three of article thirteen of the Constitution of this state."

[427] *It thus appears that when the lands in question and others embraced in the Morris patent were, as is contended, forfeited to the state for the failure of the owner during the five consecutive years after they were redeemed by Randall, trustee, in 1883, to have them entered upon the land books of the proper county and charged with the taxes thereon, it was provided by the statutes of West Virginia:

That all lands thus forfeited to the state should be sold for the benefit of the school fund;

That the sale should be sought by petition filed by the commissioner of school lands in the proper circuit court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found;

That the petition should be referred to a commissioner in chancery, who should report upon the same and upon such other things as the court might direct, and particularly as to the amount of taxes due and unpaid upon any lands mentioned in the petition, in whose name and when and how forfeited, and in whom the legal title was at the time of the forfeiture;

That if there were no exceptions to the report, or if there were exceptions which were overruled, the court was required to confirm the same and decree a sale of the lands for the benefit of the school fund; and,

That at any time during the pendency of the proceedings instituted for the sale of forfeited lands for the benefit of the school fund, the owner, or any creditor of the owner having a lien thereon, might file his petition in the circuit court of the county for the redemption of his lands upon the payment into court, or to the commissioner of school lands, of all costs, taxes, and interest due thereon, and obtain a decree or order declaring the lands redeemed so far as the title thereto was in the state immediately before the date of such order.

These provisions were substantially preserved in chapter 105 as amended and re-enacted in 1891 and 1893. Code of West Va. 1891, p. 731; Acts of West Va. 1893, p. 57. But in the Code of 1891 will be found this additional and important provision (Acts 1891, chap. 94):

*"Sec. 18. In every such suit brought under [428] the provisions of this chapter, the court shall have full jurisdiction, power, and authority to hear, try, and determine *all questions of title*, possession, and boundary which may arise therein, *as well as any and all conflicting claims whatever to the real estate in question arising therein.* And the court in its discretion may at any time, regardless of the evidence, if any, already taken therein, direct an issue to be made up and tried at its bar as to any question, matter, or thing arising therein, which, in the opinion of the court, is proper to be tried by a jury. And if any such issue be as to the question of title, possession, or boundary of the land in question, or any part of it, it shall be tried and determined in all respects as if such issue was made up in an action pending in such court. And every such issue shall be proceeded in, and the trial thereof shall be governed by the law and practice applicable to the trial of an issue out of chancery; and the court may grant a new trial therein as in other cases tried by a jury." And this provision was preserved, substantially, in the act of 1893, amendatory of chapter 105 of the Code of West Virginia.

If, as contended, the state, without an inquisition or proceeding of some kind declaring a forfeiture of lands for failure during a named period to list them for taxation, and by force alone of its Constitution or statutes, could not take the absolute title to such lands, still it was in its power by legislation to provide, as it did, a mode in which the attempted forfeiture or liability to forfeiture could be removed and the owner enabled to retain the full possession of and title to his lands. We should therefore look to the Constitution and statutes of the state together for the purpose of ascertaining whether the *system* of taxation established by the state was, in its essential features, consistent with due process of law. If, in addition to the provisions contained in the Constitution, that instrument had itself provided for the sale of forfeited lands for the benefit of the school fund, but reserved the right to the owner, before sale and within a reasonable period, to pay

the taxes and charges due thereon, and there by relieve his land from forfeiture, we do not suppose that such a system would be held to
[429] *be inconsistent with due process of law. If this be true it would seem to follow necessarily that if the statutes of the state, in connection with the Constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character. This subject was fully considered in *Den, Murray's Lessee*, v. *Hoboken Land & Improvement Co.* 18 How. 272, 280, 281, 282 [15: 372, 376, 377], which arose under the act of Congress of May 15, 1820, providing for the better organization of the Treasury Department. The account of a collector of customs having been audited by the first auditor and certified by the first comptroller of the Treasury, a distress warrant for the balance found to be due was issued by the solicitor of the Treasury, in accordance with the act of Congress, and levied upon the lands of the collector. The question presented was whether such a proceeding was consistent with due process of law—the objection to it being that it was judicial in its nature and that it operated to deprive the debtor of his property without a hearing or trial by jury and without due process of law. This court said, among other things: "Tested by the common and statute law of England prior to the emigration of our ancestors and by the laws of many of the states at the time of the adoption of this Amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For,
[430] though 'due process of law' generally*implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; *Hoke* v. *Henderson*, 15 N. C. (4 Dev. L.) 15 [25 Am. Dec. 677]; *Taylor* v. *Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Vanzandt* v. *Waddel*, 2 Yerg. 260; *Bank of the State* v. *Cooper*, 2 Yerg. 599 [24 Am. Dec. 517]; *Jones's Heirs* v. *Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Greene* v. *Briggs*, 1 Curt. C. C. 311), yet this is not universally true. There may be and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings." Again: "The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the states, so far as we know, without objection—for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by systems of fines *and penalties, [431]
but always in some way observed and yielded to." In *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232, 239 [33: 892, 896], it was said that "the process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." This must be so, else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes.

In this connection reference may be made to what was said by the supreme court of appeals in *McClure* v. *Maitland*, above cited, touching the rights of the owner of lands forfeited to the state, and for the sale of which proceedings were instituted by the commissioner of school lands. That court said: "The title to the land and all the right and interest of the former owner having thus, by his default and the operation of the law, become absolutely vested in the state and become irredeemable, she, having thus acquired a perfect title to, and unqualified dominion over, the land, had the undoubted right to hold or dispose of it for any proper purpose, in any manner and upon any terms and conditions she might in her sovereign capacity deem

proper, without consulting the former owner or anyone else. For after the forfeiture had become complete, as it had in the case before us, the former owner had no more claim to or lien upon the land than one who never had pretended to own it. In the exercise of this perfect dominion over her own property the state saw proper to transfer and vest her title to so much of said land owned by her, in any person, other than those who occasioned the default, as such person may have been in the actual possession of, or have just title to, claiming the same, and was not in default for the taxes thereon chargeable to him. . . . The laws, as we have shown, by their own force, transferred to and vested the title to the land absolutely in the state without any judicial inquiry or inquest of any kind.
[432] There could *therefore be no necessity or reason for proceeding *in rem* against the land. That had already become the absolute property of the state, and she had a perfect right to sell it without further inquiry. All the laws providing for the sale of these lands presupposed the title to have vested in the state prior to the commencement of the proceedings. In fact the whole authority of the commissioner and the jurisdiction of the court are based upon the assumption that the unconditional title is in the state; for unless such is the fact neither has any authority to act. *Twiggs* v. *Chevallie*, 4 W. Va. 463. And all the right, title, and interest of the former owner having been completely devested, he has not a particle of interest in the land—no more than if he had never owned it; there is therefore no possible reason for making him a party or proceeding against him *in personam* or otherwise. The proceeding is of necessity, then, neither *in rem* nor *in personam;* and as all judicial proceedings properly so styled must belong to either the one or the other of these classes, it follows that this is not and cannot be in any technical sense a judicial proceeding."

It is said that this shows that the taxpayer, after his land is forfeited to the state, is left by the statutes of West Virginia without any right or opportunity, by any form of judicial proceeding, to get it back or to prevent its sale, and, therefore, it is argued, he is absolutely devested of his lands solely by reason of his failure to place them on the proper land books.

An answer to this view is, that what was said in *McClure* v. *Maitland*, on this point, had reference to proceedings under the act of November 18, 1873 (Acts 1872–73, p. 449, chap. 134), which were not judicial in their nature but administrative. But, as declared in *Hays, Com'r*, v. *Camden's Heirs*, 38 W. Va. 109, 110, the act of 1873 was so amended by the act of March 25, 1882 (Acts W. Va. 1882, p. 253, chap. 95), as to make the proceeding in the circuit court for the sale of forfeited lands, in which the owners or claimants could intervene and effect a redemption of their lands from forfeiture, a judicial proceeding. This view was reaffirmed in *Wiant* v. *Hays, Com'r*, 38 W. Va. 681, 684, in which Judge
[433] Brannon,*delivering the unanimous judgment of the state court, observed that what was said in *McClure* v. *Maitland*, as to the landowner not being entitled of right to be made a party to the proceeding instituted for the sale of forfeited lands for the benefit of the school funds, had reference to the then existing act which was changed by the act of 1882. Answering the suggestion that the proceedings under the new law were not judicial, the court said: "Now, why, with parties plaintiff and defendant, process, pleading, hearing between the parties, decree, etc., it is not, if not technically a chancery suit, yet a suit, I cannot see; a suit under a special statute, it is true, but none the less a suit. So, substantially, it was regarded in *Hays* v. *Camden's Heirs*, 38 W. Va. 109, 18 S. E. 461. Proceedings at rules take place as in ordinary and common-law suits. In some places it is called a 'suit.' But I know that it is said by those holding the other view that the question is not to be tested by the circumstances, such as I have alluded to, the presence of pleading, process, hearing, etc., but it must be tested by the nature of the proceeding; that is, that it is only an administrative process by the state, through an officer and court, to realize money on its own property. But to this I reply that though the state might make the proceeding such, and did in its acts up to 1882, yet by its act in 1882 it changed the proceeding from one *ex parte* to one *inter partes*, and clothed the proceeding with all the habiliments of a suit; and still it did not proceed against the land, taking the act of forfeiture as a concession, and simply at once sell the land, but it subjected its right and title under the supposed forfeiture to question and investigation under the law through a suit, called in all interested adversely to its claim, and gave them leave to contest its right, and made its claim the subject of litigation."

It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands.

*It is said that the landowner will be without remedy if the commissioner of the school [434]
fund should fail to institute the proceeding in which the statute permitted such owner to intervene by petition and obtain a redemption of his lands from the forfeiture claimed by the state. It cannot be assumed that the commissioner will neglect to discharge a duty expressly imposed upon him by law, nor that the courts are without power to compel him to act, where his action becomes necessary for the protection of the rights of the landowner.

It is further said that a forfeiture may arise under the Constitution of West Virginia despite any effort of the landowner to prevent it; that although the owner may direct his lands to be entered on the proper land books, and that he be charged with the taxes due thereon, the custodian of such

books may neglect to perform his duty. Thus, it is argued, the lands may be forfeited by reason of the landowner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect. We do not so interpret the state Constitution or the statutes enacted under it. If the landowner does all that is reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been "charged on such books" with the state tax. The state could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books. Any steps attempted to be taken by the officers of the state, based upon such neglect of its agent,—the taxpayer not being in default,—would be without legal sanction, and could be restrained by any court having jurisdiction in the premises. We go further, and say, that any sale had under the statute providing for a sale, under the order of court, for the benefit of the school fund, of lands alleged to be forfeited by reason of their not having been charged on the land books for five consecutive years with the state tax due thereon, would be absolutely void, if the landowner was not before the court, or had not been duly notified of the proceedings, but had done all that he could reasonably do to have his
[435] lands entered *on the proper books and to cause himself to be charged with the taxes due thereon. If the state was not entitled to treat them *as forfeited lands*, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected. In the present case, it does not appear that any evidence was offered tending to show that the absence from the land books of any charge of taxes on the lands claimed by the plaintiff during five consecutive years after their redemption by Randall, trustee, in 1883 was due to any neglect of the officers of the state, or that the plaintiff, or those under whom he asserts title, entered or attempted to enter the lands upon the land books, or that he or they caused or attempted to cause the lands to be charged with taxes thereon. But there was evidence tending to show that the requirements of the Constitution were not met during any of the years from 1883 to the bringing of this action. So far as the record discloses, it is a case of sheer neglect upon the part of the landowner to perform the duty required of him by the Constitution and statutes of the state.

Another point made by the plaintiff in error is that the provision of the Constitution of Virginia exempting tracts of less than 1,000 acres from forfeiture is a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. We do not concur in this view. The evil intended to be remedied by the Constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by someone, and its extent of boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed
*as to small tracts. The judiciary should be [436]
very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the state attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the 14th Amendment forbidding a denial of the equal protection of the laws.

For the reasons stated, we hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed, or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representatives of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the state.

Having discussed all the points suggested by the assignments of error which we deem it necessary to examine, we conclude this opinion by saying that as neither the plaintiff nor those under whom he claims title availed themselves of the remedy provided by the statutes of West Virginia for removing the forfeiture arising from the fact that, during the years 1884, 1885, 1886, 1887, and 1888, the lands in question were not charged on the proper land books with the state taxes thereon for that period or any part thereof, the forfeiture of such lands to the state was not displaced or discharged, and the circuit court properly directed the jury to find a verdict for the defendants. The plaintiff was entitled to recover only on the strength of his own title. Whether the defendants had a good title or not the plaintiff had no such interest in or claim to the lands as enabled him to maintain his action of ejectment. We concur in what the supreme court of appeals of
Virginia said *in a case recently decided: "In [437]
an action of ejectment the plaintiff must recover on the strength of his own title, and if it appear that the legal title is in another,

whether that other be the defendant, the commonwealth, or some third person, it is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the commonwealth for the nonpayment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the commonwealth, the presumption is that the title is still outstanding in the commonwealth." *Reusens* v. *Lawson*, 91 Va. 226.

The judgment of the Circuit Court of the United States is affirmed.

HENRY C. KING, *Appt.*,
v.
PANTHER LUMBER COMPANY and Jerome P. Kroll.

(See S. C. Reporter's ed. 437–438.)

Forfeiture of lands in West Virginia—King v. Mullins, 171 U. S. 404 [*ante, 214*], *followed.*

1. The omission to enter certain lands for taxation upon the proper land books, as and for the period required by the Constitution of West Virginia, operated to forfeit and devest the title and vest the same in said state.
2. *King* v. *Mullins*, 171 U. S. 404 [*ante*, 214], followed.

[No. 240.]

Argued April 28, 1898. Decided May 31, 1898.

APPEAL from a judgment of the Circuit Court of the United States for the District of West Virginia dissolving the injunction and dismissing a suit in equity brought by Henry C. King against the Panther Lumber Company *et al.*, to enjoin defendants from cutting and removing timber from a certain tract of land in West Virginia. *Affirmed.*

The facts are stated in the opinion.

Mr. **Maynard F. Stiles** for appellant.

No counsel for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This was a suit in equity by the appellant, a citizen of New York, against the appellee, a corporation of West Virginia, and one Kroll a citizen of the latter state. Its object was to obtain a decree enjoining the defendant from cutting and removing timber from a certain tract of land in West Virginia, of which the plaintiff, King, claimed to be the owner.

The defendant corporation denied the plaintiff's ownership of the land, and asserted title in itself.

*The land in dispute is a part of a tract pur- [**438**] porting to contain 500,000 acres, and which was patented in 1793 by the commonwealth of Virginia to Robert Morris, assignee of Wilson Cary Nicholas. It is the same patent which is referred to in the opinion in *King* v. *Mullins*, just decided, 171 U. S. 404 [*ante*, 214].

It appeared from the pleadings and exhibits in the cause that the lands in controversy were not entered upon the proper land books for taxation or charged with taxes for any year from 1883 to 1895, inclusive.

The final order in the cause was in these words: "It having been held by this court in the case of *H. C. King* v. *M. B. Mullins et als.*, recently tried in this court, the honorable circuit judge presiding, that such omission of said land from the land books operated to forfeit and devest the title to said tract of land and vest the same absolutely in the state of West Virginia, under the provisions of the Constitution of said state, before the purchase of the same by complainant, and that therefore complainant has no title to said land, the court is of the opinion to dissolve said injunction, reserving the right to render and file herein an opinion in writing upon said motion. It is therefore ordered, adjudged, and decreed that the said injunction be, and the same is hereby, dissolved, and that the said bills be dismissed, and that the defendants recover of the complainants their costs."

The controlling questions in this case are the same as those decided in the case of *King* v. *Mullins*. For the reasons therein given, *the judgment of the Circuit Court is affirmed.*

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10 : 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5 : 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5 : 423.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1898.

Vol. 171.

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1898.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

[441] CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, *Plff. in Err.*,

v.

RICHARD P. THOMAS.

(See S. C. Reporter's ed. 441–446.)

Federal question, when necessary.

A writ of error to a state court will be dismissed when no Federal right was specially set up or claimed until after the judgment in the highest court of the state.

[No. 36.]

Submitted May 4, 1898. Decided October 17, 1898.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court reversing a judgment of the Superior Court of the City and County of San Francisco in favor of the plaintiff, John Chetwood, Jr., and against the defendant, Richard P. Thomas, for a certain sum of money; the case being remanded by the Supreme Court of the State to the trial court, with directions to enter a judgment in favor of the defendant, Thomas. *Dismissed on motion.*

See same case below, 113 Cal. 414.

Statement by Mr. Justice **Brown:**

This was an action sounding in tort, but styled a bill of complaint in equity, for an accounting and settlement of a trust by Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson. The action was instituted in the superior court of San Francisco by John Chetwood, Junior, for himself and as the representative of all the stockholders of the California National Bank, which bank had failed and was at the time in the hands of a receiver.

The bill alleged that the failure was due to the negligence of Richard P. Thomas, presi-
[442] dent, Robert R. Thompson, vice *president, and Robert A. Wilson, a director, composing the executive committee of the corporation, who had as such committee contrived together to injure and deceive the said corporation by neglecting to conform to its by-laws; and as such committee had made worthless loans, whereby the money of the corporation was wasted, misused, and lost to the amount of about $200,000.

Among the duties and powers of the committee, as set forth in the by-laws adopted by the bank, were an immediate supervision of all the officers and business of the bank; auditing all bills for current and other expenses; discounting and purchasing bills, notes, and other evidences of debt; and reporting to the directors at each regular meeting all bills, notes, and other evidences of debt discounted or purchased by them for the bank. It was further provided by the by-laws that the president should have general control and supervision of the bank, and be responsible for its condition to the directors. The vice president was to assist the president in the discharge of his duties.

The bill alleged that "it was the duty of each of said members of the executive committee to exercise, concurrently with his associates on said committee, diligence and fidelity in performing the duties of said committee," but that "they negligently permitted the cashier of said bank to control and manage the whole business of the said bank as he saw fit and without consulting or in anywise informing said defendants," and that by reason of the negligence of said defendants, and the acts and misconduct of the cashier, negligently permitted as aforesaid, the bank suddenly failed on December 15, 1888, owing about $450,000, and the Comptroller of the Currency had placed a receiver in charge of said bank and its affairs, and thereafter levied an assessment of $75,000 upon the stockholders, which sum was all paid except $20,000 assessed against Richard P. Thomas, the president of the bank.

The prayer of the bill was that a decree might be entered holding Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson to an accounting of their trust,

and that a joint and several money judgment [443] be entered against them for the sum *of $400,000, with legal interest thereon from the time of such loss.

The defendants answered the bill, denying the allegations as to negligence on their part.

Upon the cause being submitted to the court, a judgment was "entered in favor of the plaintiff and against Richard P. Thomas, Robert R. Thompson, and Robert A. Wilson," and the case was referred to a master, who found the actual loss of the bank to be $166,919. Before a final judgment was rendered by the court, however, the suit was dismissed by the plaintiff as to Robert R. Thompson and Robert A. Wilson, from whom had been collected the sum of $27,500, thus leaving a net loss to the bank of $139,419, and judgment for this amount was rendered against Richard P. Thomas.

Thereupon, Thomas appealed to the supreme court of the state of California, by which court the judgment was reversed, and the case remanded to the trial court, with directions to enter a judgment in favor of the defendant Thomas. (113 Cal. 414.)

The plaintiff thereupon sued out a writ of error to this court, assigning as the principal ground to give this court jurisdiction that the judgment of the supreme court of the state was rendered without due or any process of law, and deprived the plaintiff of its property without due process of law, contrary to the Constitution, etc., and Revised Statutes, § 5136, relating to national banks.

Messrs. **Robert Rae, E. G. Knapp,** and **John Chetwood, Jr.,** for plaintiff in error.

Mr. **A. H. Ricketts** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

Unless the plaintiff in error was denied some right under the Constitution or stat- [444] utes of the United States, "specially *set up and claimed" by it, this writ of error must be dismissed.

The bill of complaint, filed in the superior court of San Francisco by a stockholder of the California National Bank, sought to charge three directors of the bank with negligence in the performance of their trust, and particularly in failing to comply with certain by-laws of the bank, by which large amounts of money were lost to the bank, which the bill prayed that the defendants might be decreed to make good and restore. The bank was chartered under the national banking act and the by-laws were adopted in pursuance of Revised Statutes, section 5136, which authorizes associations incorporated under the act to define the duties of the president and other officers and to regulate the manner in which its general business shall be conducted. Certain transactions of the directors are also alleged to be infractions of Revised Statutes, section 5200, for which the directors are made liable in section 5239, although no violations of this section are specifically alleged in the bill.

Demurrers were interposed by the several defendants and overruled, when answers were filed denying in general the allegations of the bill. The court subsequently entered judgment against the three directors, but, being unable to determine the proper amount, appointed a referee to take proof of the amount appearing to be due and owing to the bank from certain named individuals. Upon such report having been made, a stipulation was entered into between the plaintiff stockholder and the defendants Thompson and Wilson, whereby the plaintiff renounced and withdrew his action against such defendants, and the court, upon such stipulation, entered a judgment dismissing the action against them. The court thereupon made a finding of all the facts in the case, among which was one to the effect that there had been collected of the two defendants Thompson and Wilson the sum of $27,500, leaving a net loss to the bank of $139,419, for which judgment was entered against the defendant Thomas. Thomas thereupon appealed to the supreme court of the state from the judgment so entered.

*That court was of opinion that the com- [445] plaint, though entitled "a bill in equity for the accounting and settlement of a trust," contained nothing more than a charge *ex delicto* against the directors for a breach and nonperformance of their duties. It did not consider it necessary to dispose of the objections to the complaint; but assumed, without deciding, that the complaint was sufficient to state a cause of action in its averments of misconduct. It then proceeded to decide (1) that the complaint was one sounding in tort, and that the defendants were charged as joint tortfeasors; that their negligence was pleaded as their joint neglect to perform duties, not individually imposed upon them, but collectively undertaken as members of the executive committee; that in the findings of fact no mention was made of any dereliction of duty on the part of Thompson and Wilson, and that there was an absolute failure by the court to find upon the most material issues of the case—the joint negligence of the three defendants, which alone, it was alleged, had occasioned loss to the bank. "Such," said the court, "is the cause of action pleaded in the complaint. The findings, if it be conceded that they give evidence of a meritorious cause of action against the defendant Thomas, do so because of a showing that he was negligent, not with the other defendants and as member of the executive committee, but that he was individually and separately negligent in the performance of his duties as president. But this is not the cause of action pleaded against him, and it is well settled that, where the case made out by the findings is a different case from that presented by the pleadings, the judgment will be reversed; for the relief decreed must be the relief sought, and a variance, even if it be such as could have been cured by amendment, is fatal to the validity of the judgment." The court further held (2) that, as the defendants in error were sued jointly for a tort, a withdrawal of the action in favor of Thompson and Wilson operated also to release the defendant Thomas.

This was in fact the main reason given for its conclusion. The court thereupon ordered the judgment to be reversed, and the cause remanded with directions to enter judgment in favor of the defendant Thomas.

[446] *In all this record there was no Federal right specially set up or claimed by the plaintiff in error until after the judgment in the supreme court, when a petition for writ of error was filed by the California National Bank, a codefendant with Thomas in the original action, in which various allegations were made of a denial of Federal rights. But assuming that a Federal question might be extorted from the allegations of the complaint, it is sufficient to say that the case was not disposed of upon the merits of such complaint, which was treated as sufficient, but upon a variance between its allegations and the proofs, and upon the settlement made with the defendants Thompson and Wilson, and the withdrawal of the action against them. These were purely questions under the law of the state, as to which the opinion of the supreme court was conclusive. Not only was no suggestion of a Federal question made to the trial court or to the appellate court, but there was nothing to indicate that the judgment rendered could not have been given without deciding a Federal question. Indeed, the opinion shows that the cause was decided, as it might well have been, solely upon grounds not involving such question.

Whether a judgment should be ordered in favor of Thomas for a dismissal of the action against him or simply for a new trial, involved merely a question of the procedure under the law of the state. The court might have been, and probably was, of the opinion that an action would lie upon the separate liability of Thomas, and have reserved for future consideration the question whether the dismissal of this action upon a joint liability would operate as estoppel against a new action upon his individual liability.

There was no Federal question involved in the disposition of this case, and the writ of error is therefore *dismissed*.

---

[447] CALIFORNIA NATIONAL BANK *et al.*, *Plffs. in Err.*,

v.

THOMAS K. STATELER *et al.*

(See S. C. Reporter's ed. 447–449.)

What is not a final order.

An order directing the trial court to enter an order for turning over certain moneys and securities received from certain persons, after making reasonable allowances for "costs, disbursements, and attorneys' fees" as contemplated by law, is not a final order for the purpose of a writ of error.

[No. 37.]

Submitted May 4, 1898. Decided October 17, 1898.

IN ERROR to the Supreme Court of the State of California to review a decision of that court reversing an order made by the Superior Court of the City and County of San Francisco denying a motion to require the plaintiff Chetwood to appear and show cause why moneys collected of defendants Thompson and Wilson and certain stock and other securities should not be turned over to Thomas K. Stateler as agent of the stockholders of the California National Bank and directing the trial court to enter the order prayed for, after allowing plaintiff for his costs, etc. On motion to dismiss. *Dismissed.*

See same case below, 113 Cal. 649.

Statement by Mr. Justice **Brown:**

This was an intervening petition by Stateler in the case just decided, of the *California National Bank* v. *Thomas* [*ante*, 231] to obtain the possession of the sum of $27,500 paid to the plaintiff Chetwood by the defendants Thompson and Wilson in the settlement of the suit of Chetwood against them as codefendants with Thomas.

Pending the insolvency and winding-up proceedings of the California National Bank, and subsequent to the appointment of a receiver by the Comptroller of the Currency, the petitioner Stateler was elected "agent" by the stockholders pursuant to the act of Congress of August 3, 1892 (27 Stat. at L. 345). As this act provided that the person so elected agent "shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association," Stateler applied by affidavit to the superior court of the city and county of San Francisco, in which the Chetwood action was then pending, for an order upon the plaintiff Chetwood to appear and show cause why the moneys collected of Thompson and Wilson, as well as certain stock and other securities, should not be turned over to the affiant as such agent.

The motion was opposed upon the ground that of the whole number of 2,000 shares, 1,020 shares only were voted to elect Stateler as agent of the bank, and that they were either owned or controlled by Richard P. Thomas, the former president, against whom there was a judgment outstanding in *favor [448] of the stockholders in the amount of $139,419, besides an unpaid assessment of $20,000 levied upon him as a stockholder by the Comptroller of the Currency.

Upon affidavits read at the hearing of the motion the court denied the order prayed for, whereupon Stateler appealed to the supreme court of the state. That court held that the regularity of the appointment of the agent could not be questioned in a proceeding of this kind, inasmuch as it had been approved by the Comptroller of the Currency, and that the agent's demand to have the money paid over to him should have been granted. The court thereupon reversed the order "with directions to the trial court to enter the order prayed for, after making reasonable allowance to the plaintiff Chetwood for his costs, disbursements, and attorney's fees in said

action as contemplated by law." An application for a hearing in banc was made and denied by the supreme court, whereupon the bank and Chetwood, as representative stockholder, and the party upon whom the order was made, sued out a writ of error from this court, which the defendants in error moved to dismiss.

Messrs. **Robert Rae** and **E. G. Knapp** for plaintiff in error in opposition to the motion.

Messrs. **Robert Brent Mitchell,** *William M. Pierson,* and *Robert A. Friedrich* for defendant in error, in favor of the motion to dismiss.

Mr. Justice **Brown** delivered the opinion of the court:

Motion is made to dismiss this writ of error upon the ground that no Federal question is involved in the case.

Without, however, expressing an opinion upon this, we think the case will have to be dismissed upon the ground that the order appealed from is not a final order within the decisions of this court. The affidavit of Stateler, which is the basis of this proceeding, sets forth, not only the payment of $27, 500 in cash by Thompson and Wilson, but avers upon information and belief that there
[449] was also transferred to the *plaintiff, by said defendants, a large block of stock belonging to them in the California National Bank, which is the property of its stockholders, and the prayer is for an order turning over to the petitioner the moneys above mentioned, and "all stock and other securities of every sort, nature, and description, received by him from defendants Thompson and Wilson in this action."

While the opinion of the court deals only with the moneys paid by Thompson and Wilson, the order appealed from directs the trial court to *enter the order prayed for* "after making reasonable allowances to the plaintiff Chetwood for his costs, disbursements, and attorney's fees in said action as contemplated by law." This order lacks finality in two particulars. It would still be competent to prove that Chetwood had received the block of stock set up in Stateler's affidavit, and it would certainly be necessary for Chetwood to prove up his costs, disbursements, and attorney's fees before the amount for which he is ultimately made liable could be ascertained.

The settled rule is that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final. *Craighead* v. *Wilson*, 18 How. 199 [15: 332]; *Beebe* v. *Russell*, 19 How. 283 [15:668]; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91 [33:275]; *Lodge* v. *Twell*, 135 U. S. 232 [34: 153]; *McGourkey* v. *Toledo & Ohio C. Railway Co.* 146 U. S. 536 [36:1079]; *Union Mutual Life Ins. Co.* v. *Kirchoff*, 160 U. S. 374 [40:461]; *Hollander* v. *Fechheimer*, 162 U. S. 326 [40:985].

The writ of error is therefore *dismissed.*

THE G. R. BOOTH. [450]

(See S. C. Reporter's ed. 450–462.)

Loss by peril of the sea—proximate cause—accident of navigation.

1. Damage to sugar, part of the cargo of a ship, while unloading at the dock in her port of destination, caused by sea water which entered the ship through a hole made in her side by the explosion, without her fault and purely by accident, of a case of detonators, also a part of her cargo, is not "a loss or damage occasioned by the perils of the sea or other waters," or by an "accident of navigation of whatsoever kind," within the exceptions in the bill of lading.
2. The explosion, and not the sea water, was the proximate cause of the damage to the sugar, and this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading.
3. The damage to the sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage and had been finally and intentionally moored at the dock, there to remain until the cargo was taken out of her, cannot be considered as "occasioned by accidents of navigation."

[No. 10.]

Argued December 17, 1897. Decided October 17, 1898.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit, certifying a question of law for instructions, upon an appeal from a decree dismissing a libel in admiralty filed in the District Court of the United States for the Southern District of New York by the American Sugar Refining Company against the steamship G. R. Booth, for damage to cargo. *Question answered in the negative.*

See same case below, 64 Fed. Rep. 878.

Statement by Mr. Justice **Gray:**

Upon an appeal from a decree of the district court of the United States for the southern district of New York, dismissing a libel in admiralty by the American Sugar Refining Company against the steamship G. R. Booth, for damage to cargo, 64 Fed. Rep. 878), the circuit court of appeals certified to this court the following statement of facts and question of law:

"On July 14, 1891, the steamship G. R. Booth, a large seaworthy steel vessel, was lying at the dock in the waters of the harbor of New York, discharging a general cargo which had been laden on board at Hamburg for transportation to and delivery at New York city. Part of the cargo laden on board at Hamburg consisted of twenty cases of detonators.

"Detonators are blasting caps used to explode dynamite or gun cotton, and consist of a copper cap packed with fulminate of mercury. In use, the cap is placed in contact with dynamite; a fuse is pushed into the cap until it meets the packing; the fuse is lighted; and when the fire reaches the fulminate it explodes it, thus exploding the

dynamite. The detonators were made in Germany, and were packed according to the regulations prescribed by German law, adopted and enforced for the purpose of eliminating risk of danger in handling and
[451]*transporting them. When thus packed, the immunity from danger of an accidental explosion is supposed to be complete, and they are transported and handled like ordinary merchandise by carriers and truckmen without the use of any special precautions to avoid risk. They do not explode when subjected to violent shock, as when thrown from such a height above the ground as to shatter in fragments the cases in which they are packed. They were customarily stowed and transported in vessels like ordinary merchandise, indiscriminately with the other cargo; and until the present occurrence, although millions of cases had been shipped and carried to all parts of the world, no accident had happened, so far as is known.

"The detonators were stowed with other cargo in afterhold No. 4. While the steamship was being unladen, one of the cases exploded, making a large hole in the side of the ship, in the No. 4 hold, besides doing other damage. In consequence of the opening thus made in the ship's side, sea water rapidly entered in the No. 4 hold, beyond the control of the capacity of the pumps, and passed from the No. 4 hold through the partition into No. 3 hold. In No. 3 hold there was cargo belonging to the libellant, consisting of sugar, which had not as yet been discharged. The sea water thus entering the hold damaged the sugar extensively. The boxes of detonators were stowed and handled in the usual way; and the explosion occurred purely by accident, and without any fault or negligence on the part of any person engaged in tansporting them or in discharging the cargo.

"The bill of lading under which the sugar of the libellant was carried contained the following clause: 'The ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters; by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, robbers or thieves; by arrest and restraint of princes, rulers, or people; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; by colusion, stranding, or other accidents of navigation, of whatsoever kind.'

[452] *"Upon these facts the court desires instructions upon the following question of law, *viz.:* Whether the damage to libellant's sugar caused by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, is a 'loss or damage occasioned by the perils of the sea or other waters,' or by an 'accident of navigation of whatsoever kind,' within the above-mentioned exceptions in the bill of lading.

Mr. **Harrington Putnam,** for the appellant:

The learned district judge held: "The explosion did no direct damage to the sugar, nor in any manner directly affected it. By bursting a hole in the side of the ship, sea water was let into the hold, which subsequently made it way among the sugar and damaged it. Such damage is a sea peril. The Xantho, L. R. 12 App. Cas. 503. The burden of proof is upon the libellant to show that it might have been avoided by the ship by reasonable care."

The G. R. Booth, 64 Fed. Rep. 879.

The absolute liability of a common carrier for any loss except the act of God and the King's enemies has been settled in English law since the reign of Elizabeth.

1 Co. Inst. 89; 1 Comyns, Dig., p. 212, ed. Dublin, 1785; *Tompkins* v. *Ulster,* Fed. Cas. No. 14,087*a; Nugent* v. *Smith,* L. R. 1 C. P. Div. 19; Ulpian, Dig. lib. IV. tit. IX., § 3; Casaregis, Disc. XXIII. 38; *Baxter* v. *Leland,* Abb. Adm. 348.

By dangers of the sea are meant all unavoidable accidents from which common carriers, by the general law, are not excused unless they arise from the act of God.

To bring a disaster within the scope of the phrase "act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to show that it occurred independent of human action or neglect.

Dibble v. *Morgan,* 1 Woods, 411.

Perils of the sea are those accidents peculiar to navigation, that are of an extraordinary character, or arise from an irresistible force or from an overwhelming power which cannot be guarded against by the ordinary exercise of human skill and prudence.

14 Am. & Eng. Enc. Law, 323; Holt, Shipping, 2d ed. (London, 1842) 412; Park, Ins. chap. 3, p. 61, 3d ed., Boston, 1800.

Losses by perils of the sea are now restricted to such accidents or misfortunes as proceed from mere sea damage; that is, such as arise *ex vi divina* from stress of weather, winds and waves, from lightning and tempest, rocks and sands, etc.

Marshall, Marine Ins. 5th ed. 386; 2 Arnould, Ins. 6th ed. 1887, 754; *The Reeside,* 2 Sumn. 571; *The Majestic,* 166 U. S. 386, 41 L. ed. 1044; *The Mohler,* 21 Wall. 230, 233, 22 L. ed. 485, 486; Revue Internationale du Droit Maritime, vol. X. 207; *New Jersey Steam Nav. Co.* v. *Merchants' Bank,* 6 How. 344, 383, 12 L. ed. 465, 482.

A damage from explosion is not a loss by perils of the sea.

The New World v. *King,* 16 How. 469, 476, 14 L. ed. 1019, 1022: *Buckley* v. *Naumkeag Steam Cotton Co.* 1 Cliff. 322, Affirmed 24 How. 386, 16 L. ed. 599; *The Mohawk,* 8 Wall. 153, 162, 19 L. ed. 406, 409; *Dunlap* v. *The Reliance,* 2 Fed. Rep. 249; *Posey* v. *Scoville,* 10 Fed. Rep. 140; *Rose* v. *Stephens & C. Transp. Co.* 11 Fed. Rep. 438; *The Sydney,* 27 Fed. Rep. 123; *Grimsley* v. *Hankins,* 46 Fed. Rep. 400; *Warn* v. *Davis Oil Co.* 61 Fed. Rep. 631.

In the present case the process of discharging was under the control of the vessel, and the casualty was such as in the ordinary course of hoisting out cargo does not happen if reasonable care is used. In the ab-

sence of explanation by the claimant such an accident cannot be deemed inevitable.

Inland & S. Coasting Co. v. *Tolson*, 139 U. S. 555, 35 L. ed. 272; *Breen* v. *New York C. & H. R. R. Co.* 109 N. Y. 297; *The Nitroglycerine Case*, 15 Wall. 524, 537, 538, 21 L. ed. 206, 211, 212.

The idea that contact of sea water with the cargo makes a prima facie sea peril, without regard to the way the water made its way into the ship, is not the law of this court.

This inflow of water is not a cause. It is itself a natural result of the bursting of the ship below the water line. The real cause is the explosion which opened the bilge plates.

Phillips, Ins. § 1132; *Louisiana Mut. Ins. Co.* v. *Tweed*, 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 470, 24 L. ed. 257; *Ætna F. Ins. Co.* v. *Boon*, 95 U. S. 130, 24 L. ed. 399; *Waters* v. *Merchants' Louisville Ins. Co.* 11 Pet. 213, 9 L. ed. 691; *Dole* v. *New England Mut. Marine Ins. Co.* 2 Cliff. 394; *The Chasca*, L. R. 4 Adm. & Eccl. 446; *Brown* v. *St. Nicholas Ins. Co.* 61 N. Y. 332.

In case of a loss or damage to goods covered by a bill of lading, the presumption of the law is that such loss or damage was occasioned by the act or default of the carrier, and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible.

The William Taber, 2 Ben. 329; *Cullen* v. *Butler*, 5 Maule & S. 461; *The Exe*, 14 U. S. App. 627, 57 Fed. Rep. 399, 6 C. C. A. 410.

Neither is such an explosion an accident of navigation, within the exceptions of the bill of lading.

Hanseatische Gerichtszeitung, Nov. 17, 1886, p. 276.

The later English decisions enlarging the import of the term "perils of the sea" in a bill of lading, and reversing the former canons of construction of those contracts, will not be followed by this court.

King v. *Shepherd*, 3 Story, 349; *Lloyd* v. *General Iron Screw Collier Co.* 3 Hurlst. & C. 284; *Grill* v. *General Iron Screw Collier Co.* L. R. 1 C. P. 600, L. R. 3 C. P. 476; Restrictions by Contract upon the Liability of Shipowners as Carriers of Goods, by J. E. Gray Hill, London, 1891, p. 2; *The Duero*, L. R. 2 Adm. & Eccl. 393; *Chartered Mercantile Bank* v. *Netherlands India Steam Nav. Co.* 5 Asp. M. L. Cas. 65, L. R. 10 Q. B. Div. 532; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518.

These English decisions will not be followed by this court.

Hazard v. *New England Marine Ins. Co.* 8 Pet. 557, 584, 8 L. ed. 1043, 1053; *Garrigues* v. *Coxe*, 1 Binn. 592; *Merrill* v. *Arey*, 3 Ware, 215.

In frequent instances the courts have declared the carrier by sea to have been without the slightest negligence, and yet responsible for nondelivery of the cargo that has been intrusted to the vessel.

Hyde v. *Trent Nav. Co.* 5 T. R. 389; *Nugent* v. *Smith*, L. R. 1 C. P. Div. 19.

Even jarring, heat, and concussion may produce an explosion of such blasting caps.

Mather v. *Rillston*, 156 U. S. 391, 39 L. ed. 464.

In a general ship, the damage of one part of the cargo to another can never be attributed to a peril of the sea, unless first initiated by some external cause.

Brousseau v. *The Hudson*, 11 La. Ann. 427.

Mr. **J. Parker Kirlin,** for the appellee:

The proximate cause of the loss was the entrance of sea water through the ship's side without the ship's fault.

Milwaukee & St. P. R. Co. v. *Kellogg*, 94 U. S. 469, 474, 24 L. ed. 256, 259; *The Xantho*, L. R. 12 App. Cas. 503.

The character of the loss as such must be regarded first; and, finding the immediate cause of the damage to be an inflow of sea water without the ship's fault,—a loss peculiar to sea carriage,—it is unnecessary to examine or consider the cause of that cause.

General Mut. Ins. Co. v. *Sherwood*, 14 How. 351, 366, 14 L. ed. 452, 458.

In looking for the proximate cause of the loss, if it is found to be a peril of the sea we inquire no further; we do not look for the cause of that peril.

The maxim has been applied in this sense in *Howard F. Ins. Co.* v. *Norwich & N. Y. Transp. Co.* 12 Wall. 194, 20 L. ed. 378; *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 31 L. ed. 63; *Western Transp. Co.* v. *Downer*, 11 Wall. 129, 20 L. ed. 160; *Memphis & C. R. Co.* v. *Reeves*, 10 Wall. 176, 19 L. ed. 909; *Morrison* v. *Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Northwest Transp. Co.* v. *Boston Marine Ins. Co.* 41 Fed. Rep. 793; *City F. Ins. Co.* v. *Corlies*, 21 Wend. 367, 34 Am. Dec. 258; *Lewis* v. *Springfield F. M. Ins. Co.* 10 Gray, 159; *Kenniston* v. *Merrimack Mut. Ins. Co.* 14 N. H. 341, 40 Am. Dec. 193; *Babcock* v. *Montgomery County Mut. Ins. Co.* 6 Barb. 637; *Grim* v. *Phœnix Ins. Co.* 13 Johns. 451.

The occurrence of a loss peculiar to sea carriage, from one of the dangers incident to transportation of goods by water, in a seaworthy ship, without contributing fault by the carrier, is within the exception, and the carrier is excused. In *Clark* v. *Barnwell*, 12 How. 272, 282, 13 L. ed. 985, 989, damage to cargo by sweat in a ship's hold, without the ship's fault, was held to be a loss by "perils of the sea" within an exception in the bill of lading.

The same principle is admitted in *The Star of Hope*, 17 Wall. 651, 654, 21 L. ed. 719, 721; *Hostetter* v. *Park*, 137 U. S. 30, 34 L. ed. 568; *Hibernia Ins. Co.* v. *St. Louis Transp. Co.* 120 U. S. 166, 30 L. ed. 621.

Damage caused by the entrance of sea water through the ship's side, without the ship's fault, is a loss "by an accident of navigation," and also by a "peril of the sea and other waters," within the meaning of these words in a policy of insurance on goods.

Gow, Marine Ins. 349.

If this action had been brought by the owner of the sugar against an insurance company insuring it under this form of policy, it is not to be doubted that the court would

find the loss was caused by a "peril of the sea."

Carruthers v. *Sydebotham*, 4 Maule & S. 77; *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *Union Ins. Co.* v. *Smith*, 124 U. S. 405, 31 L. ed. 497; *Cullen* v. *Butler*, 5 Maule & S. 461.

The meaning of the words, "a loss by an accident of navigation," or "by a peril of the sea," is the same in a bill of lading as in a goods policy. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence conducing to the loss would not be a defense to an underwriter; but this result does not flow from any different meaning of the same words occurring in two maritime instruments.

In the present case the loss would be within the words, whether in a policy or in a bill of lading.

The Xantho, L. R. 12 App. Cas. 503; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518; *The Southgate* [1894] P. 329; *The Cressington* [1891] P. 152; *The Glendarroch* [1894] P. 226; *The Exe*, 14 U. S. App. 626, 57 Fed. Rep. 399, 6 C. C. A. 410; *The Castleventry*, 69 Fed. Rep. 475, note.

The casualty occurred during the voyage. Although the ship had arrived at the dock, the cargo which was damaged was still on board and in her custody, under the terms of the contract of carriage.

Scott v. *Baltimore, C. & R. S. B. Co.* 19 Fed. Rep. 56; *Constable* v. *National S. S. Co.* 154 U. S. 51, 63, 38 L. ed. 903, 911.

[452] *Mr. Justice **Gray** delivered the opinion of the court:

This was a libel against the steamship G. R. Booth, for damage done to sugar, part of her cargo, under the following circumstances: Another part of the cargo consisted of twenty cases of detonators, being copper caps packed with fulminate of mercury for exploding dynamite or gun cotton. While she was being unladen at the dock in her port of destination, one of the cases of detonators exploded, purely by accident, and without any fault or negligence on the part of anyone engaged in carrying or discharging the cargo. The explosion made a large hole in the side of the ship, through which the sea water rapidly entered the hold, and greatly damaged the sugar.

The bill of lading of the sugar provides that "the ship or carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters," or "by collision, stranding, or other accidents of navigation, of whatsoever kind."

The question certified by the circuit court of appeals to this court is whether the damage to the sugar is within these exceptions in the bill of lading.

The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was "occasioned by the perils of
[453] the sea;" or, in other words, *whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim, *Causa proxima non remota spectatur.*

The many authorities bearing upon this point, fully cited and discussed in the learned arguments at the bar, have been carefully examined. But only a few of them need be referred to, because judgments heretofore delivered by this court afford sufficient guides for the decision of this case.

In an early case, in which the action was upon a bond, given under the embargo act of December 29, 1807 (2 Stat. at L. chap. 5, § 2, p. 453), to reland goods in some port of the United States, "the dangers of the seas only excepted," the vessel was irresistibly driven by stress of weather into Porto Rico, and the cargo was there landed and sold by order of the governor, with which the master was obliged to comply. It was argued for the United States, that the goods arrived in Porto Rico in safety, and the party had the full benefit of them, and probably at a higher price than if he had landed them in the United States; and that the sea was not the proximate cause of the loss. But this court held that the case was within the exception in the bond, because the vessel, as said by Chief Justice Marshall in delivering judgment, "was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented by the dangers of the seas from complying with the condition of the bond: for an effect which proceeds, inevitably and of absolute necessity, from a specified cause, must be ascribed to that cause." *United States* v. *Hall*, 6 Cranch, 171, 176 [3: 189, 190].

In *Waters* v. *Merchants' Louisville Ins. Co.* 11 Pet. 213 [9: 691], the circuit court certified to this court the question whether a policy of insurance upon a steamboat on the western waters against the perils of the rivers and of fire covered a loss of the boat by a fire caused by the barratry of the master and crew. This question was answered in the negative, for reasons stated by Mr. Justice Story as follows: "As we understand the first *question it assumes that the fire was [454]
directly and immediately caused by the barratry of the master and crew as the efficient agents; or, in other words, that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratary as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or rivers, though the flow of the water should co-operate in

producing the sinking." 11 Pet. 219, 220 [9: 694, 695].

The maxim has been largely expounded and defined by this court in cases of insurance against fire.

In *Louisiana Mut. Insurance Co.* v. *Tweed*, 7 Wall. 44 [19: 65], cotton in a warehouse was insured against fire by a policy which provided that the insurers should not be liable for losses which might "happen or take place by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power, explosion, earthquake, or hurricane." An explosion took place in one warehouse, resulting in a conflagration which spread to a second warehouse, and thence, in the course of the wind blowing at the time, to a third warehouse containing the insured cotton. This court held that the loss of the cotton was caused by the explosion, and therefore the insurer was not liable; and, speaking by Mr. Justice Miller, said: "The only question to be decided in the case is whether the fire which destroyed plaintiff's cotton happened or took place by means of the explosion; for if it did, the defendant is not liable by the express terms of the contract. That the explosion was in some sense the cause of the fire is not denied, but it is claimed that its relation was too remote to bring the case within the exception of the policy. And we have had cited to us a general review of the doctrine of proximate
[455] and remote causes *as it has arisen and been decided in the courts in a great variety of cases . . . One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause. . . . We are clearly of opinion that the explosion was the cause of the fire in this case." 7 Wall. 51, 52 [19: 67]. In that case, as has been since observed by Mr. Justice Strong in delivering judgment in a case to be presently referred to more particularly, "it was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster." *Ætna F. Insurance Co.* v. *Boon*, 95 U. S. 117, 131 [24: 395, 399].

In *Howard F. Insurance Co.* v. *Norwich & N. Y. Transportation Co.* 12 Wall. 194 [20: 378], a large steamboat on Long Island sound was insured against fire, excepting fire happening "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." The facts, as found by the circuit court and stated in the report, were as follows: Another vessel came into collision with the steamboat, striking her on the side, and cutting into her hull below the water line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of her furnace, and generated steam which blew the fire against her woodwork, whereby her upper works were enveloped in flames and continued to burn for half or three quarters of an hour, when she rolled over and gradually sank in twenty fathoms of water. From the effects of the collision
alone, *she would not have sunk below her [456]
promenade deck, but would have remained suspended in the water, and could have been towed to a place of safety, and repaired at an expense of $15,000. The sinking of the steamboat below her promenade deck was the result of the action of the fire in burning off her upper works, whereby her floating capacity was decreased and she sank to the bottom, and the amount of the additional damage thereby caused, including the cost of raising her, was $7,300. Upon that state of facts, this court, affirming the judgment of the circuit court, held the insurers liable for the latter sum. But in the opinion of this court, delivered by Mr. Justice Strong, the rule was recognized and affirmed, that "when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." And it was added, "And certainly that cause which set the other in motion, and gave to it its efficiency for harm at the time of the disaster, must rank as predominant." 12 Wall. 199 [20: 379]. The rule was held to be inapplicable to that case, because the damage resulting from the fire, and that caused by the collision, apart from the fire, were clearly distinguished; and because the policy, exempting the insurers from liability for losses by fire by certain specified causes, covered losses by fire from all other causes, including collisions. But for those distinctions, the decision could hardly be reconciled with the earlier opinions already referred to, or with that delivered by the same able and careful judge in the latter case of *Ætna F. Insurance Co.* v. *Boon*, 95 U. S. 117 [24: 395].

In *Ætna F. Insurance Co.* v. *Boon* a policy of insurance against fire, issued during the war of the rebellion, for one year, upon goods in a store in the city of Glasgow, in the state of Missouri, provided that the insurers should not be liable for "any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." The city of Glasgow, being occupied as a military post by the United States forces, was attacked by a superior armed force of the rebels, and defended by
the *United States forces; and during the bat- [457]
tle the commander of these forces, upon its becoming apparent that the city could not be successfully defended, and, in order to pre-

vent military stores, which had been placed in the city hall, from falling into the hands of the rebels, caused them to be destroyed by burning the city hall; and the fire, spreading from building to building, through three intermediate buildings, to that containing the goods insured, destroyed them. This court held that the loss was within the exception in the policy, because the rebel military power was the predominating and operating cause of the fire; and in the opinion of the court, delivered by Mr. Justice Strong, and strongly supported by authority, the true rule and its application to that case were stated as follows:

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim, *Causa proxima non remota spectatur.* The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster." 95 U. S. 130 [24:399]. "The conclusion is inevitable, that the fire which caused the destruction of the plaintiff's property happened or took place, not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. It was the *causa causans* which set in operation every agency that contributed to the destruction. It created the military necessity for the destruction of the military stores in the city hall, and made it the duty of the commanding officer of the Federal forces to destroy them. His act, therefore, in setting fire to the city hall, was directly in the line of the force set in motion by the usurping power." 95 U. S. 132 [24:399]. "The court below regarded the action of the United States military authorities as a sufficient cause intervening
[458] *between the rebel attack and the destruction of the plaintiff's property, and therefore held it to be the responsible proximate cause. With this we cannot concur. The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *Milwaukee & St. Paul Railway Co.* v. *Kellogg*, 94 U. S. 469 [24: 256], we said, in considering what is the proximate and what the remote cause of an injury: 'The inquiry must always be whether there was any intermediate cause *disconnected from the primary fault,* and self-operating, which produced the injury.' In the present case, the burning of the city hall and the spread of the fire afterwards was not a new and *independent* cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town,—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power,—events so linked together as to form one continuous whole." 95 U. S. 133 [24: 400].

In general accord with the opinions above quoted are two cases in this court upon the meaning and effect of the term "dangers of navigation," or "perils of the sea," in a bill of lading. *The Mohawk,* 8 Wall. 153 [19: 406]; *The Portsmouth,* 9 Wall. 682 [19: 754].

In *The Mohawk,* a steamboat carrying wheat under a bill of lading containing an exception of "dangers of navigation" grounded on the flats, and, in the effort to get her off, became disabled by the bursting of her boiler, and afterwards sank. It was argued, among other things, on the one side, that the explosion was not a danger incident to navigation; and, on the other, that the sinking of the vessel was the immediate cause of the damage to the wheat. The question at issue was whether the vessel was entitled to freight *pro rata itineris.* This court, speaking by Mr. Justice Nelson, said that "the explosion of the boiler was not a peril within the exception of the bill of lading," and therefore the case fell within that class in which the ship is disabled or prevented from forwarding the goods to the port of destination by a peril or accident not *within the exception in the bill of lading. 8 Wall. 162 [19: 409]. Although this statement was [459]
perhaps not absolutely necessary to the decision, it was upon a point argued by counsel, and shows clearly that the court was of opinion that the explosion, and not the sinking, was the proximate cause of the loss.

In *The Portsmouth,* it was decided that a jettison made to lighten a steamboat which had been run aground by her captain's negligence was not within an exception of "the dangers of lake navigation," in a bill of lading; and Mr. Justice Strong, in delivering judgment, said: "A loss by a jettison occasioned by a peril of the sea is, in ordinary cases, a loss by perils of the sea. But it is well settled that, if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present, and enter into the case. This is a principle alike applicable to exceptions in bills of lading and in policies of insurance. Though the peril of the sea may be nearer in time to the disaster, the efficient cause, without which the peril would not have been incurred, is regarded as the proximate cause of the loss. And there is, perhaps, greater reason for applying the rule to exceptions in contracts of common carriers than to those in policies of insurance, for, in general, negligence of the insured does not relieve an underwriter, while a common carrier may not, even by stipulation, relieve himself from the consequences of his own fault." 9 Wall. 684, 685 [19: 755, 756].

Generally speaking, the words "perils of

the sea" have the same meaning in a bill of lading as in a policy of insurance. There is a difference, indeed, in their effect in the two kinds of contract, when negligence of the master or crew of the vessel contributes to a loss by a peril of the sea; in such a case, an insurer against "perils of the sea" is liable, because the assured does not warrant that his servants shall use due care to avoid them; whereas an exception of "perils of the sea" in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care, unless prevented by the excepted perils. But when, as in the
[460] present case, it is *distinctly found that there was no negligence, there is no reason, and much inconvenience, in holding that the words have different meanings in the two kinds of commercial contract. *The Portsmouth*, above cited; *Phœnix Ins. Co.* v. *Erie & W. Transportation Co.* 117 U. S. 312, 322-325 [29:873, 879, 880]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 438, 442 [32:788, 791, 792]; *Compania La Flecha* v. *Brauer*, 168 U. S. 104 [42:398]; *The Xantho*, L. R. 12 App. Cas. 503, 510, 514, 517.

In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage—the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possibility of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage;
[461] *but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion,—events so linked together as to form one continuous whole.

The damage was not owing to any violent action of winds or waves, or to the ship coming against a rock or shoal or other external object; but it was owing to an explosion within the ship, and arising out of the nature of the cargo, which cannot be considered, either in common understanding or according to the judicial precedents, as a peril of the sea.

As was observed by this court in *Ætna F. Insurance Co.* v. *Boon*, above cited: "Often in case of a fire, much of the destruction is caused by water applied in efforts to extinguish the flames. Yet it is not doubted all that destruction is caused by the fire, and insurers against fire are liable for it." 95 U. S. 131 [24:399]. If damage done by water thrown on by human agency to put out a fire is considered a direct consequence of the fire, surely damage done by water entering instantly, by the mere force of gravitation, through a hole made by an explosion of part of the cargo, must be considered as a direct consequence of the explosion.

Upon principle and authority, therefore, our conclusion is that the explosion, and not the sea water, was the proximate cause of the damage to the sugar, and that this damage was not occasioned by the perils of the sea, within the exceptions in the bill of lading.

Nor can the damage to the sugar, attributable, not to a peril of the sea, but to the explosion of part of the cargo after the ship had ended her voyage, and had been finally and intentionally moored at the dock, there to remain until her cargo was taken out of her, be considered as "occasioned by accidents of navigation." *Canada Shipping Co.* v. *British Shipowners' Mut. Protection Association*, L. R. 23 Q. B. Div. 342; *The Accomac*, L. R. 15 Prob. Div. 208; *Thames & Mersey Marine Ins. Co.* v. *Hamilton*, L. R. 12 App. Cas. 484; *The Mohawk* [8 Wall. 153, 19: 406], above cited.

Much reliance was placed by the appellee upon a recent English case, in which the House of Lords, reversing the decision *of [462]
Lord Esher and Lords Justices Bowen and Fry in the court of appeal, and restoring the judgment of Lord Justice Lopes in the Queen's bench division, held that damage to goods by sea water which, without any neglect or default on the part of the shipowners or their servants, found its way into the hold of a steamship through a hole which had been gnawed by rats in a leaden pipe connected with the bath room of the vessel, was within the exception of "dangers or accidents of the seas" in a bill of lading. *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518, L. R. 17 Q. B. Div. 670, L. R. 16 Q. B. Div. 629. There is nothing in the report of any stage of that case to show that the sea water entered the ship immediately upon the gnawing by the rats of the hole in the pipe; and any such inference would be inconsistent with one of the opinions delivered in the House of Lords in which Lord Fitzgerald said: "The remote cause was in a certain sense the action

of the rats on the lead pipe, but the immediate cause of the damage was the irruption of sea water from time to time through the injured pipe caused by the rolling of the ship as she proceeded on her voyage." L. R. 12 App. Cas. 528. However that may have been, that case differs so much in its facts from the case now before us, that it is unnecessary to consider it more particularly. *Question certified answered in the negative.*

THE SILVIA.

(See S. C. Reporter's ed. 462-466.)

When a ship is not unseaworthy—error in navigation.

1. A ship beginning her voyage when the weather is fair is not unseaworthy because her ports between decks, which are tightly closed with thick glass, are not also covered with the inner covers of iron provided for that purpose, and because the hatches are battened down, where they can be opened in two minutes, and no cargo is stowed against the ports, and they can be speedily got at and closed with the iron covers if occasion should require.
2. Neglect in not closing the iron covers of the ports of a ship is a fault or error in the navigation or in the management of the ship, within the meaning of § 3 of the Harter act.

[No. 5.]

Argued March 8, 1898. Decided October 17, 1898.

ON CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court affirming a judgment of the District Court of the United States for the Southern District of New York dismissing a libel in admiralty filed by the Franklin Sugar Refining Company against the steamship Silvia to recover damages for injuries to a cargo of sugar shipped upon the Silvia at Matanzas, Cuba, to be delivered at the port of Philadelphia. *Affirmed.*

See same case below, 64 Fed. Rep. 607, and 35 U. S. App. 395.

The facts are stated in the opinion.

Messrs. **Harrington Putnam** and **Charles C. Burlingham,** for the Franklin Sugar Refining Company, appellant:

The negligence of the ship was abundantly established.

The steamship sailed from Matanzas in an unseaworthy condition.

Dobell v. *Steamship Rossmore Co.* [1895] 2 Q. B. 408.

The act of February 13, 1893, does not do away with the warranty of seaworthiness.

The Harter act is to be construed in accordance with the state of pre-existing law, the various efforts made to agree on a division of the carriers' liabilities, the standard forms of bills of lading which commercial bodies had adopted before 1893, and the exigencies which led to the passage of the act. *The Delaware,* 161 U. S. 459, 472, 40 L. ed. 771, 776; Wendt, Maritime Legislation, 3d ed. 398, 401.

But if the severity of the obligation which has heretofore rested on the shipowner to furnish a seaworthy ship has been relaxed, the strict obligation of diligence substituted therefor has not been satisfied by the owners of the Silvia.

The Main v. *Williams,* 152 U. S. 122, 132, 38 L. ed. 381, 385; *The Millie R. Bohannon,* 64 Fed. Rep. 883; *The Sintram,* 64 Fed. Rep. 884; *The Mary L. Peters,* 68 Fed. Rep. 919; *The Flamborough,* 69 Fed. Rep. 470; *The Alvena,* 74 Fed. Rep. 252; *The Colima,* 82 Fed. Rep. 665.

The omission to close the dummy was not a fault or error in navigation or in the management of the vessel under § 3 of the Harter act.

Good v. *London S. S. Owners' Mut. Protecting Asso.* L. R. 6 C. P. 563; *Carmichael* v. *Liverpool Sailing Shipowners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *The Warkworth,* L. R. 9 Prob. Div. 20, and 145; *Dobell* v. *Steamship Rossmore Co.* [1895] 2 Q. B. 408; *Steel* v. *State Line S. S. Co.* L. R. 3 App. Cas. 72.

By the absolute undertaking of the charter party to have the ship fit for the voyage, the claimant has precluded itself from any exemption under the Harter act.

The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688.

Mr. **J. Parker Kirlin,** for The Silvia, appellee:

The exemptions provided by § 3 of the Harter act are available to foreign vessels.

The Etona, 64 Fed. Rep. 880, 38 U. S. App. 50, 71 Fed. Rep. 895, 18 C. C. A. 380; *The Silvia,* 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Straitherly,* 124 U. S. 558, 31 L. ed. 580; *The Scotland,* 105 U. S. 24, 30, 26 L. ed. 1001, 1003; *The State of Virginia,* 60 Fed. Rep. 1018; *Thommasen* v. *Whitwill,* 12 Fed. Rep. 891; *Re Leonard,* 14 Fed. Rep. 53; *Levinson* v. *Oceanic Steam Nav. Co.* 17 Alb. L. J. 285, Fed. Cas. No. 8,292.

The ship was seaworthy on sailing from Matanzas, with the glass port closed and secured, though the dummy or deadlight inside was not shut. There was ready access to the steerage, so that the dummy could be closed, if necessary, at a moment's notice on approach of a storm.

The Titania, 19 Fed. Rep. 101; *Steele* v. *The State Line,* L. R. 3 App. Cas. 72; *Hedley* v. *Pinkney & Sons S. S. Co.* [1894] A. C. 222; *Gilroy* v. *Price* [1893] A. C. 56; *The Mexican Prince,* 82 Fed. Rep. 484; *Quebec S. S. Co.* v. *Merchant,* 133 U. S. 375, 33 L. ed. 656.

The loss was within the exception of "dangers of the sea," contained in the bill of lading.

A loss happening under these circumstances is prima facie a loss by a danger of the sea. *The G. R. Booth,* 64 Fed. Rep. 878; *Hibernia Ins. Co.* v. *St. Louis Transp. Co.* 120 U. S. 166, 30 L. ed. 621; *Carruthers* v. *Sydebotham,* 4 Maule & S. 77; *Laurie* v. *Douglas,* 15 Mees. & W. 746; *Davidson* v. *Burnand,*

L. R. 4 C. P. 117; *The Southgate* [1894] P. 329; *The Xantho*, L. R. 12 App. Cas. 503; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518.

The loss being prima facie by a danger of the sea, and hence within the exception, the burden of proof was upon the libellant to defeat its operation.

The Hindoustan, 35 U. S. App. 173, 67 Fed. Rep. 794, 14 C. C. A. 650; *The Victory and The Plymothian*, 168 U. S. 410, 423, 42 L. ed. 519, 528; *Western Transp. Co.* v. *Downer*, 11 Wall. 129, 20 L. ed. 160; *Memphis & C. R. Co.* v. *Reeves*, 10 Wall. 176, 189, 190, 19 L. ed. 909, 913.

If the loss may as well have occurred by a peril of the sea as by negligence, the libellant cannot recover.

Clark v. *Barnwell*, 12 How. 272, 280, 13 L. ed. 985, 988; *Muddle* v. *Stride*, L. R. 9 C. & P. 380; *The R. D. Bibber*, 8 U. S. App. 42, 50 Fed. Rep. 841, 2 C. C. A. 50: *Searles* v. *Manhattan R. Co.* 101 N. Y. 661.

If the vessel be deemed to have been unseaworthy when she broke ground on the voyage, nevertheless the shipowner "exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied."

A presumption of competency arises under the circumstances.

Butler v. *Boston & S. S. Co.* 130 U. S. 527, 554, 32 L. ed. 1017, 1023; *Pickup* v. *Thames Marine Ins. Co.* L. R. 3 Q. B. Div. 594.

The Harter act exempts shipowners from responsibility for faults in the management of the ship's appliances, the ordinary use and control of which are committed to the officers and crew, even though such mismanagement may occur prior to sailing, and may leave the ship unseaworthy.

The Delaware, 161 U. S. 459, 471, 40 L. ed. 771; *The Colima*, 82 Fed. Rep. 665; *The Mary L. Peters*, 68 Fed. Rep. 919; *The Flamborough*, 69 Fed. Rep. 470; *The Alvena*, 74 Fed. Rep. 252; *The Carron Park*, L. R. 15 Prob. Div. 203; *The Mexican Prince* 82 Fed. Rep. 484; *The Glenochil* [1896] P. 10.

The proper closing of the ports was an act belonging to the management or navigation of the ship.

Carmichael v. *Liverpool Sailing Shipowners' Mut. Indemnity Asso.* L. R. 19 Q. B. Div. 242; *The Warkworth*, L. R. 9 Prob. Div. 20, and 145; *The Sandfield*, 79 Fed. Rep. 371; *The Castleventry*, 69 Fed. Rep. 475, note.

The libellant is not in privity with the charter party between the owner and J. H. Winchester & Co.

Russell v. *Niemann*, 17 C. B. 163; *Serraino* v. *Campbell* [1890] 1 Q. B. 283.

[463] *Mr. Justice **Gray** delivered the opinion of the court:

This was a libel in admiralty, filed June 14, 1894, in the district court of the United States for the southern district of New York, by the Franklin Sugar Refining Company, a corporation organized under the laws of the state of Pennsylvania, against the steamship Silvia, of Liverpool, owned by the Red Cross Line of Steamers, to recover damages for injuries to a cargo of sugar owned by the libellant, which had been shipped on or about February 15, 1894, upon the Silvia at Matanzas, Cuba, for Philadelphia, under a bill of lading by which the sugar was "to be delivered in the like good order and condition at the port of Philadelphia (the dangers of the seas only excepted)," upon payment of agreed freight, "and all other conditions as per charter party dated New York 31st January, 1894."

The charter party, which had been made and concluded at New York January 31, 1894, provided that the Silvia, then at Tucacas, Venezuela, should proceed as soon as possible in ballast to Matanzas for a voyage thence to Philadelphia, New York, or Boston, and contained these provisions: "The vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, the merchandise hereinafter mentioned (the act of God, adverse winds, restraint of princes and rulers, the Queen's enemies, fire, pirates, accidents to machinery or boilers, collisions, errors of navigation, and all other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage, always excepted). *The said party of the second part doth en- [464]
gage to provide and furnish to the said vessel a full cargo, under deck, of sugar in bags. The bills of lading to be signed without prejudice to this charter."

The Silvia, with the sugar in her lower hold, sailed from Matanzas for Philadelphia on the morning of February 16, 1894. The compartment between decks next the forecastle had been fitted up to carry steerage passengers, but on this voyage contained only spare sails and ropes and a small quantity of stores. This compartment had four round ports on each side, which were about eight or nine feet above the water line when the vessel was deep laden. Each port was eight inches in diameter, furnished with a cover of glass five eighths of an inch thick, set in a brass frame, as well as with an inner cover or dummy of iron. When the ship sailed, the weather was fair, and the glass covers were tightly closed, but the iron covers were left open in order to light the compartment should it become necessary to get anything from it, and the hatches were battened down, but could have been opened in two minutes by knocking out the wedges. In the afternoon of the day of sailing, the ship encountered rough weather, and the glass cover of one of the ports was broken,—whether by the force of the seas or by floating timber or wreckage was wholly a matter of conjecture,—and the water came in through the port and damaged the sugar.

The decree of the district court dismissed the libel, and was affirmed by the circuit court of appeals. 64 Fed. Rep. 607, and 35 U.S. App. 395. The libellant applied for and obtained a writ of certiorari from this court.

It was adjudged by this court at the last term that the act of Congress of February 13, 1893, chap. 105, known as the Harter act, has not released the owner of a ship from the duty of making her seaworthy at the begin-

ning of her voyage. *The Carib Prince*, 170 U. S. 655 [42: 1181].

But the contention that the Silvia was unseaworthy when she sailed from Matanzas is unsupported by the facts. The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has un-
[465] dertaken to transport. *The portholes of the compartment in question were furnished both with the usual glass covers and with the usual iron shutters or deadlights; and there is nothing in the case to justify an inference that there was any defect in the construction of either. When she began her voyage, the weather being fair, the glass covers only were shut, and the iron ones were left open for the purpose of lighting the compartment. Although the hatches were battened down, they could have been taken off in two minutes, and no cargo was stowed against the ports so as to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close the iron shutters. Had the cargo been so stowed as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy. But as no cargo was so stowed, and the ports were in a place where these shutters would usually be left open for the admission of light, and could be speedily got at and closed if occasion should require, there is no ground for holding that the ship was unseaworthy at the time of sailing. *Steel* v. *State Line Steamship Co.* L. R. 3 App. Cas. 72, 82, 90, 91; *Hedley* v. *Pinkney & Sons Steamship Co.* [1892] 1 Q. B. 58, 65, and [1894] A. C. 222, 227, 228; *Gilroy* v. *Price* [1893] A. C. 56, 64.

The third section of the Harter act provides that "if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel." 27 Stat. at L. 445.

This provision, in its terms and intent, includes foreign vessels carrying goods to or from a port of the United States. *The Scotland*, 105 U. S. 24, 30 [26: 1001-1003]; *The Carib Prince*, above cited.

Not only had the owners of the Silvia exercised due diligence to make her seaworthy, but, as has been seen, she was actually seaworthy when she began her voyage.

[466] *This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words. *Good* v. *London Steamship Owners' Mut. Protecting Association*, L. R. 6 C. P. 563; *The Warkworth*, L. R. 9 Prob. Div. 20, 145; *Carmichael* v. *Liverpool Sailing Shipowners' Mut. Indemnity Association*, L. R. 19 Q. B. Div. 242; *Canada Shipping Co.* v. *British Shipowners' Mut. Protection Association*, L. R. 23 Q. B. Div. 342; *The Ferro* [1893] P. 38; *The Glenochil* [1896] P. 10.

In the case, cited by the appellant, of *Dobell* v. *The Steamship Rossmore Co.* [1895] 2 Q. B. 408, 414, the ship was unseaworthy at the time of sailing, by reason of the cargo having been so stowed against an open port that the port could not be closed without removing a considerable part of the cargo; and Lord Esher, M. R., upon that ground, distinguished that case from the decision of the circuit court of appeals in the present case.

Judgment affirmed.

JAMES A. BRIGGS, Executor of Charles M. Briggs, Deceased, *Plff. in Err.*,

v.

AMANDA M. WALKER, and Ohio Valley Banking & Trust Company, Administrator of the Estate of A. L. Shotwell, Deceased.

(See S. C. Reporter's ed. 466-474.)

Federal question—act of Congress for the relief of an estate.

1. A Federal question is presented by the determination of a state court as to whether the right given by act of Congress to the "legal representatives" of a person is for the benefit of his next of kin, to the exclusion of his creditors, or not.
2. An act of Congress for the relief of the estate of a person, and referring to the court of claims a claim of his "legal representatives," makes the recovery on such claim assets of his estate and subject to his debts and liabilities.

[No. 260.]

Submitted April 25, 1898. Decided October 17, 1898.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming a judgment of the Circuit Court of Jefferson County in said state in a suit brought against James A. Briggs, executor, to which Amanda M. Walker and others were parties in favor of defendants Walker and Shotwell for certain sums of money, and adjudging that moneys in the hands of Briggs as executor be applied to the payment of these sums, and of a further sum due from Moorehead to Briggs. On motion to dismiss the writ of error or to affirm the judgment. *Judgment affirmed.*

See same case below, 19 Ky. L. Rep. 1490, 43 S. W. 479.

Statement by Mr. Justice **Gray:**

[467] *The controversy in this case was between the executor and two creditors of Charles M. Briggs, and arose as follows:

On April 18, 1862, during the war of the rebellion, Charles S. Morehead, of Kentucky, executed and delivered to his nephew, Charles M. Briggs, a bill of sale of cotton in Mississippi, in these terms:

"For and in consideration of money loaned and advanced heretofore by C. M. Briggs, and further valuable consideration by way of suretyship for me by said Briggs, I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi near Eggspoint and Greenville. Said cotton so sold embraces all I have, baled and unbaled, gathered and ungathered. This is intended to cover all cotton that I have now or may have this year on said two plantations, supposed to be about 2,000 bales."

At the same time, Briggs executed and delivered to Samuel J. Walker, Morehead's son-in-law, a writing in these terms:

"In consideration of the sale and transfer this day made to me by C. S. Morehead of all the cotton on his two plantations near Eggspoint in the state of Mississippi, as specified in said sale and transfer in writing, I hereby assume and agree to pay to Samuel J. Walker the sum of forty thousand dollars due and owing to said Walker by said C. S. Morehead, upon condition, however, that I realize sufficient amount from any cotton on or from said plantations or proceeds of same, together with about twenty-five thousand dollars due me from said C. S. Morehead for moneys advanced and liability for him as surety; also about ten thousand dollars, more or less, being a claim of A. S. Shotwell as he may hereafter establish against said C. S. Morehead; but in case I should not realize sufficient to pay all of said claims or amounts above named in full, then I am to pay or divide the amount that may be realized from said cotton, proportionately or *pro rata* according to the respective amounts named, to the parties above named,
[468] first, *however, paying and refunding any moneys paid by the respective parties for or on account of expenses pertaining to same; and in case more should be realized than sufficient to pay said amounts, with interest thereon to the time of realization and payment, then any surplus to be divided, one half to said Shotwell and C. M. Briggs jointly for any services, and the remaining one half to said Samuel J. Walker, but no other consideration to be paid to said Shotwell and Briggs for their service."

Briggs at once took steps to get possession of the cotton, but was prevented by the Federal forces and the Confederate forces in the vicinity. This cotton, amounting to four hundred and fifty bales, was finally seized, together with the other cotton, by Captain G. L. Fort, assistant quartermaster general in the United States Army, in behalf of the United States, and was by him sold and the proceeds paid into the Treasury of the United States.

Briggs died in 1875, after repeated and unsuccessful efforts, through his attorneys, to obtain the proceeds of the cotton in question; and his executor continued the efforts and through the same attorneys procured the passage of the act of Congress of June 4, 1888, chap. 348, copied in the margin.†

*Under the provisions of that act, Briggs's **[469]**
executor brought suit in the court of claims, and therein recovered the sum of $88,000. See *Briggs* v. *United States*, 25 Ct. Cl. 126, 143 U. S. 346 [36:180], 27 Ct. Cl. 564. Half of that sum was paid to the attorneys, pursuant to a contract between them and Briggs; and the rest, being the sum of $44,000, came to the hands of the executor.

Thereupon the executor, in a suit previously brought against him for the settlement of Briggs's estate, in the chancery division of the circuit court for the county of Jefferson and state of Kentucky, set up, by amended answer, that he had collected this sum of $44,000; and prayed that Walker's widow (to whom Walker had assigned his claim) and Shotwell's administrator might be made parties to the suit, and be required to set up their claims to this sum. And Mrs.

†An Act for the Relief of the Estate of C. M. Briggs, Deceased.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the court of claims is hereby given, subject to the proviso hereinafter mentioned, like jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased, for the proceeds of four hundred and fifty-five bales of cotton, now in the Treasury of the United States, alleged to have been owned, in whole or in part, by said Briggs, as is given to said court by the acts of March twelfth, eighteen hundred and sixty-three, and July second, eighteen hundred and sixty-four, upon petition to be filed in said court at any time within two years from the passage of this act, any statute of limitations to the contrary notwithstanding: Provided, however, that unless the said court shall, on a preliminary inquiry, find that said Briggs was in fact loyal to the United States government, and that the assignment to him hereinafter mentioned was bona fide, the court shall not have jurisdiction of the case, and the same shall, without further proceedings, be dismissed: And provided further, that if the court shall find that the alleged assignment from one Morehead to said Briggs, of date April eighteenth, eighteen hundred and sixty-two, under which said Briggs claimed said cotton, was intended only as security to said Briggs for indebtedness, and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs to secure which said assignment was given: Provided, said judgment shall not be paid out of the general fund in the Treasury arising from the sale of captured and abandoned property, but shall be paid out of the special fund charged to and accounted for by Captain G. L. Fort, assistant quartermaster at Memphis, arising from the sale of the two thousand two hundred and nine bales of cotton, received by him, with which claimant's cotton was intermingled, said claimant to receive only the proportion which his cotton bears to the net proceeds accounted for by said Fort. 25 Stat. at L. 1075, chap. 348.

Walker and Shotwell's administrator filed petitions in the cause, claiming the sums mentioned as due to Walker and to Shotwell, respectively, in the writing signed by Briggs, April 18, 1862, and above set forth.

To these petitions the executor of Briggs filed supplemental answers, in which, among other things, he set up the act of Congress of June 4, 1888, and the proceedings in the court of claims; and alleged that " in pursuance to the said act this defendant, through his said counsel, instituted an action against the United States in the court of claims to recover the proceeds of sale of the cotton aforesaid, and in and by said action it was finally determined and adjudged

[470 that the said *testator was loyal to the United States, and that the assignment made by said Morehead to defendant's testator was bona fide and founded on a valuable consideration; but this defendant was, by the act aforesaid, as well as the final judgment of the court of claims, limited in his recovery to such sum as would satisfy the debts and claims of his testator, to secure which the said assignment was given; and this defendant says that by the final judgment of said court of claims he only received and recovered from the United States such sum as was owing directly to his testator by said Morehead, and did not recover anything whatsoever for or on account of anything that may have been owing by said Morehead to A. L. Shotwell or Samuel J. Walker;" and further alleged that "the passage of the act aforesaid was an act of grace on the part of the United States for the sole benefit of this defendant, and to permit this defendant to assert a claim against the proceeds of said cotton to the extent that said Morehead was indebted to his testator; that long prior thereto all claim that had existed in favor of said testator as against the United States for any part of the proceeds of said cotton had been barred by limitation, and said claim was outlawed and worthless;" and that "it was not intended by said act that this defendant should recover anything for the benefit, directly or indirectly, of any other person."

The circuit court of Jefferson county sustained demurrers of the petitioners to the supplemental answers of the executor; and, upon a hearing, found that there was due to Walker the sum of $40,000 and to Shotwell the sum of $6,681.21; and adjudged that the sum of $44,000, in the hands of the executor, after deducting his commissions, be applied *pro rata* to the payment of these two sums, and of the further sum of $25,000 due from Morehead to Briggs. The executor appealed to the court of appeals of Kentucky, which affirmed the judgment. 43 S. W. 479. Thereupon he sued out this writ of error.

The case was submitted to this court upon a motion by the defendants in error to dismiss the writ of error for want of jurisdiction, or to affirm the judgment.

Messrs. **James P. Helm, Helm Bruce, Samuel B. Vance,** *Charles M. Walker*, and *William B. Dixon*, for defendants in error, in favor of motion.

Messrs. **Wm. Stone Abert, Charles H. Gibson, John Marshall,** and **D. W. Sanders** for plaintiff in error, opposed to motion.

*Mr. Justice **Gray**, after stating the case, [471] delivered the opinion of the court:

The motion to dismiss must be overruled. An executor represents the person of the testator, and is charged with the duty of resisting unfounded claims against the fund in his hands. Co. Lit. 209*a; McArthur* v. *Scott,* 113 U. S. 340, 396 [28: 1015, 1033]. The record, therefore, does present the Federal question whether the right given by the act of Congress to the "legal representatives" of Charles M. Briggs was for the benefit of his next of kin to the exclusion of his creditors.

But we are of opinion that this question, which is the only Federal question in the case, must be answered in the negative, and consequently that the judgment of the court of appeals of Kentucky must be affirmed.

The primary and ordinary meaning of the words "representatives," or "legal representatives," or "personal representatives," when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper court. *Re Crawford's Trust*, 2 Drew. 230; *Re Wyndham's Trusts*, L. R. 1 Eq. 290; 2 Jarman on Wills, chap. 29, § 5 (5th ed.), 957, 966; Williams on Executors, pt. 3, bk. 3, chap. 2, § 2 (7), (9th ed.) 992; *Cox* v. *Curwen*, 118 Mass. 198; *Halsey* v. *Paterson*, 37 N. J. Eq. 445.

In *Stevens* v. *Bagwell*, 15 Ves. Jr. 140, 152, a claim by the next of kin of a naval officer to the share awarded him in a prize condemned after his death, and ordered by treasury warrant to be paid to his "representatives," was rejected by Sir William Grant, who said that the intention of the Crown in all cases of this kind is to put what is in strictness matter of bounty upon the footing of matter of right, and not to exercise any kind of judgment or selection with regard to the persons *to be ultimately bene- [472] fited by the gift; that the representatives to whom the Crown gives are those who legally sustain that character; but the gift is made in augmentation of the estate, and is to be considered as if it had been actually part of the officer's property at the time of his death.

In this court, it is well settled that moneys received by the United States from a foreign government by way of indemnity for the destruction of American vessels, and granted by act of Congress to the owners of those vessels, without directing to whom payment shall be made in case of death or insolvency, pass to the assignees in bankruptcy for the benefit of the creditors of such owners, although such assignees have been appointed before the act of Congress making the grant. *Comegys* v. *Vasse*, 1 Pet. 193 [7: 108]; *Erwin* v. *United States*, 97 U. S. 392 [24: 1065]; *Williams* v. *Heard*, 140 U. S. 529 [35: 550].

In *Emerson* v. *Hall*, 13 Pet. 409 [10: 223], cited by the plaintiff in error, in which money paid by the United States to the heirs at law, as "the legal representatives of William Emerson," under the act of March 3,

1831 (6 Stat. at L. 464, chap. 102), was held not to be assets in their hands for the payment of his creditors, the act, in its title, was expressed to be "for the relief of the heirs of William Emerson, deceased;" and it granted the money as a reward for services, meritorious indeed, but voluntarily rendered by Emerson, not under any law or contract, and imposing no obligation, legal or equitable, upon the government to compensate him therefor; and the money was therefore held to have been received by his heirs as a gift or pure donation.

In the provision of the appropriation act of March 3, 1891, chap. 540, concerning the French Spoliation Claims, the words "personal representative" and "legal representative" were used to designate the executor or administrator of the original sufferer; and money awarded by the court of claims to such a representative was held by this court to belong to the next of kin, to the exclusion of assignees in bankruptcy, upon the ground that the act expressly so provided. 26 Stat. at L. 897, 908; *Blagge* v. *Balch*, 162 U. S. 439 [40: 1032].

The words "legal representatives" or "per-
[473] sonal representatives" *have also been used as designating executors or administrators, and not next of kin, in acts of Congress giving actions for wrongs or injuries causing death. Act of April 20, 1871 (17 Stat. at L. 15, chap. 22, § 6); Rev. Stat. § 1981; Act of February 17, 1885 (23 Stat. at L. 307, chap. 126); *Stewart* v. *Baltimore & Ohio Railroad Co.* 168 U. S. 445, 449 [42: 537, 539].

The act of June 4, 1888, chap. 348, now before the court, is entitled "An Act for the Relief of the Estate of C. M. Briggs, Deceased," and confers upon the court of claims "jurisdiction to hear and determine the claim of the legal representatives of C. M. Briggs, deceased," for the proceeds, in the treasury of the United States, of cotton owned by him. The only conditions which the act imposes upon the right of recovery are that the petition shall be filed in the court of claims within two years; that that court shall find that Briggs was in fact loyal to the United States, and that Morehead's assignment of the cotton to Briggs was made in good faith; and that if it shall find that the assignment "was intended only as security to said Briggs for indebtedness, and against contingent liabilities assumed by him for said Morehead, judgment shall be rendered for such portion of the proceeds of said cotton as will satisfy the debts and claims of said Briggs to secure which said assignment was given." The "debts and claims," in this last clause, manifestly include both classes of debts previously mentioned, namely, the direct "indebtedness" of Morehead to Briggs; and the "contingent liabilities assumed by him for said Morehead," including the claims of the defendants in error, specified in the written agreement executed by Briggs contemporaneously with the assignment, and the amount of each of which has been ascertained by the court below.

The act of Congress nowhere mentions heirs at law, or next of kin. Its manifest purpose is not to confer a bounty or gratuity upon anyone; but to provide for the ascertainment and payment of a debt due from the United States to a loyal citizen for property of his, taken by the United States, and to enable his executor to recover, as part of his estate, proceeds received by the United States from the sale of that property. *The [474]
act is "for the relief of the estate" of Charles M. Briggs, and the only matter referred to the court of claims is the claim of his "legal representatives." The executor was the proper person to represent the estate of Briggs, and was his legal representative; and as such he brought suit in the court of claims, and recovered the fund now in question, and consequently held it as assets of the estate, and subject to the debts and liabilities of his testator to the defendants in error.

Judgment affirmed.

E. H. HUBBARD, Assignee of the Union Loan & Trust Company, *Petitioner*,

v.

J. KENNEDY TOD *et al.*

(See S. C. Reporter's ed. 474-504.)

Rights of pledgees—when pledge is discharged—acts of an officer of a corporation—secret equity—usurious agreement—holder in good faith.

1. Failure of pledgees to sustain their alleged rights as purchasers at a sale set up as a defense will not affect their rights as pledgees, when they stand on all their rights and have not been put to an election.
2. A pledge is discharged by the voluntary parting with the possession of the property.
3. The mere fact that a person who negotiates securities is an officer of a corporation does not call for an inference that he is acting as such in that transaction.
4. A secret equity in securities pledged by a person who has been empowered to do so by a corporation cannot be set up by it as against the pledgee.
5. One seeking the affirmative aid of equity for relief against an alleged usurious agreement must himself do equity by tendering or offering payment of what is justly due.
6. Usury between the parties to a contract, or defect of power of a corporation engaged in the transaction, will not prevent the purchaser of securities from being a holder in good faith as against another corporation which attempts to set up a secret equity.

[No. 24.]

Argued April 22, 25, 1898. Decided October 17, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that Court affirming the decree of the Circuit Court of the United States for the Northern District of Iowa in an action brought by the Manhattan Trust Company of New York against the Sioux City & Northern Railroad

Company of Iowa, in which action E. H. Hubbard as assignee of the Union Loan & Trust Company filed an intervening petition against J. Kennedy Tod & Co., and the decree of the Circuit Court authorized the redemption of certain securities by the intervener on payment to Tod & Co. of a certain sum with interest. *Affirmed.*

See same case below, 65 Fed. Rep. 559.

Statement by Mr. Chief Justice **Fuller:**

The Manhattan Trust Company of New York filed its bill, on September 28, 1893, in the circuit court of the United States for the northern district of Iowa, against the Sioux City & Northern Railroad Company
[475] of Iowa, praying for *the appointment of a receiver to take possession of the railroad and its properties and to operate and preserve the same, under and by virtue of the terms of a trust deed made and executed by the Sioux City & Northern Railroad Company to the Manhattan Trust Company, January 1, 1890, to secure an issue of bonds to the amount of $1,920,000.

October 5, 1893, receivers were appointed, and on the same day E. H. Hubbard, as assignee of the Union Loan & Trust Company, a corporation of Iowa, filed in said cause an intervening petition against the members of the banking firm of J. Kennedy Tod & Co. of New York, praying in respect of 10,600 shares of the capital stock of the Sioux City & Northern Railroad Company, and $2,340,000 in first-mortgage bonds of the Sioux City, O'Neill, & Western Railway Company, a corporation of Nebraska. held by J. Kennedy Tod & Co., an injunction against the disposition thereof, an accounting of what sums J. Kennedy Tod & Co. had advanced in good faith on said securities, and the surrender by them of the collateral to the intervening petitioner on the ascertainment of the sums so advanced and constituting a lien thereon.

J. Kennedy Tod, W. S. Tod, and Robert S. Tod, composing the firm of Tod & Co. objected to the jurisdiction, but answered November 16, 1893, and about the 1st of January, 1894, petitioner filed an amended petition, to which defendants filed a supplemental answer, and petitioner, a replication.

The intervening petition and amendments averred that the Union Loan & Trust Company was a corporation of the state of Iowa, organized in the year 1885, and thereafter engaged in carrying on a loan and trust business up to and until April 25, 1893, when it made a general assignment of all its property and assets to E. H. Hubbard of Sioux City, Iowa.

That on July 3, 1889, A. S. Garretson, John Hornick, J. D. Booge, Ed. Haakinson, and D. T. Hedges entered into an agreement in writing, referred to as a railroad syndicate agreement, for the construction of the Sioux City & Northern Railroad, which construction was proceeded with and from time to time the individual members of the syndi-
[476] cate executed and *delivered their respective notes to the Union Loan & Trust Company in various sums, which notes that company sold to various bankers and brokers throughout the United States; that there existed an understanding or agreement between the syndicate and the company that the syndicate should deposit with the company, as collateral security for said notes, the stock and bonds of the Sioux City & Northern Railway Company when issued; that the syndicate caused the corporation to issue the mortgage described in the original bill; and that the bonds and stock of the corporation were held by the company "as collateral security for the payment of the notes with the proceeds whereof the said railroad has been constructed and equipped as aforesaid."

That afterwards the syndicate lent its aid to the Wyoming-Pacific Improvement Company, a Wyoming corporation engaged in the construction of the Nebraska & Western Railroad, a line of road extending westward from Sioux City to the town of O'Neill, in the state of Nebraska, and that said syndicate also extended its aid and assistance to other corporations in and about Sioux City, such as the Pacific Short Line Bridge Company, the Union Stock Yards Company, the Sioux City Terminal Railroad & Warehouse Company, and the Sioux City Dressed Beef & Canning Company, with a like understanding between the syndicate and the Union Loan & Trust Company that the securities of the respective companies coming into the possession of the syndicate should be deposited with the Union Loan & Trust Company as collateral to the notes which the members of the syndicate might give to that company on behalf of the enterprises respectively.

And also that the syndicate organized the corporation known as the Pacific Short Line Bridge Company to construct a bridge across the Missouri River at Sioux City for the purpose of connecting said railroads, the stock of said company to belong to the Nebraska Company.

It was further averred that the syndicate acquired the ownership of all the bonds of the Nebraska & Western Railway Company, and that they became subject to the lien of the Union Loan & Trust Company; yet that A. S. Garretson, *on or about October 1, 1891, [477]
without any apparent record or other authority from the Union Loan & Trust Company, caused all of the Nebraska & Western bonds and 7,200 shares of Sioux City & Northern Railroad stock to be transferred to Tod & Co. as security for a loan of one million dollars, but that Tod & Co. were chargeable with notice of Garretson's want of authority.

That the Nebraska & Western Railway was built by the Wyoming & Pacific Improvement Company, which was practically owned and controlled by the Manhattan Trust Company, and that the improvement company received stock and bonds of the Nebraska & Western Company, and delivered them to the Manhattan Trust Company, by which they were pledged, or held in trust, as security for loans negotiated and advanced by it to the improvement company, including a loan of $500,000 by Belmont & Co., all of which were outstanding when, on November 1, 1890, the improvement company collapsed, to the knowledge of Tod & Co.

That to relieve itself from impending loss, the Manhattan Trust Company, by untruth-

ful representations as to the amount of the indebtedness of the Nebraska & Western Railway Company, induced Garretson to purchase said loans; that Garretson thereupon deposited $750,000 of the Sioux City & Northern bonds with the Manhattan Trust Company as security for relief of the maturing obligations to Belmont & Co.; and that about the same time Tod & Co. began to make advances to Garretson on the security of the Nebraska & Western bonds; that Garretson was obliged to sell all the Sioux City & Northern bonds at a sacrifice price of seventy-five per cent, and to pledge all the Nebraska & Western bonds and half of the Sioux City & Northern stock substantially for the value of the purchase price of the Nebraska & Western bonds.

That the mortgage covering said bonds was foreclosed, and the property conveyed to a new corporation called the Sioux City, O'Neill, & Western Railway Company in exchange for the issue of $2,340,000 of first-mortgage bonds, and 36,000 shares of stock; and that in the latter part of 1892, or early
[478] *in 1893, Garretson, without any apparent record or other authority from the Union Loan & Trust Company, caused all of the bonds of the Sioux City, O'Neill, & Western Railway Company, and substantially all of the stock of the Sioux City & Northern Railroad Company, to be vested in the Pacific Short Line Bridge Company, and the notes of the latter company, to the amount of $1,500,000, to be given to himself, and the payment thereof to be secured by the pledge of all said bonds and stock, and transferred the notes and securities to J. Kennedy Tod & Co., who, acting as trustees, but chargeable with notice, negotiated or bought the greater part of the said notes for different holders or purchasers thereof, $500,000 being taken by the Great Northern Railway, which desired to acquire the Sioux City & Northern Railroad, and with which Tod & Co. were allied.

That after the failure of the Union Loan & Trust Company, a committee of its creditors, Tod & Co. having advertised the sale of the collateral pursuant to the terms of the $1,500,000 loan, there having been default in payment of interest for thirty days, offered to pay the overdue interest on certain conditions, which were refused, and the collateral was sold and bought in by Tod & Co. for $1,000,000.

The petition and amended petition contained an averment that petitioner, "as assignee of said Union Loan & Trust Company, is entitled to the immediate surrender of all and singular of said securities by said J. Kennedy Tod & Co. to your petitioner without any payment of principal or interest upon said alleged loan, or any other consideration whatsoever."

The prayer of the amended petition was: That Tod & Co. surrender to petitioner, without any terms or conditions, the collateral held by them as aforesaid; and that they be enjoined from selling or disposing of the same; for an accounting of sums advanced by Tod & Co. in good faith and without notice on account of the securities, and the disposition made by them of any other collateral held by them under the loan agreement of December 31, 1892; the surrender of the certificates to the petitioner upon an accounting, and the *ascertainment of what sums, if [479]
any, constituted a lien thereon; and the appointment of a receiver *pendente lite.*

The answers of Tod & Co. traversed the allegations of the petition and amended petition on which petitioner based his claim to the securities, and particularly denied all charges of fraud, want of good faith or notice; and set forth at length the transactions in respect of said securities on which they claimed the title thereto or right to hold the same. After much of the testimony had been taken petitioner moved for leave to further amend his petition, which motion was held over to the hearing.

The case was heard on the merits, and, in the final decree, leave to further amend was granted. This second amended petition made the Manhattan Trust Company a party, and averred, among other things, that the loan of one million dollars, and the loan of one million and a half, were usurious, and prayed that each be declared void, and that the securities be surrendered to petitioner free and clear of any claim, right, interest, or lien of Kennedy Tod & Co.

The evidence may be sufficiently summarized as follows:

I. The Union Loan & Trust Company was organized in 1885 with a capital stock of $100,000, which was afterwards increased to $1,000,000. The purposes of its incorporation, as stated in its certificate of organization, were the loaning of money on real and personal security; the purchase and sale of securities; the negotiation of loans; and the execution of trusts; but the company was not to "purchase, nor loan its funds on the securities of any railroad company." It had a board of five directors, a president, vice president, and secretary, and by its by-laws a committee of three members on applications for loans was provided for.

November 2, 1885, George L. Joy was elected president, A. S. Garretson, vice president, and E. R. Smith, secretary, subsequently also made treasurer, and these three persons were appointed the committee on loans. They continued to hold these offices and to constitute that committee up to and until April 24, 1893, when the company made an assignment to E. H. Hubbard.

The practical management of the company's affairs was *left to E. R. Smith, sec- [480]
retary and treasurer, and he accepted, indorsed and discounted notes as if he were solely in charge of the business.

When individual members of the syndicate presented notes to the company, Smith accepted the notes without collateral, but claimed that this was on the understanding that securities were to be or would be thereafter deposited; and when securities, whether bonds or stock, did come to the hands of Smith as secretary and treasurer, he parted with them to Garretson, or transmitted them as requested by Garretson, constantly recognizing Garretson's right to sell or rehypothecate the same. Garretson testified to the right of the syndicate to sell or pledge the

securities on the market; and its financial management was intrusted to him.

The so-called railroad syndicate agreement was entered into July 3, 1889, by A. S. Garretson, John Hornick, J. E. Booge, Ed. Haakinson, and D. T. Hedges, for the purpose of building and equipping the Sioux City & Northern Railroad, and provided that all money borrowed and contracts made for the building and equipment of the road should be borne equally by the parties; that where notes were executed by one for the purposes expressed, each should be equally liable therefor; that all money borrowed should be placed to the credit of John Hornick, trustee, at the office of the Union Loan & Trust Company; and that the contract should continue until the railroad should be completed and its debts paid; and be lodged with the company.

The agreement contained no provision that the money borrowed for the uses of the copartnership should be borrowed from or through the Union Loan & Trust Company; nor any stipulation for the depositing with that company of the stock and bonds of the Sioux City & Northern Railroad, as security for any money the syndicate might borrow.

It appeared that when the Union Loan & Trust Company desired to rediscount or sell notes, it sent out a circular offering them at a considerable discount, and reciting "in every case we hold good and sufficient security from the maker;" but it did not appear that the holders of notes, the creditors rep-
[481] resented *by the assignee, took them on the faith of any pledge of the securities in question. Nor was any reference thereto made in the notes themselves. The understanding between the syndicate and the Union Loan & Trust Company, that railroad securities should be deposited to secure syndicate paper, rested on conversations between the parties, and did not involve the liberty of the syndicate to borrow elsewhere; nor did the understanding permit securities held for moneys advanced to one enterprise to be held as security for any other.

The Sioux City & Northern Railroad was constructed by the syndicate, some of the money being raised on notes of its members, which were discounted by the Union Loan & Trust Company, the proceeds credited to Hornick, trustee, and drawn against as provided in the agreement.

The road was completed in January, 1890, and the syndicate acquired its first-mortgage bonds for $1,920,000, secured by mortgage to the Manhattan Trust Company as trustee, and its capital stock of about 14,400 shares. None of the shares of this stock ever stood in the name of the Union Loan & Trust Company, nor did any of the bonds; nor did the books of the company contain entries referring to the collateral in controversy as pledged to secure syndicate paper or the company's indorsement thereof.

The bonds came into the custody of the Union Loan & Trust Company before they were certified by the Manhattan Trust Company, and on February 24, 1890, Smith, secretary, transmitted them to the Manhattan Trust Company to be certified, but did not request that they should be returned. On the same day Garretson directed the Manhattan Trust Company to certify the bonds and hold them subject to his order; and on March 12, 1890, Smith, secretary, directed the Manhattan Trust Company to issue its receipt for said bonds to A. S. Garretson, individually, which was accordingly done.

Efforts to sell the bonds were made, and, in furtherance thereof, August 26, 1890, Garretson directed the Manhattan Trust Company to ship the bonds to the Boston Safe Deposit & Trust Company, Boston, to be held subject to the order of F. V. Parker & Co., and the bonds were so shipped.

*Subsequently, Garretson hypothecated por- [482]
tions of these bonds to secure his own notes given for loans made for the purpose of acquiring control of the Nebraska & Western Railroad, forming part of the "Pacific Short Line" enterprise, promoted to build a road from a point on the Missouri river opposite Sioux City westward to Ogden, Utah.

In the latter part of December, 1890, or early in January, 1891, Garretson and Hedges offered the Sioux City & Northern bonds to Tod & Co. at 90 cents, but no purchase was made, Tod & Co. offering 66½. A few weeks later, Tod & Co. were again applied to and they purchased the bonds at 75 cents. The evidence tended to show that out of the proceeds Garretson's notes to the aggregate of $690,000, secured by 920 Sioux City & Northern bonds, were taken up, and $750,000 were paid over to the Union Loan & Trust Company, and credited to the syndicate.

II. The Nebraska & Western Railway Company was organized in 1889, and on the first day of July of that year made and executed its mortgage to the Manhattan Trust Company to secure its issue of bonds to the amount of $2,583,000.

It then contracted with the Wyoming-Pacific Improvement Company to construct and equip the road, which was to receive therefor the bonds of the railway company, to be delivered by the Manhattan Trust Company as issued and certified to by it, and in this way the improvement company became the owner of the bonds. On February 1, 1890, the improvement company entered into an agreement with the Manhattan Trust Company, under which the latter procured for the former, on its notes, loans to the amount of $1,050,000, secured by bonds held in trust in the ratio of two dollars in bonds to one dollar in money loaned. At the same time an underwriter's agreement was entered into between the improvement company and the subscribers thereto, by which if the loans were not paid the bonds were to be taken at fifty cents on the dollar.

Of this loan Belmont & Co. took $500,000, and Garretson & Hedges $125,000 each.

Garretson, Hornick, and Booge had pre-
viously become subscribers *to the enterprise [483]
to the extent of $100,000 for certificates of the improvement company, and they, and Hedges and Haakinson, executed an agreement February 15, 1890, agreeing that, for the purpose of securing the "construction of

the Pacific Short Line from Sioux City westward to O'Neill," they would raise $350,000, $250,000 to be loaned the improvement company on the security of $500,000 first-mortgage bonds of the Nebraska & Western Railway Co., held by the Manhattan Trust Company, and $100,000 certificates of the improvement company to be assigned to the syndicate by the original subscribers.

The Manhattan Trust Company held $2,100,000 of the Nebraska & Western bonds to secure the $1,050,000 loan and, subsequently, $483,000 more to secure other loans.

About November 1, 1890, it became necessary to provide for the payment of the loan by Belmont & Co.

On that date Garretson borrowed through the Manhattan Trust Company $500,000 on his individual notes secured by $750,000 Sioux City & Northern bonds, and took up the Belmont loan of $500,000. He at the same time negotiated with the officers of the Manhattan Trust Company touching other loans to the improvement company under the underwriter's agreement to the effect that the Manhattan Trust Company should cause said loans to be renewed or placed elsewhere and that the Nebraska & Western bonds in possession of the Manhattan Trust Company should be used as collateral.

And January 28, 1891, Garretson entered into a written agreement with the Manhattan Trust Company for the taking up of the then outstanding notes and receiving the collateral held as security therefor.

Among the transactions, Garretson borrowed in February, $190,000 secured by 170 Sioux City & Northern bonds, and the equity in the 750 bonds held to secure the $500,000 loan. These loans were paid out of the proceeds of the sale of the whole issue of the Sioux City & Northern bonds, as before stated.

The testimony of Garretson was relied on
[484] to sustain the *charge that the Manhattan Trust Company perpetrated a fraud on him at the time he entered into negotiations to assume or take up the obligations of the improvement company, in the acquisition of the Nebraska & Western road, in that it misrepresented the amount of that company's indebtedness. The officers of the Manhattan Trust Company positively denied any such misrepresentation; and the eighth paragraph of Garretson's contract with the Manhattan Trust Company of January 28, 1891, declared: "This agreement and the settlement herein made is in full adjustment and settlement of all questions heretofore arising between the parties hereto, in reference to the said improvement company or the construction of the Nebraska & Western Railway, and the first party agrees that his note for $500,000 heretofore given on taking up certain loans shall be paid at or before maturity." The evidence did not show that if there had been any misrepresentation, Tod & Co. had any knowledge in fact thereof, though at one time a member of the firm, now deceased, was a director of that trust company, and its counsel was also Tod & Co.'s.

After Garretson had become the holder of the obligations of the improvement company and the Nebraska & Western bonds, he caused the bonds to be sold on May 27, 1891, and June 24, 1891, pursuant to a demand made on the Manhattan Trust Company as trustee and to notice given, and at the sale purchased all the bonds of the Nebraska & Western Railway Company.

In June, 1891, Tod & Co. loaned Garretson $75,000 on $200,000 Nebraska & Western bonds as collateral.

III. October 1, 1891, Garretson entered into a contract with Tod & Co. to borrow one million dollars, which recited that Garretson was the holder of $2,500,000, or thereabouts, of Nebraska & Western bonds; of 25,000 shares of the stock of the Nebraska & Western Railway Company, and of 7,200 shares of the stock of the Sioux City & Northern Railroad Company; that proceedings were pending for the foreclosure and sale of the Nebraska & Western Railway; and that Garretson desired to borrow money, purchase the road, form a new corporation, and obtain
a new issue of bonds and stock; *and Tod [485]
& Co. agreed to make or procure him a loan on these terms: Garretson to deliver to Tod & Co. his two hundred promissory notes of $5,000 each, dated October 1, 1891, and payable on demand, and to deposit as security for the equal and common benefit of all who should become holders thereof the Nebraska & Western bonds, the shares of Nebraska & Western stock, and the shares of Sioux City & Northern stock; Tod & Co. to procure the sale of the notes at par, and to advance thereon at once $200,000, if required in obtaining title, the collateral to be held by Tod & Co. for the equal benefit of the holders of the notes; on the reorganization of the Nebraska & Western Railway Company under the foreclosure, a new mortgage to be executed to the Manhattan Trust Company to secure a new issue of bonds at the rate of $18,000 per mile, and the whole amount of such issue, $2,340,000 and one half of the capital stock of the new company to be delivered to Tod & Co. in the place of the Nebraska & Western bonds and stock. If the Nebraska & Western bonds were required to be deposited in court, the road was to be purchased in the name of trustees, and until the new corporation was formed and new bonds and stock delivered, no more than $600,000 was to be paid over to Garretson, the balance to remain to his credit with the banking company.

The new bonds were also to be further secured by all the stock of the Pacific Bridge Company except such part not exceeding fifty shares as should be necessary to qualify directors. The note holders were also given certain options, and Tod & Co. were to receive one per cent commission for their services.

The notes representing this million-dollar loan were not executed October 1, 1891, but were thereafter prepared and sent to Garretson at Sioux City, were there executed by him, and were received by Tod & Co. October 26, Garretson being credited with the principal and twenty-five days' interest.

One million of the Nebraska & Western

bonds were delivered to Tod & Co. October 19, 1891, $800,000 by the Manhattan Trust Company and $200,000 by Tod & Co.'s cashier, which had been pledged to them to secure the loan of $75,000, and these bonds [486] *were sent that day to Wickersham, Tod & Co.'s attorney and agent at Omaha, to be used in the purchase under the foreclosure. One hundred and fifty thousand dollars of the bonds had been delivered to the St. Charles Car Company, and were received by Tod & Co. October 27, and forwarded to Wickersham that day.

Of the remainder of the bonds, 500 were held by the Manhattan Trust Company as collateral to the $250,000 subscribed by Garretson and Hedges to the underwriter's agreement, and had been shipped to the Union Loan & Trust Company by the Manhattan Trust Company by direction of Garretson, December 2, 1890.

And $933,000, which had been lodged in Tod & Co.'s custody by Garretson, had been sent to the company in August, 1891, on his instructions, which contained nothing to indicate that the Union Loan & Trust Company had any claim of lien thereon, or right thereto, while Tod & Co. testified that they supposed they were transmitted as a mere matter of safety deposit.

These bonds for $1,433,000 were sent to Garretson at Omaha by the Union Loan & Trust Company, and delivered by him to Wickersham.

The railroad was sold under the foreclosure decree October 23, 1891, and bought in by Garretson and Wickersham as trustees for the holders of the first-mortgage bonds of the Nebraska & Western Railway Company, and on October 30 the entire issue, $2,583,000, was deposited by Wickersham with the clerk of the court, and the sale thereupon confirmed.

The road was reorganized under the name of the Sioux City, O'Neill, & Western Railway Company, and Wickersham and Garretson as trustees conveyed the property to the new company in exchange for the issue of the bonds and stock.

Pending the issue of the engraved bonds of the Sioux City, O'Neill, & Western Railway Company, a temporary bond was issued and delivered to Tod & Co., and afterwards exchanged for the engraved bonds.

All the bonds of the company were thus pledged to secure the $1,000,000 loan with [487] the full knowledge and participation *of Garretson, and of Smith, secretary and treasurer of the Union Loan & Trust Company.

Some of the notes issued under this loan were sold to various parties and some retained by Tod & Co.

It having been intimated that payment of the one million-dollar loan would be required, Garretson applied to Tod & Co. for the negotiation of a loan of $1,500,000. It was contemplated that the notes of the Sioux City, O'Neill, & Western Railway Company for that amount should be given, to be secured by the bonds of that company and the stock of the Sioux City & Northern Company, then in pledge with Tod & Co. But Tod & Co. were advised by their counsel that the railway company was not authorized under the law of Nebraska to contract so large an indebtedness in excess of its outstanding bonds, and thereupon it was suggested that Garretson should sell the securities to the Pacific Short Line Bridge Company and receive back the notes of that company for $1,500,000, to be secured by a pledge of said securities, and that Tod & Co. should negotiate a sale of these notes on the strength of the securities thus pledged.

The Pacific Short Line Bridge Company was a corporation of Iowa, organized for the purpose of constructing a bridge across the Missouri River at Sioux City, as a part of the Nebraska and Western enterprise. Its stock was divided into 20,000 shares of $100 each, which were issued November 13, 1891, in four certificates of 5,000 shares each, in the name of "A. S. Garretson, trustee," and these certificates were delivered by Garretson, November 19, 1891, to Tod & Co., who, on December 14, delivered them to the Manhattan Trust Company as trustee under the mortgage of the Sioux City, O'Neill, & Western Railway Company, pursuant to the million-dollar-loan agreement of October 1, 1891. The bridge company had executed a mortgage to secure $1,500,000 of bonds, but of these only $500,000 had been certified by the trustee, and it did not affirmatively appear that any had been negotiated. Garretson testified that the purpose of the $1,500,000 loan was to take up the million-dollar loan and to get "additional funds with which to carry on the construction of the bridge to a *point where we could get money from [488] the bonds of the bridge to complete it."

December 26, 1892, the Pacific Short Line Bridge Company, at a meeting of its board of directors, passed a series of resolutions by which it agreed to purchase the bonds of the Sioux City, O'Neill, & Western Railway Company, and 10,200 shares of the capital stock of the Sioux City & Northern Company, and to give therefor its promissory notes in the sum of $1,500,000 to the order of Garretson, dated December 30, 1892, and to pledge said bonds and stock to Garretson as security. Accordingly on December 31, 1892, a contract was entered into between Garretson, Hedges, Hornick, and Haakinson (the remaining member of the syndicate, Booge, having failed and dropped out), and the Pacific Short Line Bridge Company, by which the bridge company purchased the securities and agreed to give its notes therefor, payable to Garretson's order, February 1, March 1, and April 1, 1894, bearing date December 30, 1892, to be forwarded to Tod & Co. to be delivered to Garretson or his order, or held by Tod & Co. as trustees to secure the payment of said notes. The notes were to provide, and when issued did provide, that on thirty days' default in payment of interest, the principal was to become due and payable at the option of Tod & Co., on behalf of the holders, to be exercised on the written request of a majority.

Tod & Co. negotiated a sale of the notes through the Union Debenture Company, a corporation of the state of New Jersey, which was evidenced by a contract under date of

December 30, 1892, between Garretson and that company, which recited that the notes were to be secured by the 2,340 Sioux City, O'Neill, & Western bonds and 14,200 shares of the Sioux City & Northern stock, by an indenture of trust with Tod & Co. December 31, Garretson entered into this indenture of trust whereby he pledged the said bonds and stock to Tod & Co. as trustees for the equal and *pro rata* benefit and security of all the holders of the notes, it being provided that if default should be made in the payment of the principal or interest of any of the notes, the trustee, on request, might declare the
[489]*principal and interest due and sell the bonds and stock at public auction, and that the holders might appoint a purchasing trustee, in whom, if he bought at the sale, the right and title to the bonds and stock [should vest] in trust for all the note holders in proportion to the amounts due them respectively.

The note holders were given certain options, and Garretson agreed to pay the debenture company three and a half per cent commission.

As already set forth, Tod & Co. then held the 2,340 bonds and 7,200 shares of Sioux City & Northern stock. Of the remaining 7,000 shares of this stock to be pledged under the agreement, 6,190 shares were delivered to Tod & Co. by Garretson in December, 1892, in New York, and certificates for 1,000 shares were sent to Tod & Co. by Smith, secretary, January 16, 1893. All these shares were transferred by members of the syndicate. In March, 1893, Tod & Co., as authorized by the indenture of trust, at the request of Garretson, released and delivered to the treasurer of the Great Northern Railroad Company 3,600 shares, which Garretson had sold to that company for $350,000 in cash, all of which was received by Garretson. W. S. Tod testified that his firm supposed the proceeds of this sale were to be applied towards the construction of the bridge, and the evidence tended to show that the money was paid over to the Union Loan & Trust Company to be applied in payment of notes of the syndicate.

The notes for the $1,500,000 were executed and indorsed by Garretson, and the transaction closed, January 30, 1893, and on that date the Union Debenture Company turned over to Tod & Co. $1,507,500, being principal with accrued interest, and thereupon Tod & Co. paid off the million-dollar loan with accrued interest. $1,004,833.33. They thus released the $2,340,000 Sioux City, O'Neill, & Western bonds, the 18,000 shares of Sioux City & Western stock, and 7,200 shares of Sioux City & Northern stock, and delivered to themselves as trustees under the indenture of trust the bonds, 10,200 shares of Sioux City & Northern stock and also 4,000 of the latter stock; and certified and delivered the bridge notes to the debenture company.
[490] *These notes contained the provision that they might be declared due on default in payment of interest or principal, and that they were secured by the indenture of trust of December 31, 1892, and the deposit of the bonds and stock as collateral.

The Union Debenture Company was a corporation of New Jersey, with a capital stock of $300,000 and over $800,000 of assets, and had issued and had outstanding $500.000 of twenty-year debenture bonds, which had been sold mainly in England, Scotland, and Holland. Tod & Co. owned one third of the capital stock, and the business of the company was transacted through Tod & Co. as brokers. The notes in question, except about $40,000 retained by the debenture company, were sold by them as brokers to various persons, including $590,000 to parties abroad and $500,000 to the Great Northern Railway Company, but Tod & Co. took no part of the loan.

The commission of three and one-half per cent, $52,500, was paid to the debenture company by Tod & Co.

The remainder of the proceeds of the $1,500,000 loan, after the discharge of the million-dollar loan, the payment of the commissions, and of a temporary loan of $30.000 to Garretson, was paid over on Garretson's drafts, to the Union Loan & Trust Company, to be applied to the payment of bridge estimates and to the credit of Hornick, trustee. About $200,000 was applied on bridge account.

All the members of the syndicate were parties to the agreement by which the bonds and stock in controversy were sold to the bridge company, and knew of the use Garretson proposed to make of the notes and securities. They did not repudiate the transaction, and never made any complaint or gave any notice to Tod & Co. that Garretson was wrongfully pledging the collateral. Tod & Co. rendered full accounts of the two loans to Garretson, which were sent by him to Smith as they were received.

Garretson was a prominent man in banking, financial, and railroad circles when he began his dealings with Tod & Co., and continued to be so until 1893. He had been, or was, an officer of many business corporations or companies; and one *of the chief promot- [491]
ers and builders of the Sioux City & Northern Railway, and organizers of the Union Loan & Trust Company. He was highly recommended to Tod & Co. by the president of the Great Northern Railway Company, of which J. Kennedy Tod was a director. Mr. Tod stated that they believed during the negotiations between their firm and Garretson that he was a man of large wealth.

The Tods testified that they knew nothing of the dealings between the Manhattan Trust Company and the improvement company, or of the loan transactions of the improvement company, and had no connection therewith; that they had no knowledge or notice of any claims of the Union Loan & Trust Company to these securities at or before the time they were pledged to secure either the loan for $1.000.000. or the loan for $1,500,000, and the first information they had of any such claim was after default had been made in the payment of interest on the latter loan.

The interest on the notes was payable July 1, 1893, and January 1, 1894, and the interest due July 1, 1893, not having been paid,

and the default having continued for thirty days, Tod & Co., on a request of a majority of the note holders, declared the principal due, and advertised the securities for sale on September 19, in accordance with the indenture of trust, due notice being given, which sale was adjourned to September 26, at the instance of the creditors of the Union Loan & Trust Company, when the sale took place, and Tod & Co. bought the securities as purchasing trustees, thereto duly appointed, and held the same for the benefit of the holders of the notes. Certificates were issued by Tod & Co. as such purchasing trustees that they so held the securities and that each of the note holders was entitled to a three-hundredth part interest for every $5,000 note deposited.

After the interest had defaulted Tod & Co. were interviewed on behalf of some of the creditors of the Union Loan & Trust Company, and an offer to pay the defaulted interest was made on condition that such creditors should be put in control of the board of directors of the Sioux City & Northern Railroad Company, but with this condition Tod
[492]& Co. were without *authority to comply, and the creditors committee declined to pay. No money was tendered.

According to the evidence of the Tods it was then, for the first time, that Tod & Co. received any intimation that their right to hold the securities was questioned by the Union Loan & Trust Company or its creditors.

The circuit court entered a final decree authorizing the redemption of the securities by the intervener on payment to Tod & Co., as trustees, of the sum of $1,500,000, with interest thereon from December 30, 1892, computed with semiannual rests, to the date of payment.

The opinion is reported 65 Fed. Rep. 559, and it appears therefrom that District Judge Shiras, by whom the cause was heard, held that the transactions prior to the million and a half loan could not be passed on, but that the inquiry at issue was to be determined by considering the contracts under which Tod & Co. obtained possession of and claimed title to the 10,600 shares of Sioux City & Northern stock, and the $2,340.000 of Sioux City, O'Neill, & Western bonds held by them.

After a brief review of the formation of the syndicate and its dealings with the Union Loan & Trust Company, the conclusion was drawn "that the trust company, as against the members of the syndicate, is entitled to the benefit of the securities which were placed in its possession, and upon the faith of which it may be assumed it indorsed the syndicate paper," but that it was fairly deducible from the evidence that "the trust company parted with the possession of the securities, knowing that it was intended to rehypothecate them," and that "it is not now open to the trust company to repudiate the acts of its secretary and treasurer in regard to these securities, by whose action in placing the same in the possession and under the control of Garretson the latter was enabled to repledge the same as security for further advances." That "the fair inference from the entire evidence is that the trust company consented to the repledging of these securities, in order that further funds might be procured for carrying on the work in question, but by so doing it did not abandon its *lien upon or equity in the securities, but [493]
only subordinated its rights to those created by the repledging of the securities."

That the sale of the securities by Tod & Co. under the provisions of the trust agreement of December 31, 1892, did not devest the trust company, or its assignee, of the junior lien on the securities, and that its right to redeem remained because the $1,500,000 of notes were not purchased in the ordinary course of business, nor in fact issued by the bridge company in connection with its business, but made at the dictation of the syndicate on the suggestion of Tod & Co., and operated as a fraud on the bridge company; that the use of its name was in reality a matter of form merely, and was so understood; and that the transaction must be considered as a loan to the syndicate, secured by a pledge of the collateral, which lien was superior to that existing in favor of the trust company.

The suggestion as to usury was dismissed on the ground that in any view equity required the payment of the sums advanced with interest, and no offer to do this was made by the intervener.

From the decree the intervener prosecuted an appeal to the circuit court of appeals for the eighth circuit, assigning as error, in substance, that the circuit court erred in not finding that intervener had a prior lien; that the securities were wrongfully taken from the Union Loan & Trust Company, and that defendants were not bona fide holders and took with notice; that the loans were usurious and void, and defendants, therefore, unable to hold the securities as against the intervener.

Defendants also appealed from the decree, assigning as error the failure of the court to sustain objections to certain evidence; the allowance in the final decree of leave to intervener to file his second amended petition; and the award of redemption.

The cause was heard in the court of appeals by two circuit judges, and the decree affirmed by an equal division; but on a petition for rehearing by the intervener an opinion was filed from which it appeared that both judges were agreed *that appellees' lien [494]
on the securities was paramount to any claim of intervener, but that they were divided on the question whether or not the right of redemption was cut off by the auction sale under the loan agreement.

The intervener then applied to this court for a writ of certiorari, which was granted.

Messrs. **John C. Coombs, Henry J. Taylor,** and *William Faxon, Jr.,* for appellant:

An equitable lien may be created by agreement of the parties.

Walker v. *Brown,* 165 U. S. 654, 664 41 L.

ed. 865, 871; *Fourth Street Bank* v. *Yardley,* 165 U. S. 634, 41 L. ed. 855; *Ketchum* v. *St. Louis,* 101 U. S. 306, 25 L. ed. 999; *Pinch* v. *Anthony,* 8 Allen, 536.

Such equitable liens do not depend upon the possession of the property, but are founded upon the contract of the parties, which may be either oral or in writing.

Nichols v. *Hudgins,* 19 U. S. App. 144, 58 Fed. Rep. 490, 7 C. C. A. 335; *Hovey* v. *Elliott,* 118 N. Y. 124.

The Union Loan & Trust Company, as well in its receipt of these collateral securities as in the agreement so to receive them in pledge and trust, became a trustee in interest, vested with a legal, or entitled to an equitable, lien and trust to protect its indorsement, and for the benefit of all parties, that might become holders of these syndicate notes.

Morrill v. *Morrill,* 53 Vt. 74, 38 Am. Rep. 659; *Kramer and Rahms's Appeal,* 37 Pa. 71; *Ijmes* v. *Gaither,* 93 N. C. 363; *Heath* v. *Hand,* 1 Paige, 329; *Clark* v. *Ely,* 2 Sandf. Ch. 166; *Woodville* v. *Reed,* 26 Md. 181.

The discharge of the surety by any cause will not bar the creditor's right.

Cullum v. *Branch Bank,* 23 Ala. 797; *Helm* v. *Young,* 9 B. Mon. 394; *Crosby* v. *Crafts,* 5 Hun, 327; *Roberts* v. *Colvin,* 3 Gratt, 359; *Eastman* v. *Foster,* 8 Met. 19.

After a trust of this kind has been created, it cannot usually be defeated without the consent of the parties in interest, unless it be by a conveyance to a bona fide purchaser without notice.

Capehart v. *Dettrick,* 91 N. C. 344; Jones, Mortg. § 387.

Assent or knowledge on the part of the creditor is not necessary to perfect the trust. The transaction being for his benefit, his assent will be presumed.

Baltimore & O. R. Co. v. *Trimble,* 51 Md. 99; *Moses* v. *Murgatroyd,* 1 Johns. Ch. 119, 7 Am. Dec. 478.

It makes no difference that the creditor did not act upon the credit of such security in the first instance, or even know of its existence.

Curtis v. *Tyler,* 9 Paige, 432; *Kramer's Appeal,* 37 Pa. 71; *Re Jaycox,* 7 Nat. Bankr. Reg. 314, 8 Nat. Bankr. Reg. 253.

Property given to a surety for the payment of a debt is held by such surety in trust for the creditor.

Kelly v. *Herrick,* 131 Mass. 374.

There was a trust created in its favor as payee of the note, which was imposed upon the surety.

Aldrich v. *Blake,* 134 Mass. 585.

These syndicate securities were partnership property primarily applicable to railroad syndicate notes, which represent the only partnership debts.

Beach, Trusts, § 254; *Case* v. *Beauregard,* 99 U. S. 119, 125, 25 L. ed. 370, 372.

The holder of negotiable security must have taken it in good faith and due course of an actual business transaction, in order to be entitled to hold it, either absolutely or conditionally, as against an antecedent lienor from whose possession the security was wrongfully diverted.

California Nat. Bank v. *Kennedy,* 167 U. S. 362, 42 L. ed. 198; *Wenlock* v. *River Dee Co.* L. R. 10 App. Cas. 354; *Ex parte Watson,* L. R. 21 Q. B. Div. 301; *Bank of United States* v. *Owens,* 2 Pet. 527, 7 L. ed. 508; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 412, 32 L. ed. 985; *Miller* v. *Ammon,* 145 U. S. 426, 36 L. ed. 762; *Pratt* v. *Short,* 79 N. Y. 437, 35 Am. Rep. 531; *Blasdel* v. *Fowle,* 120 Mass. 447; *Cincinnati Mut. Health Assur. Co.* v. *Rosenthal,* 55 Ill. 85; 27 Am. & Eng. Enc. Law, pp. 943, 945, 946; *Tiffany* v. *Boatman's Sav. Inst.* 18 Wall. 375, 21 L. ed. 868.

The contracts further offend against the statutory policy of Iowa, and against good faith everywhere.

Ottumwa Screen Co. v. *Stodghill,* 103 Iowa, 437; *Murphy's Application,* 51 Wis. 519; *Moore* v. *Marshalltown Opera-House,* 81 Iowa, 45; *Hammond* v. *Hastings,* 134 U. S. 401, 33 L. ed. 960.

The contract into which the bridge company seemingly entered was *ultra vires* and contrary to the policy of the state of Iowa.

Buckeye Marble & F. Co. v. *Harvey,* 92 Tenn. 115, 18 L. R. A. 252.

To recover upon paper which has been diverted from its original destination and fraudulently put in circulation, the holder must show that he received it in good faith, in the ordinary course of business, and paid for it a valuable consideration.

Thompson v. *Sioux Falls Nat. Bank,* 150 U. S. 231, 37 L. ed. 1063; *Brooklyn City & N. R. Co.* v. *National Bank of the Republic,* 102 U. S. 14, 26 L. ed. 61; *Canajoharie Nat. Bank* v. *Diefendorf,* 123 N. Y. 191, 10 L. R. A. 676; *Paton* v. *Coit,* 5 Mich. 505; *Bank of United States* v. *Owens,* 2 Pet. 527, 7 L. ed. 508.

The doctrine of estoppel is applied to promote justice and fair dealing, never to aid a fraudulent purpose.

Royce v. *Watrous,* 73 N. Y. 597.

The doctrine of estoppel *in pais* rests upon equity, good conscience, and honest dealing.

Wilcox v. *Howell,* 44 N. Y. 398.

The parties and their privies only are bound by, or can take advantage of, an estoppel.

7 Am. & Eng. Enc. Law, p. 23; 2 Pom. Eq. Jur. 2d ed. § 813.

The Federal courts sitting in Iowa, in a case brought by an Iowa assignee for the recovery of the assets of an assigned estate, are bound to follow the supreme court of the state of Iowa in construing the assignment laws of that state.

South Branch Lumber Co. v. *Ott,* 142 U. S. 627, 35 L. ed. 1136; *Union Nat. Bank* v. *Bank of Kansas City,* 136 U. S. 235, 34 L. ed. 341; *May* v. *Tenney,* 148 U. S. 60, 37 L. ed. 368; *Etheridge* v. *Sperry,* 139 U. S. 266, 35 L. ed. 171; *German Sav. Bank* v. *Franklin County,* 128 U. S. 526, 32 L. ed. 519.

When one who is entitled to a lien only, withholds under a claim of absolute ownership, property to which a demandant would be entitled but for the lien, and fails to maintain the ownership claimed, he must surrender the property.

Boardman v. *Sill,* 1 Campb. 410, note; *Legg* v. *Willard,* 17 Pick. 140; *Mexal* v.

Dearborn, 12 Gray, 336; *Van Winkle* v. *Crowell*, 146 U. S. 42, 36 L. ed. 880; *Bailey* v. *Hervey*, 135 Mass. 172; *Jacobs* v. *Latour*, 5 Bing. 130; *Ayling* v. *Williams*, 5 Car. & P. 399; *Jones* v. *Cliff*, 5 Car. & P. 560; *White* v. *Gainer*, 2 Bing. 23.

Messrs. **George W. Wickersham, John L. Webster,** *Francis B. Daniels*, and *Strong & Cadwalader*, for appellees:

The evidence fails to establish the alleged pledge or agreement to pledge the securities in controversy to the Union Loan & Trust Company.

3 Pom. Eq. Jur. § 1235; *Walker* v. *Brown*, 165 U. S. 654, 41 L. ed. 865.

The entire course of dealing pursued by the Union Loan & Trust Company is at variance with the contention of its assignee that such of the securities as were ever in its possession were wrongfully withdrawn from its custody.

Leicester Piano Co. v. *Front Royal & R. Improv. Co.* 8 U. S. App. 374, 55 Fed. Rep. 190, 5 C. C. A. 60; *Moore* v. *H. Gaus & Sons Mfg. Co.* 113 Mo. 98; *Fifth Ward Sav. Bank* v. *First Nat. Bank*, 48 N. J. L. 513; *Martin* v. *Webb*, 110 U. S. 7, 28 L. ed. 49; *Fifth Nat. Bank* v. *Navassa Phosphate Co.* 119 N. Y. 256; *Martin* v. *Niagara Falls Paper Mfg. Co.* 122 N. Y. 165; *Bell* v. *Hanover Nat. Bank*, 57 Fed. Rep. 821; *Hanover Nat. Bank* v. *American Dock & Trust Co.* 148 N. Y. 613.

The trust company delivered the securities either to Tod & Co. or to Garretson for pledge to them, in such form as to enable Garretson to hold himself out as owner of them. These facts eston the company and its assignee from now asserting title to the securities.

Donald v. *Suckling*, L. R. 1 Q. B. 585; *McNiel* v. *Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Merchants' Bank* v. *Livingston*, 74 N. Y. 223; *Moore* v. *Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Talty* v. *Freedman's Sav. & T. Co.* 93 U. S. 321, 23 L. ed. 886; *Calais S. B. Co.* v. *Scudder*, 2 Black, 372, 17 L. ed. 282; *Indiana & I. C. R. Co.* v. *Sprague*, 103 U. S. 756, 26 L. ed. 554.

Where the owner intrusts a stock certificate indorsed in blank to another, who sells or pledges it for value, the latter may hold the stock.

First Nat. Bank v. *Lanier*, 11 Wall. 369, 20 L. ed. 172; *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, 25 L. ed. 923; *Leitch* v. *Wells*, 48 N. Y. 585; *Swift* v. *Smith*, 102 U. S. 442, 26 L. ed. 193; *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573; *People's Bank* v. *Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 26 L. ed. 327; *Rumsey* v. *Town*, 20 Fed. Rep. 558; *Sandwich Mfg. Co.* v. *Wright*, 22 Fed. Rep. 631; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71; *Goff* v. *Kelly*, 74 Fed. Rep. 327.

Subrogation will not be allowed when it is inequitable or will prejudice the rights of creditors.

Meyer v. *Evans*, 66 Iowa, 179; *Lyon* v. *Council Bluffs Sav. Bank*, 29 Fed. Rep. 566.

But even if the trust company had a lien, and was not estopped from asserting it, there was an utter failure of proof that Tod and Co., when they received the pledge of the collateral in question from Garretson, had any notice of any defect in his title to the securities, or of any interest of the Union Loan & Trust Company in them.

Cheever v. *Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 34 L. R. A. 69; *Murray* v. *Lardner*, 2 Wall. 110, 17 L. ed. 857; *Stanley* v. *Schwalby*, 162 U. S. 255, 40 L. ed. 960; *Clark* v. *Evans*, 27 U. S. App. 640, 66 Fed. Rep. 263, 13 C. C. A. 433.

The circumstances amounting to notice should always be strictly proved.

Townsend v. *Little*, 109 U. S. 504, 27 L. ed. 1012; 16 Am. & Eng. Enc. Law, p. 796.

A purchaser is not bound to look for latent equities.

Acer v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Bank of the Metropolis* v. *New England Bank*, 6 How. 212, 12 L. ed. 409.

There is no duty to inquire, if the inquiry would not lead to a discovery of facts changing the rights of the parties.

Lea v. *Polk County Copper Co.* 21 How. 493, 16 L. ed. 203; *Wilson* v. *Wall*, 6 Wall. 83, 18 L. ed. 727; *Brush* v. *Ware*, 15 Pet. 93, 10 L. ed. 672.

While the construction of contracts made by a dominating stockholder with a railway company for his own benefit are looked upon with suspicion, yet their legal existence cannot be questioned by third persons who are not injured thereby.

Wright v. *Kentucky & G. E. R. Co.* 117 U. S. 72, 29 L. ed. 821; *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 10 U. S. App. 98, 51 Fed. Rep. 309, 2 C. C. A. 174; *Tod* v. *Kentucky Union Land Co.* 57 Fed. Rep. 47.

The defense of usury is personal to the borrower and those in privity with or claiming under him.

Culver v. *Wilbern*, 48 Iowa, 26, 30 Am. Rep. 385; *De Wolf* v. *Johnson*, 10 Wheat. 367, 6 L. ed. 343; *Merchants' Exch. Nat. Bank* v. *Commercial Warehouse Co.* 49 N. Y. 635; *Chapuis* v. *Mathot*, 91 Hun, 565.

The auction sale on September 26, 1893, cut off all equity of redemption of the Union Loan & Trust Company or its assignee in the securities.

Elliott v. *Wood*, 45 N. Y. 71; *Richards* v. *Holmes*, 18 How. 143, 15 L. ed. 304; *Rose* v. *Paige*, 82 Mich. 105; *Campbell* v. *Wheeler*, 69 Iowa, 588; *Wylder* v. *Crane*, 53 Ill. 490; *French* v. *Powers*, 120 N. Y. 128.

The effect of an unauthorized sale and purchase by the pledgee is to leave the property where it was.

Terry v. *Birmingham Nat. Bank*, 93 Ala. 599; *Day* v. *Holmes*, 103 Mass. 306; *Fay* v. *Gray*, 124 Mass. 500; *Stokes* v. *Frazier*, 72 Ill. 428; Jones, Pledges, § 741; *Bryan* v. *Baldwin*, 52 N. Y. 232; *Collins* v. *Riggs*, 14 Wall. 491, 20 L. ed. 723; *Jones* v. *Van-Doren*, 130 U. S. 684, 32 L. ed. 1077; *Cunningham* v. *Macon & B. R. Co.* 156 U. S. 400, 39 L. ed. 471.

If the pledgeor comes into a court of equity he must do equity by first paying the debt secured and allowing for other set-offs.

18 Am. & Eng. Enc. Law, p. 727; *Talty* v. *Freedman's Sav. & T. Co.* 93 U. S. 321, 23 L. ed. 886.

[494] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is provided by the judiciary act of March 3, 1891, that any case in which the judgments or decrees of the circuit court of appeals are thereby made final, may be required, by certiorari or otherwise, to be certified to this court "for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court."

This case belongs to the class of cases in which the decree of the circuit court of appeals is made final by the statute, and having been brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal.

And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner.

These errors as assigned in the brief of counsel are, in short, that the circuit court erred, (1) in not establishing the priority of petitioner's lien or right in and to the securities; (2) in subordinating that lien or right, and decreeing foreclosure unless payment was made as prescribed; (3) in not entering a decree giving priority to petitioner because respondents set up absolute title by purchase, which was not sustained by the court; (4) in not restraining respondents by injunction and not ordering the surrender of the securities to petitioner.

[495] *The supposed errors in decreeing foreclosure, and that respondents were entitled to hold as pledgees notwithstanding their title by purchase was so far defective as to let in redemption, may readily be disposed of.

This was not a proceeding by Tod & Co. to obtain foreclosure. It was petitioner who sought the aid of the court, and this by an application which was, in effect, a bill to reclaim the securities absolutely and free from encumbrance. The circuit court treated the pleading as if framed in the alternative, and allowed redemption on conditions stated, the right thus accorded being necessarily declared to be extinguished if the conditions were not complied with as prescribed. And no error is assigned to the particular terms imposed.

Nor is there any tenable basis for the proposition that respondents' failure to sustain their purchase at the sale as a defense affected their rights as pledgees. Respondents stood on all their rights, and were not put to an election. If the purchase were valid the equity of redemption was wiped out. If invalid, the original lien remained. If superior, its superiority was not displaced by the claim of absolute title derived through the pledge as set forth in the pleadings.

Assuming that, as between the Union Loan & Trust Company and the syndicate, the company or its assignee had a lien on the securities in question, did the circuit court err in holding that the rights of respondents in respect thereof were paramount to those asserted by the intervening petitioner?

If not, then although the circuit court may have erred in holding that the sale of the securities did not absolutely cut off the claim of the company or its assignee, that would be an error of which petitioner could not, of course, complain.

Petitioner contends that his alleged lien or right was entitled to priority, because the securities "were wrongfully and fraudulently abstracted and diverted from said trust company in subsequent rehypothecation with respondents;" and respondents did not hold them as received in good faith, in due course of business, for value and without notice, but acquired possession through transactions known to be *fictitious, usurious, *ultra vires*, [496]
fraudulent and void, and with notice.

The circuit court and the circuit court of appeals agreed that respondents' right to the securities was superior to that asserted by petitioner, and we entirely concur in that conclusion.

So far from the securities being wrongfully abstracted from the trust company, we think that, whatever the agreement between the trust company and the syndicate, the trust company must be held to have parted with such of the securities as were ever in its custody, with full knowledge that they were to be hypothecated by Garretson; that, indeed, the evidence fairly shows that those which at any time came into the possession of the trust company were either deposited there by Garretson or by his order and direction, with the understanding on his part that he was authorized to withdraw them for the purpose of sale, pledge, or otherwise, and that he always acted on that theory, with the consent and participation of Smith, as secretary and treasurer; and that in any view Smith's acts in the company's behalf must be held to have been performed with the actual or implied authority of the directors.

Smith, as secretary and treasurer, was the person who was actively engaged in the management of the affairs of the Union Loan & Trust Company, and held out to the public as having unlimited authority to manage its business and dispose of any of its securities. He indorsed in the company's name every note it put out, signed every letter that it wrote, and was, as respected the public, the trust company itself. Throughout all the transactions his conduct conceded that Garretson was the lawful holder of the stock and bonds tendered by him as collateral to the loans he negotiated. As such officer, he directly transmitted the securities of the Sioux City & Northern Railroad Company to New York, and likewise the $1,433,000 of Nebraska & Western bonds to Garretson at Omaha, to be delivered to the agent of Tod & Co., under the contract for the million-dollar loan, and to be turned into court in carrying out the reorganization scheme *in ac- [497]
cordance with which the Sioux City, O'Neill, & Western bonds were to be issued.

It appears to us indisputable on the face of this record that Garretson was intrusted, according to the understanding of all parties, with the right to sell the Sioux City & Northern bonds; that the Union Loan & Trust Company received the proceeds of a million dollars of those bonds, thus ratifying the transaction; and that the proceeds of

the balance were applied with Smith's knowledge, without objection on his part, or that of any other officer or director of the trust company, to taking up notes secured thereby, which had been given by Garretson to acquire the Nebraska & Western bonds, which he afterwards pledged to Tod & Co., and which were exchanged for the bonds of the Sioux City, O'Neill, & Western Railroad in controversy.

None of the securities ever stood in the name of the Union Loan & Trust Company. And they were delivered in such form as to enable Garretson to hold himself out as the owner or lawful holder thereof, with full power of disposition.

The district judge well said [65 Fed. Rep. 564]: "It is entirely clear that E. R. Smith, the secretary and treasurer of the trust company, dealt with these securities as though he had full authority from the company so to do, and he obeyed Garretson's instructions in regard to the same without demur; and it does not appear that the trust company, or any officer thereof, ever objected to such disposition of the securities; and, furthermore, so far as the evidence in this case discloses, the general management of the business of the trust company was intrusted to Smith, with but little, if any, supervision on part of the directors or other officers of the corporation."

The truth of the matter seems to be, as the circuit court held, that, in order that the various properties represented by the stock and bonds should become valuable, it was necessary that the enterprises on which they were based should be carried through, and this required additional funds, to procure which the trust company consented to Garretson's negotiations with Tod & Co., and the debenture company, and the pledging of the securities.

[498] *The presumption on the facts is that the securities were delivered by the company to Garretson for use, and, if they had ever been pledged to the company, that the pledge was discharged by the voluntary parting with possession. There is nothing to show an intention to limit the use to a hypothecation in subordination to a prior pledge, let alone the question whether any such pledge existed, and the absence of evidence of any assertion thereof.

Certainly, under the circumstances, the company could not be allowed to set up its alleged title as against third parties taking in good faith and without notice. And the same principle is applicable to its assignee and to creditors seeking to enforce rights in his name. So far as this case is concerned there is nothing to the contrary in the statute of Iowa regulating assignments for the benefit of creditors as expounded by the supreme court of the state. Code Iowa, title 14, chap. 7; *Schaller* v. *Wright*, 70 Iowa, 667; *Mehlhop* v. *Ellsworth*, 95 Iowa, 657.

Section 2127 of the Code provides: "Any assignee as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of such assignee everything belonging or appertaining to said estate, and, generally, do whatsoever the debtor might have done in the premises."

Conveyances by insolvent debtors in fraud of their creditors may be attacked by their statutory assignees, though equity would not aid the debtors themselves to recover the property, for the property transferred would, in the eye of the law, remain the debtors' and pass to the assignees, who would not be subject to the rule that those who commit iniquity have no standing in equity to reap the fruits thereof. But equities or rights belonging to particular creditors are not, by operation of law, transferred to such assignees.

The trust company did not own these securities, and did not transfer them in fraud of its creditors, prior to the assignment, so as to entitle the assignee to treat the transfers as void and the securities as belonging to the company.

*And it must be remembered that this proceeding is an attempt on behalf of the holders of railroad syndicate paper, which constituted only a portion of the liabilities of the trust company, to establish equities in the securities on the ground that they were pledged to the company to secure it against liability on its indorsements of such paper, and that these equities, if any, must be worked out through the company. [499]

The difficulty with the contention that the trust company was bound to hold the securities for the benefit of the holders of syndicate paper; that they were not duly parted with; and that Tod & Co. took with notice of the alleged interest of the trust company, and the equities of those holders, is that it does not appear that any of the syndicate paper was taken on the strength of these particular securities; or that Smith acted otherwise than with the knowledge and assent of the directors; or that Tod & Co. had notice of any claim of the trust company or its indorsees, or of any defect in Garretson's right to dispose of the securities.

The securities were railroad bonds, payable to bearer, and certificates of stock in the names of Garretson and his associates, with transfers indorsed by them in blank; and they were, in large part, sent to Tod & Co. by the trust company, at Garretson's request, with presumably full knowledge that they were to be used as collateral to loans he was procuring, without anything to indicate that the trust company had any interest in them, or any intimation of such interest. The securities did not stand in the name of the trust company, and Garretson did not, in any of his dealings with Tod & Co., assume to act for the company. The mere fact that he was one of its officers was not in itself sufficient to call for an inference that he was acting as such in these transactions, nor did he make his requests of Smith in that capacity, nor were they complied with by Smith as on that theory.

There was no actual notice, and as the visible state of things was consistent with Garretson's right to deal with the securities as he did, such notice cannot be presumed or

implied. Nor do we regard the conduct of Tod & Co. as so negligent as to justify the application of the doctrine of constructive notice.

[500] *The circumstances relied on as imputing notice or requiring inquiry which would have resulted in notice are in our judgment inadquate to sustain that conclusion.

Thus, it is said that because the Nebraska & Western bonds were overdue, and the mortgage in process of foreclosure, they were not negotiable and were taken subject to the alleged lien of the trust company. But they were assignable choses in action susceptible of being pledged, and were pledged to Tod & Co. until through the foreclosure and reorganization the new securities were substituted. As we have seen, the power of disposition had been lodged in Garretson by, or with the assent of, the trust company, and no secret equity could be set up by the latter.

So as to the fact that some of the shares of Sioux City & Northern stock delivered to Tod & Co. under the agreement of December 31, 1892, stood in the name of "A. S. Garretson, Trustee," the evidence disclosed that this stock belonged to Booge, one of the original members of the syndicate, and that he, having failed, had consented it should be put out of his name and held in trust, and that at this time there were no notes furnished by Booge to the syndicate outstanding. The trust company had no greater interest in this stock than in any other, and the word "trustee" was not intended to give, and did not give notice of any rights claimed by the trust company.

Again, elaborate argument is devoted to the point that Garretson was induced to assume the Nebraska & Western enterprise by false representations by the Manhattan Trust Company as to the condition of the improvement company; and that this led him to pledge the securities which he should have left with the Union Loan & Trust Company.

While we must not be understood as intimating in any degree that this charge of misrepresentation was made out, or, if it were, that Tod & Co. were cognizant thereof, it is enough that we are not satisfied that the transactions complained of involved notice of the claim of the trust company now set up.

But we do not feel called on to do more
[501] than allude to these *matters. Tod & Co. held the securities under the $1,500,000 loan in trust for the purchasers of the notes thereunder issued, and neither the debenture company, through which the transaction was made, and which holds a few of the notes, nor any other of the beneficiaries, was before the court. Nor was Garretson, nor any member of the syndicate, nor any holder of part of the million-dollar loan, other than Tod & Co., a party to the record.

The circuit court correctly held that the prior transactions could not be overhauled under such circumstances; and applied the same principle to the last loan as well.

By the final decree petitioner was permitted to file a second amended petition, on which no issue could be, or was, joined, or additional testimony taken, and it was then set up, for the first time, that the loans were void because in contravention of the statutes of New York in relation to usury, and that petitioner was, therefore, entitled to reclaim the securities without compensation. The prohibition against usury of the New York laws (N. Y. Rev. Stat. Banks Bros.' 7th ed. p. 2253) could not be interposed by corporations as a defense (Id. p. 2256; Laws 1850, chap. 172), nor could the indorsers of their paper plead the statute (*Union National Bank* v. *Wheeler*, 60 N. Y. 612, 96 U. S. 268 [24: 833]; *Stewart* v. *Bramhall*, 74 N. Y. 85; *Junction Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226 [20: 385]); nor did it apply to demand loans of $5,000 or upwards, secured by collateral. Laws 1882, chap, 237, § 1; Laws 1892, chap. 689, § 56.

Apart from these considerations, the circuit court disposed of this contention on the ground that the petitioner, in order to any relief in equity, would be compelled to pay the sums advanced and interest, but had not tendered or made any offer of payment. This assumed that the point might have been passed on, if there had been such tender or offer, notwithstanding the trust company was not a party to the contract of loan, and neither the bridge company, nor Garretson, nor any member of the syndicate, nor the debenture company, nor any other loan holder, was a party to the record. We think the court was right if the question was properly before it. This was not a proceeding to enforce an alleged usurious agreement, but it
*was petitioner who sought the affirmative [502]
aid of equity, which he could only obtain by doing equity. It is true that by a statute of New York (N. Y. Rev. Stat. 7th ed. 2255; Acts 1837, chap. 430, § 4), it is provided that whenever a borrower files a bill for relief in respect of violation of the usury law, he need not pay or offer to pay "any interest or principal on the sum or thing loaned;" but this act has been rigidly confined to the borrower himself (*Wheelock* v. *Lee*, 64 N. Y. 242; *Buckingham* v. *Corning*, 91 N. Y. 525; *Allerton* v. *Belden*, 49 N. Y. 373); and, moreover, is not applicable to suits brought in courts not within the state of New York.

It is further urged that the transaction with the bridge company was *ultra vires*, and that, this being so, the securities should have been awarded petitioner free and clear from any condition whatsoever.

The circuit court held that the bridge company did exceed its powers, and that the matter must be treated as if that company had not been interposed as an actor in the transaction. Relief to the extent of redemption was on that account accorded, yet it was limited to that because there was nothing in the invalidity of the action of the bridge company which gave the trust company any greater right to the securities than it had before. The bridge company was not a party to the proceeding, and, indeed, if it had itself instituted suit for the cancelation of its notes, it could not have demanded possession of the securities. Clearly the trust

company could not avail itself, in favor of its own alleged claim, of such an infirmity, if it existed, nor could the holders of the notes, which had passed into their hands as strangers, be deprived of the securities on the faith of which they had advanced their money; or have their rights adjudicated in their absence.

However, whatever the contention in the courts below may have been the errors assigned here merely put forward the theory that the alleged usurious character of the contract by reason of the options granted and commissions paid, and its invalidity for lack of power in the bridge company, so took the transaction out of the ordinary course of
[503] business as to *charge Tod & Co. and the loan-holders with bad faith and notice of the alleged claims of the trust company.

But we cannot perceive that the fact of usury between the parties to the contract, if usury there were, or action in excess of power, if that existed, either or both, can be laid hold of to justify the imputation of notice that Garretson was dealing with the securities in derogation of rights of the trust company. Doubtless there are cases where commercial paper or securities may be offered for negotiation under circumstances so out of the usual course of business as to throw such grave suspicion on the source of title that lack of inquiry, assuming that it would disclose defects, might amount to culpable negligence. But that doctrine has no application here.

Respondents had possession of all the Sioux City, O'Neill, & Western bonds, and 7,200 shares of Sioux City & Northern stock, in pledge to secure payment of $1,000,000 of Garretson's notes payable on demand, which amount had been borrowed for the purposes of, and was used in, acquiring the Sioux City, O'Neill, & Western Railroad for the syndicate.

The syndicate was engaged in constructing a bridge across the Missouri river to connect the railroad in Nebraska with that in Iowa. The stock of the bridge company was all owned by the syndicate, and had been pledged with the bonds of the Sioux City, O'Neill, & Western Railway.

Garretson applied for a new loan of $1,500,000, with which to take up the million dollar loan and get additional funds for the construction of the bridge.

As the railroads whose bonds and stock constituted the security were new, and the securities were then without market value, the negotiation of the loan was made more attractive to the debenture company by the allowance of the commission and certain options. And since there seems to have been a question as to whether the agreements might not be obnoxious to the New York usury statutes, and as notes of a corporation were supposed to be more readily salable than those of an individual, it was thought best to make the loan directly to one of the corporations owned by Garretson and his associates. The original suggestion was that the loan
[504] *should be made to the Sioux City, O'Neill, & Western Railway Company, but objections being raised to this in view of certain provisions of the statutes of Nebraska, it was arranged between Tod & Co. and Garretson and his associates that the bridge company, which was equally owned by the syndicate, and to the purposes of which $500,000 of the loan were ostensibly to be devoted, should become the borrower. The sale of the securities, the issue of the notes secured thereby, and the making of the loan followed.

Garretson executed the indenture of trust to Tod & Co., the debenture company paid over $1,500,000 and interest to them, and they took up the million dollar loan, thereby releasing the Sioux City, O'Neill, & Western bonds and 7,200 shares of Sioux City & Northern stock; the balance of the latter stock was sent to Tod & Co. by the trust company; Tod & Co., as trustees, certified on the notes that the collateral had been deposited with them, and the notes were sold to various purchasers, who apparently advanced their money in good faith.

If the transactions, thus briefly stated, were unaffected by notice of any want of authority in Garretson in respect of the trust company as now alleged, it is not for that company to say that Tod & Co., or the holders of the loan, should be held chargeable with notice simply because the commissions and options might have constituted usury as between the parties to the loan, or the bridge company, its stockholders, or judgment creditors might have had cause of complaint of defect of power.

In letting petitioner in to redeem the circuit court went at least as far as the record would permit. Whether or not there was error in the decree of which respondents might have complained, we do not feel at liberty to decide.

Decree affirmed.

UNITED STATES* [505]

v.

JOINT-TRAFFIC ASSOCIATION *et al.*

(See S. C. Reporter's ed. 505–578.)

Joint-traffic association, when illegal—power of Congress to prohibit—agreement by which competition is prevented—freedom of contract—valid statute—agreement between railroad companies.

1. The right of a railroad company in a joint-traffic association to deviate from the rates prescribed, provided it acts on a resolution of its board of directors and serves a copy thereof on the managers of the association, who, upon its receipt, are required to "act promptly for the protection of the parties hereto," does not relieve the association from condemnation as an illegal restraint of competition, as the privilege of deviating from the rates would be exercised upon pain of a war of competition against it by the whole association.
2. Congress has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad companies to establish and maintain interstate rates and fares for the transportation

of freight and passengers on any of the railroads, parties to the contract or combination, even though the rates and fares thus established are reasonable.

3. Congress has the power to forbid any agreement or combination among or between competing railroad companies for interstate commerce, by means of which competition is prevented.

4. The constitutional freedom of contract in the use and management of property does not include the right of railroad companies to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition, even if their rates and charges are reasonable.

5. The statute under review is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof.

6. An agreement of railroad companies which directly and effectually prevents competition is, under the statute, in restraint of trade, notwithstanding the possibility that a restraint of trade might also follow unrestricted competition, which might destroy weaker roads and give the survivor power to raise rates.

[No. 84.]

Argued February 24, 25, 1898. Decided October 24, 1898.

APPEAL from a decree of the United States Circuit court of Appeals for the Second Circuit affirming the decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity brought by the United States, plaintiff, against the Joint-Traffic Association *et al.*, for the purpose of obtaining an adjudication that an agreement entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution. Judgments of the Circuit Court and of the Circuit Court of Appeals *reversed*, and the case remanded to the Circuit Court with directions to take further proceedings in conformity with the opinion of this court.

See same case below, 76 Fed. Rep. 895.

Statement by Mr. Justice **Peckham:**

The bill was filed in this case in the circuit court of the United States for the southern district of New York for the purpose of obtaining an adjudication that an agreement
[506] *entered into between some thirty-one different railroad companies was illegal, and enjoining its further execution.

These railroad companies formed most (but not all) of the lines engaged in the business of railroad transportation between Chicago and the Atlantic coast, and the object of the agreement, as expressed in its preamble, was to form an association of railroad companies "to aid in fulfilling the purpose of the Interstate Commerce Act, to cooperate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies and the introduction of economies in the conduct of the freight and passenger service." To accomplish these purposes the railroad companies adopted articles of association, by which they agreed that the affairs of the association should be administered by several different boards, and that it should have jurisdiction over all competitive traffic (with certain exceptions therein noted) which passed through the western termini of the trunk lines (naming them), and such other points as might be thereafter designated by the managers. The duly published schedules of rates, fares, and charges, and the rules applicable thereto, which were in force at the time of the execution of the agreement and authorized by the different companies and filed with the Interstate Commerce Commission, were reaffirmed by the companies composing the association. From time to time the managers were to recommend such changes in the rates, fares, charges, and rules as might be reasonable and just and necessary for governing the traffic covered by the agreement and for protecting the interests of the parties to the agreement, and a failure to observe such recommendations by any of the parties to the agreement was to be deemed a violation of the agreement. No company which was a party to it was permitted in any way to deviate from or change the rates, fares, charges, or rules set forth in the agreement or recommended by the managers except by a resolution of the board of directors of the company, and its action was not to affect the rates, etc., disapproved, except to the extent *of its interest [507]
therein over its own road. A copy of such resolution of the board of any company authorizing a change of rates or fares, etc., was to be immediately forwarded by the company making the same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon the receipt of such resolution the managers were "to act promptly upon the same for the protection of the parties hereto." It was further stated in the agreement that "the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

One provision of the agreement was to the effect that the managers were charged with the duty of securing to each company which was a party to the agreement equitable proportions of the competitive traffic covered by the agreement, so far as it could be legally done. The managers were given power to decide and enforce the course which should be pursued with connecting companies, not parties to the agreement, which might de-

cline or fail to observe the rates, etc., established under it, and the interests of parties injuriously affected by such action of the managers were to be accorded reasonable protection in so far as the managers could reasonably do so. When in the judgment of the managers it was necessary to the purposes of the agreement, they might determine the divisions of rates and fares between connecting companies who were parties to the agreement and connections not parties thereto, keeping in view uniformity and the equities involved.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be so arranged as to give proper representation to each company party to the agreement. Soliciting or contracting passenger or freight agencies were not to be maintained by the companies, ex-
[508] cept *with the approval of the managers, and no one that the managers decided to be objectionable was to be employed or continued in an agency. The officials and employees of any of the companies could be examined, and an investigation made when, in the judgment of the managers, their information or any complaint might so warrant. Any violation of the agreement was to be followed by a forfeiture of the offending company in a sum to be determined by the managers, which should not exceed five thousand dollars, or if the gross receipts of the transaction which violated the agreement should exceed five thousand dollars, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such gross receipts. The sums thus collected were to go to the payment of the expenses of the association, except the offending company should not participate in the application of its own forfeiture.

The agreement also provided for assessments upon the companies in order to pay the expenses of the association, and also for the appointment of commissioners and arbitrators who were to decide matters coming before them. No one retiring from the agreement before the time fixed for its final completion, except by the unanimous consent of the parties, should be entiled to any refund from the residue of the deposits remaining at the close of the agreement.

It was to take effect January 1, 1896, and to continue in existence five years, after which any company could retire upon giving ninety days' written notice of its desire to do so.

The bill filed by the government contained allegations showing that all the defendant railroad companies were common carriers duly incorporated by the several states through which they passed, and that they were engaged as such carriers in the transportation of freight and passengers, separately or in connection with each other, in trade and commerce continuously carried on among the several states of the Union and between the several states and territories thereof. The bill also charged that the defendants, unlawfully intending to restrain commerce among the several states, and to prevent competition among the railroads named, in respect to all their *interstate com- [509]
merce, entered into the agreement referred to above, and it charged that the agreement was an unlawful one, and a combination and conspiracy, and that it was entered into in order to terminate all competition among the parties to it for freight and passenger traffic, and that the agreement unlawfully restrained trade and commerce among the several states and territories of the United States, and unlawfully attempted to monopolize a part of such interstate trade and commerce. The bill ended with the allegation that the companies were preparing to put into full operation all the provisions of the agreement, and the relief sought was a judgment declaring the agreement void and enjoining the parties from operating their roads under the same. The defendant, the Joint Traffic Association, filed an answer (the other defendants substantially adopting it), which admitted the making of the contract, but denied its invalidity or that it is or was intended to be an unlawful contract, combination, or conspiracy to restrain trade or commerce, or that it was an attempt to monopolize the same, or that it was intended to restrain or prevent legitimate competition among the railroads which were parties to the agreement. The answer, in brief, denied all allegations of unlawful acts or of an unlawful intent, unless the making of the agreement itself was an unlawful act. The answer then set forth in quite lengthy terms a general history of the condition of the railroad traffic among the various railroads which were parties to the agreement at the time it was entered into, and alleged the necessity of some such agreement in order to the harmonious operation of the different roads, and that it was necessary as well to the public as to the railroads themselves.

The case came on for hearing on bill and answer, and the circuit court, after a hearing, dismissed the bill, and upon appeal its decree was affirmed by the circuit court of appeals for the second circuit, and the government has appealed here.

Mr. **John K. Richards,** Solicitor General, for the appellant, the United States:

The agreement violates the anti-trust law because it creates an association of competing trunk-line systems, to which is given jurisdiction over competitive interstate traffic, with power, through a central authority, aided by a skilful scheme of restrictions, regulations, and penalties, to establish and maintain rates and fares on such traffic and prevent competition, thus constituting a contract in restraint of trade or commerce among the several states, as defined by this court in *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007.

In the Trans-Missouri case this court held (1) that the anti-trust law applies to common carriers by railroad; (2) that it prohibits and renders illegal all agreements in restraint of interstate trade and commerce, whether the restraint be reasonable or unreasonable.

The question, then, is whether the agree-

ment under consideration operates as a restraint upon interstate trade and commerce. The prohibition of the Anti-Trust Act, as construed by this court, applies to all contracts in restraint of trade or commerce, and is not confined to those in unreasonable restraint.

But as a contract in restraint of commerce, the Trans-Missouri agreement is crude and ineffective when compared with the Joint Traffic agreement. The Trans-Missouri provides a penalty for competition. The Joint Traffic goes further, and contains provisions designed to deprive companies of the means of competing, while removing the inducement to compete. Control of the soliciting and contracting freight and passenger agencies is placed in the managers, who are authorized to organize joint agencies. This done, the supervision of the sources of securing business being thereby given to the managers, they are charged with the duty of apportioning the competitive traffic equitably among the members of the association.

Of course the purpose is to remove the inducement to compete. An agreement to apportion traffic operates the same as one to divide earnings. Railroads which pool their earnings have no inducement to compete. All the individual company earns goes into the pool, and it only gets its share after all. So where the traffic business is pooled, if a company by competing gets more than its share, it must yield the excess by permitting a diversion of the traffic from its line to lines which are short. A strict account is kept of the traffic carried by each trunk line. If the traffic of a particular line exceeds its percentage, the line is deemed "over," and must account for the excess to the lines which are "short."

In prohibiting pooling, Congress did not make it a condition that the rates established and maintained under a pooling agreement should be unreasonable. It sufficed they would be arbitrary, uninfluenced by competition. The public would be placed at the mercy of the traffic managers.

So, too, in the case of a contract in restraint of trade prohibited by the anti-trust law; it is enough if the agreement interferes with those natural laws which ordinarily determine rates; it is enough if it restricts competition; it is enough if it puts it in the power of the combined railroads arbitrarily to fix rates. We do not have to inquire whether the rates fixed are reasonable or unreasonable. It is the power through combination to fix rates arbitrarily, which is prohibited.

The Trans-Missouri case was elaborately argued and carefully considered. A petition for a rehearing was presented and denied. The decision has been accepted and acted upon by the departments of the government, and by the courts, both state and Federal, as definitively settling the meaning and scope of the Anti-Trust Act when applied to traffic associations among competing interstate railway systems. The decision was not only a just, but an eminently salutary one. I shall not concede that the principles it laid down remain questionable. I shall not admit that it is necessary for me by argument to fortify the positions taken by this court in that case. The anti-trust law as there construed is the law of the land.

The wisdom of Congress in prohibiting all agreements in restraint of trade among interstate railway systems is even more manifest now than when the Trans-Missouri case was decided. At the time of the argument of the Trans-Missouri case it was still to some extent a mooted question whether the Interstate Commerce Commission was empowered to determine what are fair and reasonable rates, and to enforce such rates. This question is no longer open.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414.

It will probably be urged that any illegality in the agreement is cured by § 3 of article 7, which reads;

"Sec. 3. The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto; and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and the rules established hereunder."

An injunction to construe and exercise powers conferred so as to permit no violation of law is an admission that the powers may be so construed and exercised as to violate law. If the anti-trust law prohibited only those contracts in unreasonable restraint of trade or commerce there might be saving force in this section. But the anti-trust law prohibits all contracts in restraint of trade or commerce. Whether the rates be reasonable or unreasonable, an agreement providing for their establishment and maintenance by an association of interstate railways is prohibited. The managers can exercise none of the essential powers conferred by the agreement without violating the law. In the matter of the essential powers it is not a question of method or degree; the powers cannot be exercised because they are in themselves illegal. The association is itself illegal. It is formed for the purpose of controlling certain competitive traffic. The central authority, the managers, is given the power to establish and maintain rates on that traffic. Take away from the association the power to establish and maintain rates, and it immediately falls to pieces. It ceases to have a *raison d'etre.*

It will be observed that the managers are not instructed to co-operate in securing reasonable rates. The latter part of this section is inserted to support, not the real, but ostensible purpose of the association, namely of aiding the Interstate Commerce Commission to enforce the law. Assuming the Commission powerless to enforce the law, the railroads ignored both the Commission and the law, and proceeded to form an association outside of the law and in violation of

the law, to aid in enforcing the law. The railroads shatter the law, and then combine to support the fragments.

It was contended below that the bill was multifarious. There is but one cause of action in the bill,—namely, the agreement. Upon that the bill is based. It seeks to enjoin the execution of an illegal contract. The averments of intent in the bill are unnecessary and immaterial. At the most they are conclusions of law. The court will examine the agreement and determine the question of law with respect to its meaning and effect; will determine whether the agreement restrains trade or commerce in any way so as to violate the law. If the agreement is prohibited by the anti-trust law the court will enjoin its execution; and the court will do this irrespective of whether the agreement does or does not also violate the Interstate Commerce Act, or those general principles of law which prevent any interference with interstate commerce.

It is not necessary for the government to insist that the agreement violates more than one law. It is clearly illegal as a contract in restraint of trade or commerce under the anti-trust law. The fact that it also violates some other law, if it does, assuredly will not cure its illegality under this law, or prevent the court from enjoining its execution. A thing which is doubly bad does not, therefore, become good. The rule of double negatives does not apply. Nor is the government deprived of the power to restrain the execution of a contract in restraint of trade or commerce under the anti-trust law because the contract contains a provision under which individuals have committed, or may commit, offenses punishable under the Interstate Commerce Act. If a man threatens my life I am not to be deprived of the right to put him under bond to keep the peace because he has also stolen my property.

The authority of the government to maintain this suit is sustained in *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 343, 41 L. ed. 1007, 1028; citing *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405.

Messrs. **James C. Carter** and *Lewis Cass Ledyard*, for the Joint Traffic Association, appellee:

The object of the bill is to procure an adjudication that a certain agreement entered into between a large number of railroad companies forming most, but not all, of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast, for the purpose of forming an association for the better regulation of a certain part of the traffic of those lines and systems, is illegal and void, and enjoining its execution.

Congress in 1887 enacted the Interstate Commerce Law, the main design of which was to abolish discrimination in rates and secure a greater degree of uniformity, and to that end it required all railroads engaged in interstate transportation to file with the Commission and publish schedules of their respective rates, and forbade the carriage of goods for any greater or less compensation than that specified in the published rates.

Even before the passage of the law the rival lines engaged in an effort to agree upon the schedules which each should file, and had reached such agreement in time to file and publish them in compliance with the provisions of the law.

The agreement in question was believed to promise great benefits and to make it in the interest of all to comply with the Interstate Commerce Act, and to detect, expose, and punish any who, from a mistaken view of interest, should violate it.

It made no effort to prevent competition: but sought to devise a scheme which would compel any competition to be fair, lawful, and open, and enable any rival to meet it without violating any law.

Unfortunately, large corporations are viewed with a jealousy which does not confine itself at all times within the bounds of reason, and this sentiment creates hostilities to which it is but natural, at least, that public officials should yield. Transactions which, in the absence of political prejudice and passion, would pass unnoticed by those not immediately affected by them, are subject to hostile scrutiny; and it was not unnatural that such an agreement should raise a clamor that it was designed to raise rates. There never was a pretense, however, that under the agreement there was the slightest exaction of unreasonable charges. On the contrary the schedules of rates agreed upon and filed with the Interstate Commerce Commission had never been objected to by that body, and were notoriously lower than those imposed for similar services in any other part of the world.

The answer denies every allegation of unlawful act or of unlawful intent, unless the making of the agreement itself was an unlawful act.

It may seem at first that we are aiming to persuade the court to reconsider its reasoning and determinations in the recent case of *United States* v. *Trans-Missouri Freight Association.*

It may be that one of the questions now sought to be presented might have been made in that case and a decision of it obtained; but it is quite certain that the question was not raised.

The precise question which was considered and determined in the case above referred to was this: Assuming that the agreement was one in restraint of trade, would the circumstance that the restraint actually imposed by it was reasonable relieve it from the condemnation of the statute? Or, in other words, does the statute by a true construction condemn all agreements in restraint of interstate trade and commerce, or such only as were at common law unlawful?

Prior to, and at the time of, the passage of this law there were, as there still are, certain tendencies in the industrial world which drew widespread attention and excited in

some minds much alarm. Many industries were seen or supposed to be under the control of great aggregations of capital, either in the hands of individuals united under some form of agreement, partnership or other, or contributed as the capital of corporate bodies. Some of the most conspicuous were called by the vague name of "trusts," and this term came to be employed in a general way to designate all of them. For obvious reasons, and quite aside from the question whether their objects and effects are mischievous or beneficial, such combinations of capital are not popular, and the designation "trust" came to be rather a reproachful one.

Undoubtedly it may be possible for a large aggregated capital to wield greater power in many ways than would be possible for the same amount distributed among many separate owners or managers, and the suspicion was entertained that such power was employed in controlling markets, and perhaps in controlling legislation, and it was also thought to be an instrumentality by which the unequal distribution of wealth was fostered and increased. The disfavor thus excited was, as was natural, turned to political account. Those opposed to a protective tariff charged upon its advocates that they were favoring and stimulating trusts, and the latter felt the need of repelling the charge by doing something to show that they were the declared enemies of trusts.

Under such circumstances it was quite natural that schemes of legislation aimed against these supposed public enemies should be started, and any opposition to them would naturally draw upon the authors of it the reproach that they were the friends, and perhaps the paid defenders, of these powerful interests.

While, therefore, all, or nearly all, professed themselves in favor of repressive legislation, the question what legislation could be contrived was a difficult one and suggested some difficult questions. How was a trust to be legally defined so that a prohibition of it should not include a prohibition of the exercise of the clearest constitutional rights? Congress surely could not prevent the creation of corporations under state laws, or limit the capacity of forming partnerships, or in any manner interfere with the internal business of states. And was it certain that these so-called trusts were in every instance necessarily mischievous? Indeed, sensible legislators for the most part understood very clearly that the things complained of were but the necessary incidents and consequences of the progress of industry and civilization, and could not be arrested without checking the advance of the nation and crippling it in the fierce competitions with other nations, and that any useful effort to remedy the supposed evils must be directed against the abuses of the power of aggregated capital, and not at the aggregations themselves. Under these circumstances Congress proceeded very cautiously, and enacted the only measure which seemed possible without passing the plainest constitutional limits. It did not attempt to define "trusts" or limit aggregations of capital in any form. The general charge was that these combinations were in some form monopolies and in restraint of trade; but Congress did not in the remotest degree attempt to define what a monopoly or restraint of trade was. It was, however, perfectly safe to declare that if these combinations did in any case create monopolies or restraints upon trade, they should be prohibited from doing so in the future; and this is what Congress did, and all it did, by passing the act in question. It prohibited contracts and combinations to create monopolies or restrain trade, and left it to the courts, without a word of direction or instruction, to determine what contracts did create monopolies or restrain trade, and what did not.

It cannot be said that Congress has done an unwise or imprudent thing, and that if calamity occurs the fault lies at its door. It has prohibited nothing but contracts and combinations to create restraints of trade and monopolies. These, when properly defined are, beyond question, public mischiefs and ought to be prohibited. If any useful thing becomes stricken down by the law, it must be the result of some erroneous interpretation.

The first question we design to consider is whether the agreement violates any of the provisions of the act referred to. To this end it is of much importance to have in mind the particular nature of the subject with which this act deals, and how that subject has been heretofore treated in law and legislation. It is obvious that Congress conceived itself to be dealing with acts supposed to be productive of injury to the public, and of injury to such an extent as to justify repressive legislation.

It is not contracts only of a certain character which are condemned, but they are coupled together with certain other acts, presumably of a similar nature or tendency,—namely, combinations or conspiracies in restraint of trade, and monopolies, or combinations or conspiracies to monopolize. Contracts therefore are dealt with, not so much as contracts, but as one form of acts relating to trade and commerce, assumed to be injurious in their tendency and effect.

That contracts of a certain class may be opposed to sound public policy has been recognized in the law from a very early period. The grounds or reasons of policy on which they are held void or illegal are very numerous and varied, but a class embracing numerous instances is formed of such as are supposed to have an injurious effect upon trade or commerce; between these, however, there is quite a marked distinction observable in the way they are treated in the law. One description embraces simply ordinary business transactions, where the parties make agreements with each other for supposed mutual profit and advantage, a breach of which would result in pecuniary loss or damage to the one or the other, and a demand for redress. In such cases the parties expect and intend to enforce the contract, and look to the ordinary legal remedies as the means of enforcing it. Contracts whereby a business

is sold and the seller covenants that he will not thereafter carry it on, or where a man takes an apprentice with an agreement that he will not set himself up in opposition to his master in trade, supply familiar examples of this character.

Inasmuch as such contracts would not be entered into unless it was believed that the law would afford redress in case of a breach of them, the repressive purposes of the law, where they are supposed to be opposed to public policy, are, in general, fully satisfied by declaring them void and denying redress, and this is usually the extent of the notice which the law takes of them. There is no occasion for criminal legislation, both for the reason that there is not present, ordinarily, any criminal purpose, and, if there were, repression is sufficiently accomplished without a resort to it. The doctrine respecting contracts of this character belongs, therefore, to the law of contracts.

But there is another and much smaller description of contracts supposed to be injurious to trade, of quite a different character. They are not, properly speaking, business transactions. They do not involve the sale, leasing, or exchange of property, or the hire of services; nor does a breach of them usually result in distinct and ascertainable pecuniary loss. They are not, indeed, entered into by parties in different interests, as in the case of buyer and seller, one of which expects to gain something from the other, but by parties in the same interest having in view an object for the common good of all; nor do the parties to them generally look to, or rely upon, any legal remedies to secure obedience to them. They spring out of circumstances which impress the parties to them with the belief that they have a common interest, or that it is expedient to create a common interest among them, and seek to control or regulate the conduct of each other in relation to business. Instances of this description of agreement are found where laborers or employers unite, in the form of agreement, to regulate hours of labor or prices, or where merchants or tradesmen combine to transact their business in certain prescribed ways, or to establish uniform prices for their goods, or to suppress or regulate competition among themselves; or where a class of producers or dealers combine together to control a product or a business, with a view of imposing upon others their own terms as to prices, or other incidents of the business.

The marked distinction between these cases and the ordinary business transactions first spoken of is that in the latter there is a difference of interest, sometimes regarded as a hostility of interest, between the parties, each seeking to gain the utmost from the other; whereas in the former the parties are in the same interest, each seeking the same end. The term "contract" does not well express this sort of agreement. It is a uniting together for a common purpose,—a combination,—or, when thought to be of an objectionable character, a conspiracy. Such unions always suppose agreement, but it need not be in writing; where it is in writing it is often called an agreement, or contract; but in giving it this name we should not lose sight of its real character. In reality it is simply an act, and innocent or guilty according as the law may be inclined to regard it.

It is manifest that where the law does regard it as mischievous, and to such a degree as to call for repression, it is not enough to simply declare it illegal. The practice may nevertheless be persisted in, and as it does not rely for its efficacy upon legal remedies, the mere withholding of such remedies may be ineffectual. The action, therefore, which the law usually takes in respect to such so-called contracts, is in the form of prohibition and penalty; and the subject belongs, not to the law of contracts, but to the criminal law, where it is usually dealt with under the head of conspiracy.

We do not mean by the above observations that there may not be instances which partake to a greater or less degree of the qualities of both the classes above mentioned; but the distinction between them is so constant and pervading that it will be at once recognized.

As a conclusion to what is said we desire to point out that the legal doctrine and policy to which this Anti-Trust Act belongs is manifestly the one last described. The circumstance that contracts are grouped together with combinations and conspiracies, and made the subject of criminal treatment, shows this very plainly.

The inaptitude of some of the language of this legislation is quite apparent. Undoubtedly the object of Congress was to reach that class of supposed mischiefs which flow from combinations. But the great bulk of the cases in which the courts have felt called upon to say anything about contracts in restraint of trade has been the business transactions first alluded to, in which an agreement has been entered into not to exercise a particular calling,—as, where the keeper of a well-patronized tavern sells out his establishment and goodwill, and covenants not to further carry on the business. Such agreements at the common law have been held valid or void according to the supposed reasonableness of the covenant; but surely even when void, there was nothing about them calling for the intervention of the criminal law. And yet this statute bunches the valid and void all together, and makes them all criminal, when probably there was not the remotest intention to make any of them criminal.

These observations, of course, fully admit that the particular agreement or combination against which this action is aimed would be, assuming that the act covers the contracts between railroad companies, obnoxious to the penalty imposed by the act, provided it were in fact in restraint of trade or commerce between the states. That it is in fact in restraint of trade or commerce must be shown before this action can be maintained, and this is the proper subject for discussion in this action. This question is broadly open and unaffected by any decision of this court, and we expect to show that the agreement is, not only not in restraint of

trade and commerce, but highly beneficial to both; that Congress has never declared or intended to declare it criminal, and that it is deserving, not of judicial condemnation, but of judicial encouragement and approval.

Unless the act is subject to the interpretation hereinafter maintained, it is open to grave objections on constitutional grounds, which will be dealt with by other counsel.

The court has no jurisdiction to entertain this suit unless it can be found in the provision of some statute.

The bill sets forth simply the commission of a misdemeanor, and an intention on the part of the defendants to repeat the offense. No principle of the public remedial law of America or England is more fundamental than that the ordinary administration of criminal justice by the ordinary courts of common law, is sufficient for the repression of crime, and exclusive adhesion to it necessary for the protection of the citizen.

Courts of equity have no jurisdiction to restrain the commission of crime, or to enforce moral obligations and the performance of moral duties; nor will they interfere for the prevention of an illegal act merely because it is illegal.

High, Injunc. § 20; *Atty. Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 371; *Re Debs,* 158 U. S. 564, 593, 39 L. ed. 1092, 1106.

In the case at bar nothing whatever is alleged except the mere violation of the law and the intent to continue it. It is not alleged that such violation does, or will in fact, lead to the imposition of any unjust or unreasonable charge for the carriage of merchandise, or any unjust discrimination, or in any way diminish or impair any facilities for carrying on interstate commerce. Indeed, the avowed and apparent purpose of the agreement is to secure justice, equality, and improvement in interstate transportation; and this purpose stands admitted. All that is averred in the bill is that the method chosen to accomplish the purpose is prohibited by penal law.

The Anti-Trust Act contained provisions purporting to create a jurisdiction in equity to give relief by way of injunction; and perhaps the decision made by this court in the suit of *United States* v. *Trans-Missouri Freight Asso.* should be regarded as a determination that the Attorney General was at liberty, in case of any violation of the provisions of the act, to file a bill for an injunction, although it would seem necessary, upon familiar principles, to make out a case for equitable interposition in order to justify an appeal to the equitable jurisdiction thus created. But so far as it is sought to maintain the present action on the basis of an alleged violation of the provisions of the Interstate Commerce Act, no support can be derived from the decision above referred to. No such jurisdiction in equity is given by that act. And by implication at least it is withheld; for in certain cases specially mentioned in §§ 6 and 13 jurisdiction is expressly given to courts of equity to grant injunctions. If it is not given in other cases it must be taken to be for the reason that it was not intended. *Expressio unius est exclusio alterius.*

A clear understanding should be had at the outset with the meaning of the terms with which we are dealing. The contracts condemned by the Anti-Trust Act are such, and such only, as have the effect of restraining trade or commerce. The actual effect which the contracts have upon trade or commerce is the material consideration which determines whether or not they are included within the class.

This is self-evident. But the possible suggestion may be made that there is a class of contracts called or named "contracts in restraint of trade," and that the statute relates to these irrespective of their real and true effect.

There is no foundation for such a suggestion. There is no class of contracts known to the law by the name of contracts in restraint of trade irrespective of their actual effect upon trade. Whenever heretofore the point has been made in the case of a particular contract whether it was in restraint of trade, it has been determined by an inquiry into its actual effect upon trade. No suggestion would have been indulged that it was valid or void according as it might or might not be called a contract in restraint of trade.

Moreover, we are dealing with the criminal law, which never classes acts and makes them punishable under arbitrary names without regard to their supposed effects, as being actually mischievous or otherwise. This would be putting innocence on a par with guilt.

Doubtless there are certain contracts which readily come to mind where contracts in restraint of trade are spoken of, and which may therefore be taken as good examples of the class. They are such as directly purport and assume to restrain trade, and which consequently do, in some sense and degree at least, necessarily restrain it.

Mitchel v. *Reynolds,* 1 P. Wms. 181; *Davis* v. *Mason,* 5 T. R. 118.

Agreements for combinations among persons engaged in the same employment, to promote their supposed interests,—as, of laborers and employers, or merchants, or tradespeople, have rarely, if ever, been styled agreements in restraint of trade.

There seems to be no room for doubt concerning the meaning of the term "in restraint of trade or commerce." To restrain is to hold back, to check, to prevent, and thus to diminish. It is the injury to trade or commerce which the act is aimed to prevent. Unless, therefore, a contract injures and thus diminishes, or tends to diminish, trade or commerce, it cannot be deemed as in restraint of trade or commerce.

The agreement under which the Joint Traffic Association was formed, and the carrying out of which is sought to be enjoined, is not a contract in restraint of trade or commerce within the meaning of the act of July 2, 1890.

It does not in terms purport or assume to restrain or limit trade or commerce. No one of the parties to it undertakes in any

manner to refrain from doing business. Indeed, it evidently assumes that all the parties to it are to continue to do all the business which their facilities enable them to do, and to strive against each other for a larger share of the business in every way except one.

It does, indeed, purport to restrain competition, although in a very slight degree and on a single point. That is one of its objects; and if competition and commerce were identical, being but different names for the same thing, then indeed, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce; but surely no such identity will be pretended. Commerce is the interchange of commodities. Competition is one of its incidents only, and but an occasional incident. To identify a thing with one of its occasional incidents would be an error.

It is conceivable that a restraint upon competition, although competition is but an occasional incident of commerce must still necessarily restrain the latter; but, however conceivable, it is by no means true. The contrary is often true; namely, that such restraint enlarges, increases, and benefits it.

Competition is, in general, a good thing; it is what is called "the life of trade;" and artificial efforts to repress it may have an injurious effect opposed to sound public policy; but to infer from this that it is so under all circumstances, or that it may not be productive of the most extensive mischief, is a conclusion of ignorance utterly refuted by the teachings of experience, and long since discarded by all enlightened minds.

But it is worth while to employ a few words in pointing what the true and great benefit of competition is, and when it ceases to be beneficial and becomes the source of mischief.

There is a point beyond which competition may not only cease to be beneficial, but may become exceedingly injurious, not only to private individuals, but to the public also.

When prices have reached the point which places the profits of a particular industry on a level with the average profits of industries generally, the further prosecution of the struggle is likely to be injurious to the community, and the competition becomes destructive and deadly, precisely in proportion to the difficulty of disengaging the capital employed.

A restraint upon competition does not of necessity restrain trade, but may even promote trade.

If the restraint on competition effected by this agreement is necessarily in the eye of the law a bad thing in its effect upon trade, injuring and diminishing it, then, although trade is not in terms restrained by it, it is so in fact; and if, on the other hand, it is in the eye of the law beneficial to trade, or cannot be seen to be injurious (for the burden of proving its injurious tendency is upon the plaintiffs), it must be held to be unaffected by the statute.

The agreement in question, as a whole, and particularly so much of it as affects competition, is in the highest degree promotive of trade and commerce.

The charges of railroad transportation in the United States have been constantly diminishing, and they are now lower than in any country in the world; and it is probably true that the capital actually invested in railroads was at the time of the passage of the Anti-Trust Act receiving a smaller annual return than capital invested in any other business, notwithstanding the risk to capital invested in railroads is far greater than that which attends many other investments.

The reason why railroads are greater sufferers than other industries from the destructive effects of free competition is that the latter have several defenses against it, while the former have but one.

The only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreement among themselves to check and control it.

The history of railroad transportation proves that whenever a railroad depends for its support upon traffic upon which another railroad is in like manner dependent, and the competition thus engendered has continued for any considerable length of time, one competitor has either swallowed up the other, or, if both survive, it is under some *modus vivendi* established by agreement.

Suppose the case of several rival lines, all of them much-needed public facilities, and to support all of which there is a sufficient traffic at fair rates. The competition between them waxes fiercer and fiercer until the point is reached where there is no profit for the road possessing the least natural advantages. Can a word be said in defense of the proposition that public policy requires that this competition should proceed until it ends in the successive destruction of the weaker parties and the consequent loss of most useful public facilities?

From this we venture to draw the conclusion that competition is useful only where it is voluntary. Such a thing as competition made compulsory by law is utterly abhorrent to every principle of public policy.

Freedom of contract is, in general, the best public policy. Some will always be found who will abuse freedom, and make contracts of a mischievous public tendency. These contracts should be declared illegal, and may justify penal enactments. The courts have a broad jurisdiction to inquire into and determine what contracts are and what are not in conflict with public policy.

The extinction of competition by agreement has always been going on in the industrial world, and to the principal ways in which it is done no sound lawyers or thinkers have ever suggested any objection.

An ideally perfect railroad service would be one in which a shipper was assured that he could deliver any amount, large or small, of merchandise at any point in the country, at any time, destined for any other point, and have it delivered at its destination in safety and with despatch at a price known beforehand, which would fairly reward the

service and be no greater or less than that exacted from others in similar circumstances.

This would include the following requisites. (1) Uniformity in rates; (2) stability in rates; (3) equality in rates; (4) despatch and safety; (5) ease and convenience effected by classification and publicity; (6) reasonable rates.

It is an assured fact that whenever men are engaged in performing different parts of the same work they will co-operate in it; that is, they will agree with each other to the end that the work of each may be as little troublesome and as effective as possible. Self-interest and benevolence here concur with each other; and it may with equal confidence be said that men will under these circumstances always agree unless they are somehow prevented.

With the progress of railroad extension the need of stability, equality, and uniformity of rates became increasingly and at last overwhelmingly apparent, and the lack of them equally so. Under competitive conditions this was impossible except when brought about by agreement.

The present agreement was the effort of honorable men to enable themselves to carry on the most necessary of all businesses, without ruin to the property employed and without crime. The situation was unendurable and demanded an earnest effort to discover whether some agreement, other than pooling, could not be contrived which could be enforced and which would be effective. Whether the one actually devised will be effective if it is sustained cannot be absolutely affirmed. It has not yet been fully tried; but there is no objection to it of a legal nature, which upon any principle heretofore declared, can be sustained. Its object is not in any way to create a monopoly or raise rates; not, in any degree, to suppress or check competition other than secret and illegal competition. It punishes no conduct except criminal conduct. It seeks no other end than to maintain and enforce the observance of the Interstate Commerce Law, and to secure the stability, uniformity, and equality which are the chief objects of that law.

So far as respects all forms and modes of competition save one, the agreement saves and cherishes competition. The improvement of tracks and equipment, increase of facility, safety and despatch in the conduct of the service, are all encouraged. The more these qualities are exhibited by every line the larger traffic it gains, and all these increased rewards are its own. It is competition in rates only which is aimed at; and this is not forbidden directly or indirectly. A temporary adherence to agreed rates for a period not exceeding thirty days is made obligatory.

If further illustration were needed of the magnitude of the mischiefs brought about by unrestrained competition, of the impossibility of checking or preventing them in any other way than by mutual understanding and agreement between the railway lines, of the efficacy of that method, and of the necessity for voluntary self-regulation through co-operative agreement and association, it will be found in abundance in the often-repeated declarations of the Interstate Commerce Commission.

Boston Chamber of Commerce v. *Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 763; Report of the Interstate Commerce Commission (1887) 1 Inters. Com. Rep. 653, 667–669, 671; *Re Passenger Tariff & Rate Wars,* 2 Inters. Com. Rep. 341.

When competition leads to the transportation of property below the actual cost, fairly computed, it ceases to be legitimate. Fair and reasonable competition is a public benefit; excessive and unreasonable competition is a public injury. Competition is to be regulated, not abolished.

Re Southern R. & S. S. Co. (1887) 1 Inters. Com. Rep. 288.

It is inevitable that the probability that any prescribed rates will be accepted by the public as just shall to some extent be affected by the fact that at some previous time they have been lower, perhaps considerably lower.

Report of Interstate Commerce Commission, 1 Inters. Com. Rep. 671, 672; *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 148.

Every change in rates affects values; it disturbs trade and alters to some extent the value of contracts.

Re Chicago, St. P. & K. C. R. Co. 2 Inters. Com. Rep. 149.

Public good is best subserved when all the carriers which the needs of the country require are suffered to do business at a reasonable compensation.

Second Annual Report of Interstate Commerce Commission, 2 Inters. Com. Rep. 256.

If it is important to the public that a railroad once constructed should be maintained, the ability to make charges that will render its maintenance possible is also of public importance.

Id. 258.

There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition.

But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but not to be looked for when hostile relations have been inaugurated.

Id. 263, 264.

The practice of employing soliciting agents, and the somewhat kindred one of establishing transportation lines, Red, White, Blue, etc., is in a large degree fruitful in violations of the law, dishonest artifices, and wasteful expenditure.

Re Underbillings, 1 Inters. Com. Rep. 817.

This agreement is likely to be very efficient in its operation, for (1) it takes away the temptation to violate the law; (2) it binds the parties not to violate it, and mulcts them in a severe penalty if they do violate it; and (3) it makes it to the interest of all except the guilty parties to detect and expose any violation, and thus bring it to punishment.

Fourth Annual Report of Interstate Commerce Commission, 3 Inters. Com. Rep. 339, 340.

The deliberate and solemn declarations of the body constituted by Congress itself to supervise the conditions of interstate commerce and the actions of the various railroad systems in respect thereto prove every material assertion made in this brief, of the unmeasured mischiefs of unfair competition in rates, and of the inability of repressing them in any other way than by the making and observance of such agreements.

Agreements in all fundamental respects similar to the one in question have been in force during the whole history of railroad competition, and in some instances going much further in doing away with competition by actually pooling traffic or its receipts; but will anyone say that commerce, the interchange of commodities, has been thereby restrained, that there has been less of buying and selling by reason of them? Everyone must admit that trade and commerce have been prodigiously facilitated by them, and consequently increased.

The apprehensions of monopoly and oppression with which we are dealing have no foundation in reason, or in experience.

The agreement which this action seeks to condemn is not, by reason of any restraint effected by it upon competition, or otherwise, a contract in restraint of trade or commerce, but is on the contrary, highly needful to, and promotive of, both.

The contract is necessary to the uniformity, the stability, the fairness, and the justness of rates; to the ease, safety, and convenient despatch of the enormous transportation of the country; is necessary as a supplementary aid to the Interstate Commerce Law; and necessary to the prevention of crime, concealment, and perjury, otherwise sure to be committed to a prodigious extent, and necessary to the preservation of great public facilities; and is not a contract, combination, or conspiracy in restraint of trade within the meaning of the act.

If the Anti-Trust Act is interpreted as forbidding agreements such as the one under discussion, one of three alternatives must necessarily follow: (1) That all railroad transportation will be abandoned; or (2) the consolidation of all competing railroads under a single ownership, either governmental or private; or (3) that all competing railroad business must be carried on in constant and daily violation of criminal law.

It is not possible for competing railroad transportation to be carried on permanently without uniformity in rates, fixed either by express or tacit agreement.

The multitudinous expressions of the Interstate Commerce Commission all mean uniformity of rates by agreement, either express or tacit.

Congress never intended in enacting the Anti-Trust Act, to condemn and make criminal as restraints on trade those regulating contracts and arrangements respecting railroad traffic which, in some form, are everywhere adopted, and without which it is impossible the business of railroads could be carried on in conformity with its own laws.

Church of the Holy Trinity v. *United States*. 143 U. S. 457, 36 L. ed. 226.

The positions taken in this brief are fully supported by the weight of authority.

Kellogg v. *Larkin*, 3 Pinney, 150, 56 Am. Dec. 164; *Leslie* v. *Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; *People* v. *North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33; *Collins* v. *Locke*, L. R. 4 App. Cas. 674; *National Benefit Co.* v. *Union Hospital Co.* 45 Minn. 275, 11 L. R. A. 437; *Perkins* v. *Lyman*, 9 Mass. 522; *Manchester & L. R. Co.* v. *Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; Judge Cooley's article in the Railway Review, April 26, 1884, on the subject of Traffic Pooling; *Mitchel* v. *Reynolds*, 1 Smith, Lead. Cas. pt. 2, p. 508; *Perkins* v. *Lyman*, 11 Mass. 76, 6 Am. Dec. 158; *Pierce* v. *Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *Bowser* v. *Bliss*, 7 Blatchf. 344, 43 Am. Dec. 93; *Grundy* v. *Edwards*, 7 J. J. Marsh. 368, 23 Am. Dec. 409; *Morgan* v. *Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607; *Pike* v. *Thomas*, 4 Bibb. 486, 7 Am. Dec. 741; *Morse, Twist Drill & Mach. Co.*, v. *Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Hoyt* v. *Holly*, 39 Conn. 326, 12 Am. Rep. 390; *Hubbard* v. *Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Cook* v. *Johnson*, 47 Conn. 175, 36 Am. Rep. 64.

The opinion in the Trans-Missouri case suggested a distinction between agreements restraining competition between persons or corporations engaged in business of a public nature, and those engaged in private business. To show this a passage is quoted from the case of *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 408, 32 L. ed. 979, 984, citing the following cases: *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co.* v. *Citizens' Gas Co.* 115 U. S. 683, 29 L. ed. 510; *Shepard* v. *Milwaukee Gaslight Co.* 6 Wis. 539; *Chicago Gaslight & Coke Co* v. *People's Gaslight & Coke Co.* 121 Ill. 530; *St. Louis* v. *St. Louis Gaslight Co.* 70 Mo. 69; *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 462; *West Virginia Transp Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Western U. Teleg. Co.* v. *American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781.

The case of *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, furnishes no color of support to the view that any different rule is to be applied to the case of agreements between corporations engaged in business of a public nature from that which obtains in relation to agreements between individuals engaged in the like business.

The suggested distinction between persons engaged in business of a public nature and those engaged in ordinary business, which forbids the former and permits the latter to enter into agreements which may restrain competition merely, has no support in the authorities referred to.

This question whether agreements between such persons are injurious to trade depends always upon the actual effect of such agreements upon trade, such effect being determined by the character of the agreements and the purpose in view as shown by the agreements themselves and the facts of the situation which calls them forth and to which they were to be applied.

People v. *Fisher,* 14 Wend. 9, 28 Am. Dec. 501; *Hooker* v. *Vandewater,* 4 Denio, 349, 47 Am. Dec. 258; *Stanton* v. *Allen,* 5 Denio, 434, 49 Am. Dec. 282; *Cleveland, C. C. & I. R. Co.* v. *Closser,* 126 Ind. 348, 9 L. R. A. 754, 3 Inters. Com. Rep. 387; *Shrewsbury & B. R. R. Co.* v. *London & N. W. R. Co.* 17 Q. B. 652, 6 H. L. Cas. 113; *Hare* v. *London & N. W. R. Co.* 2 Johns. & H. 80; *Manchester & L. R. Co.* v. *Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

Agreements simply designed and operative to restrain ruinous competition are not in any manner objectionable when entered into by persons engaged in ordinary business. They have been repeatedly sustained, and, it is believed, nowhere condemned. But agreements between such parties, when calculated and designed simply to raise prices by suppressing ordinary competition, are equally obnoxious to the law.

Wickens v. *Evans,* 3 Younge & J. 318; *Skrainka* v. *Scharringhausen,* 8 Mo. App. 522; *Sayer* v. *Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613; *Collins* v. *Locke,* L. R. 4 App. Cas. 674; *Central Shade Roller Co.* v. *Cushman,* 143 Mass. 355; *Gloucester Isinglass & G. Co.* v. *Russia Cement Co.* 154 Mass. 92, 12 L. R. A. 563.

The agreement is in no manner in violation of the provisions of § 2 of the act. It creates no monopoly, nor is it an attempt or conspiracy to monopolize.

In the attempt made by the bill to array every possible objection to the agreement, there is an evident purpose to suggest that its 8th article, in connection with other subsidiary provisions, constitutes pooling, and therefore is a violation of § 5 of the Interstate Commerce Act. There is no foundation for such a charge. The agreement in no manner violates any provision of the Interstate Commerce Law.

Davies v. *Davies,* L. R. 36 Ch. Div. 359.

Mr. **Edward J. Phelps,** for the New York Central & Hudson River Railroad Company, appellee:

Whether the agreement by its terms violates the Federal law depends entirely on the inquiry whether it conflicts with any statute of the United States.

The bill is not based upon any statute, but proceeds apparently upon common-law grounds. No statute is referred to or charged to have been violated.

The United States has no common law.

Wheaton v. *Peters,* 8 Pet. 591, 8 L. ed. 1055; *United States* v. *Hudson,* 7 Cranch, 32, 3 L. ed. 259; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795.

The only statutes of the United States that are claimed to be infringed by the terms of the agreement are the Interstate Commerce Act of February 4, 1887, amended by acts of March 2, 1889, February 10, 1891, and February 8, 1895, and the Anti-Trust Act of July 2, 1890.

The agreement violates no provision of the Interstate Commerce Act.

The only provision in that act which is claimed to be infringed is contained in § 5, which prohibits "pooling."

"Pooling" means a division of the money earnings of traffic which this agreement does not contemplate.

Even assuming that this clause in the agreement can be construed into a violation of § 5 of the Interstate Commerce Act, this suit would not be maintainable, because it is not authorized by that act, and is precluded by its express provisions.

This court has no power to grant an injunction, either interlocutory or upon final decree, at the suit of the United States government, against the commission of a crime, where no other grounds for the injunction exist except that the act sought to be enjoined is an offense, unless such power is specially conferred by the statute.

Nor does it come within the general equity jurisdiction of the court, since an injunction of that character is unknown in equity jurisprudence.

United States v. *Debs,* 158 U. S. 564, 39 L. ed. 1092.

No power to grant an injunction against a "pooling" contract is conferred upon the court by the Interstate Commerce Act.

The Interstate Commerce Act does not authorize the commencement of any suit until an inquiry and decision of the Commissioners has first taken place, which in this case has not taken place.

The Anti-Trust Act of July 2, 1890, does not apply to the business of railroad transportation.

The case of *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, is by no means controlling in this case. The points of difference are clearly pointed out in the brief of Mr. Edmunds, and need not be restated.

We ask of the court a reconsideration of the conclusions reached by the majority of the judges in that decision, which overrules the judgment of six United States circuit and district judges who sat in the different stages of that case and this, and is opposed to the opinion of four members of this tribunal, and also overrules the decision of Mr. Justice Jackson in the case *Re Greene,* 52 Fed. Rep. 109, which is directly in point.

Its consequences are far-reaching and disastrous. It deprives the citizens of this country of the right, never before questioned in an English or American court, of making a large class of just and reasonable contracts, often absolutely necessary to the use of property, the transaction of business, and the fair compensation of industry.

Many decisions of this court to this effect are cited by Mr. Justice White, to which many more might be added.

Where a special statute fully covers the subject to which it is addressed, and a subsequent general statute contains words that might, if standing alone, receive a construction broad enough to include the same matter, the general will always give way to the special statute, and will be regarded as not intended to intrude on its province, unless that intention is clearly manifested. And especially will this construction be given where, as in the present case, the statutes, if taken to relate to the same thing, would not only be superfluous, but inconsistent.

Endlich, Stat. §§ 113, 137, 225; Bishop, Written Law, § 126; *Brewer* v. *Blougher,* 14 Pet. 178, 10 L. ed. 408; *Reiche* v. *Smythe,* 13 Wall. 164, 20 L. ed. 566; *Atkins* v. *Fibre Disintegrating Co.* 18 Wall. 272, 21 L. ed. 841; *United States* v. *Saunders,* 22 Wall. 492, 22 L. ed. 736; *Townsend* v. *Little,* 109 U. S. 504, 27 L. ed. 1012.

Says Chief Justice Marshall in *United States* v. *Wiltberger,* 5 Wheat. 95, 5 L. ed. 42: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself."

And in *United States* v. *Morris,* 14 Pet. 475, 10 L. ed. 548, the court remarked: "It has been long and well settled that such [penal] statutes must be construed strictly."

In *Harrison* v. *Vose,* 9 How. 378, 13 L. ed. 181, this court observed: "In the construction of a penal statute, it is well settled also that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."

In the case of *The Enterprise,* 1 Paine, 32, Judge Livingston said: "It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning."

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of the courts may hold an act to be a crime when the legislature never so intended. If there is fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

Per Dillon, Justice, in *United States* v. *Whittier,* 5 Dill. 219. See also *United States* v. *Sheldon,* 2 Wheat. 119, 4 L. ed. 199; *United States* v. *Hartwell,* 6 Wall. 395, 18 L. ed. 832; *United States* v. *Shackford,* 5 Mason, 445; *United States* v. *Clayton,* 2 Dill. 219; *United States* v. *Garretson,* 42 Fed. Rep. 22; Dwarris, Stat. 641; *Hubbard* v. *Johnstone,* 3 Taunt. 177.

But if any doubt could still exist on this point, it is completely set at rest by reference to the proceedings of Congress in both Houses, on the passage of the Anti-Trust Act.

2 Cong. Record, pt. 1, 96; pt. 4, 3153, 3857; pt. 5, 4099, 4104, 4123, 4753, 4837; pt. 6, 5453, 5950, 5981; pt. 7, 6116, 6208, 6312.

The Supreme Court of the United States held in the case of *Blake* v. *National Banks,* 23 Wall. 307, 23 L. ed. 119, that reference to the Congressional Journals may be had, on a question as to the meaning of the language of a statute.

Gardner v. *The Collector,* 6 Wall. 511, 18 L. ed. 894; *Church of the Holy Trinity* v. *United States,* 143 U. S. 465, 36 L. ed. 230.

Views of individual cannot be taken into consideration.

Aldridge v. *Williams,* 3 How. 24, 11 L. ed. 476; *United States* v. *Union P. R. Co.* 91 U. S. 79, 23 L. ed. 224; *District of Columbia* v. *Washington Market Co.* 108 U. S. 250, 27 L. ed. 717.

Assuming for the purposes of argument that the Anti-Trust Act does apply to railway traffic contracts, no provision of that law is violated by the agreement now under consideration.

The prohibitions of the act are two: (1) Against contracts, combinations, or conspiracies in restraint of trade or commerce; (2) the monopoly of, or the attempt or combination to monopolize, any part of the trade or commerce of the states or with foreign nations.

The agreement in this case is not "in restraint of trade or commerce."

The theory of the bill seems to be that the agreement comes within this description because it tends to restrict competition, and because any agreement which restrains competition is "in restraint of trade." Both these assumptions are erroneous; the one in fact, the other in law.

The agreement does not restrain competition to any such appreciable extent as would justify an injunction, except that competition which is unlawful because it is secret.

Assuming, again, against the fact, that a certain restriction of competition is the necessary result of this agreement if it is allowed to proceed, it plainly appears by its terms to be only such restraint of competition as is necessary to secure "just and reasonable rates."

By the Interstate Commerce Act all rates are required to be "reasonable and just." Every unjust and unreasonable charge is made unlawful. Schedules of rates are required to be published and kept open to the public inspection, and to be filed with the Commissioners, and not to be changed without due notice to the public and the Commissioners. Ample remedies, criminal and civil, are provided for the violation of these requirements, the enforcement of which is made the duty of the Commissioners. And the companies are also made subject to the state laws regulating rates.

The precise question, therefore, under this clause of the Anti-Trust Act, is whether a contract that produces a result which the Interstate Commerce Act in terms authorizes and provides for, and helps to repress a practice which that act forbids, is for that reason a contract for the unlawful restraint of trade. Or, in other words, whether it can be made unlawful by a forced construction of the general provisions of one statute of the United States, for a carrier company to provide by a traffic contract for the maintenance of those "just and reasonable rates" which another statute of the United States not only authorizes, but creates elaborate means for making permanent, and for preventing the secret changes of rates which the Interstate Commerce Act prohibits.

It is the statutes themselves that have prescribed a definition of this clause of the Anti-Trust Act, so far as it applies to railway traffic contracts, if it is held to apply to them at all, whatever its meaning as to other contracts may be.

That the just and reasonable rates of

transportation which the Interstate Commerce Act contemplates and provides for are rates that are just ard reasonable to the carriers as well as to the carried cannot be open to doubt. The very words "just and reasonable," employed in that act, necessarily imply that meaning. They are words of comparison and relation, and unless the rights of both parties to a contract are considered there can be no comparison.

It would be preposterous to call a price just and reasonable, that was not so to one side as well as to the other. This is the construction which this court has given to the Interstate Commerce Act in this very particular.

Texas & P. R. Co. v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405.

In the same opinion some observations of Mr. Justice Jackson, in the case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 37, 3 Inters. Com. Rep. 192, were cited with approbation.

This decision of Mr. Justice Jackson was affirmed in the United States Supreme Court.

Interstate Commerce Commission v. *Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92.

The validity of the agreement here in question must be determined, therefore, not merely upon the language of the Anti-Trust Act taken by itself, but by that language considered in connection with the other statute of the United States (which if this applies) is *in pari materia,* and which deals with the subject so much more exhaustively, and in words so plain that there can be no ambiguity raised in respect of them.

Granting that the Anti-Trust Act in terms makes all contracts unlawful that are in anywise "in restraint of trade," however reasonable and necessary they may be, is that to be understood to invalidate a railway contract made to secure that, and only that, which the Interstate Commerce Act as construed by this court recognizes as the right of railway companies to receive, and provides means to secure?

It will hardly be claimed that the elaborate provisions of the Interstate Commerce Act on the subject of reasonable rates are repealed by the Anti-Trust Act. If both are to stand as applicable to this case, they must be read together, the same as if their provisions were contained (so far as they refer to the same subject) in separate sections of the same act.

Quite aside from the provisions of the Interstate Commerce Act giving to the companies the right to just and reasonable rates, and to use proper means to maintain them, the same result is reached under the principles of common law.

The term "restraint of trade" employed in the Anti-Trust Statute has a common-law definition. And as the act furnishes no other, that, upon the general rules of construction, must be taken to be intended. To make the agreement an infringement of this statute, it must therefore be one that would be void at common law.

In the construction of statutes the rule is absolutely without exception, that where a word or phrase employed has a well-settled common-law definition distinct from its literal meaning, it is assumed to be the meaning intended, unless a different definition is prescribed in the statute.

Even the Constitution of the United States has been from the outset subjected by this court to this rule of construction.

Cooley, Const. Lim. 75.

The definition at common law, of a contract "in restraint of trade," is settled by a long course of decisions, and is no longer open to discussion. It is a contract which restricts trade beyond what is reasonable and just under the circumstances of the particular case.

Fowle v. *Parke,* 131 U. S. 88, 33 L. ed. 67; *Oregon Steam Nav. Co.* v. *Winsor,* 20 Wall. 64, 22 L. ed. 315; *Mogul S. S. Co.* v. *McGregor,* L. R. 21 Q. B. Div. 553, L. R. 23 Q. B. Div. 598 [1892] A. C. 25.

Even if it should be held that the Anti-Trust Act forbids any contract in restraint of trade, however just, reasonable, and necessary, the agreement here in question would not fall within the prohibition, because it does not tend to restrain trade or commerce, but rather to promote them.

A restraint upon excessive and unwholesome competition is not a restraint upon trade, but is necessary to its maintenance.

There is no ground whatever for asserting that the agreement infringes the provisions of the Anti-Trust Act against monopolies.

The definition of the word "monopoly," both in its legal and its ordinary signification, is the concentration of a business or employment in the hands of one, or, at most, of a few. That is the plain meaning of it as employed in the act. No feature of the agreement, in any view that can be taken of it, approaches this definition.

So far from tending toward the concentration of railroad transportation in fewer hands, it does not in any possible event withdraw it from a single road now in existence, nor throw the least obstacle in the way of the construction of others.

Its effect will be, if it is successful, not to diminish, but to increase transportation facilities by preserving roads that otherwise might be driven from the field.

If the construction of the Anti-Trust Act, which was adopted by the court in the Trans-Missouri case is to stand, the act, so far as thus interpreted and applied, is in violation of the provisions of the Constitution of the United States, since it deprives the defendants in error of their liberty and their property without due process of law, and deprives them likewise of the equal protection of the laws.

This point was not made on the argument of the Trans-Missouri case because no such construction of the act was anticipated by counsel. Nor was it considered by the court, since it is an unvarying rule that no objection to the constitutionality of a law will be considered unless raised by the party affected.

The question thus presented is not whether the act in general, or in its application to the many other cases to which it is obviously addressed, is unconstitutional, but whether the agreement here under consideration is one that may be prohibited by legislation without infringing the freedom of contract and the right of property, which the Constitution declares and protects.

The record before the court conclusively establishes the fact that the agreement here in question was designed and intended and is necessary, as determined by long practical experience, to the maintenance of just and reasonable rates, and to the proper discharge of the business of the companies.

And in the Trans-Missouri Case, where the contract under consideration was similar to the one here in controversy, though far more open to the objections here urged, it was conceded, both in the majority and minority opinions of the court, that its substantive character and purpose were such as the answers in the case aver and set forth.

It was for this reason believed by the minority of the judges that it could not have been the intention of Congress that such a contract should be made a penal offense. But it was held by the majority that the language of the act admitted of no other construction, though it was conceded in the opinion of the court that the arguments against that conclusion "bear with much force upon the policy of an act which should prevent a general agreement of rates among competing railroad companies, to the extent simply of maintaining those rates which were reasonable and fair."

And in the opinion of the minority of the court, by Mr. Justice White, he remarks, after stating the general features of the contract: "I content myself with giving this mere outline of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis."

The accuracy of the statement we have made above, of the legal effect upon this case of the Anti-Trust Act as so construed, is thus both established and conceded.

And the question distinctly arises whether legislation having such result is within the power of Congress.

The operation of the act as thus interpreted does in fact, by prohibiting the contract here in question, deprive the defendants, whether rightfully or not, of both liberty and property to a very grave and perhaps ruinous extent.

A just freedom of contract in lawful business is one of the most important rights reserved to the citizen under the general term of "liberty," for all human industry depends upon such freedom for its fair reward.

The use of property is an essential part of it, and when abridged the property itself is taken. Its use is abridged when the owner is precluded from any contract that is necessary or desirable in order to secure to him a just compensation for its employment.

And when any class in the community is so precluded it is to that extent "deprived of the equal protection of the laws."

These are elementary propositions in constitutional law, and have often been asserted by this court.

Pumpelly v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 459, 33 L. ed. 982, 3 Inters. Com. Rep. 209; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 360.

The only authority of Congress over the agreement in controversy is such as may be deduced from its power "to regulate commerce," and is limited by the reasonable necessities of such regulation.

As contracts of this sort are not in themselves wrongful, have never before been held or deemed unlawful, and have been customary in all kinds of business in which they have been found useful, the right to prohibit them, if it exists at all, must arise under what is called the police power.

But the general power of police regulation is not vested in Congress. It is reserved to the states.

United States v. *E. C. Knight Co.* 156 U. S. 11, 39 L. ed. 329.

No exercise of the police power, whether the authority on which it rests is general or special, can be allowed to infringe rights secured by the Constitution of the United States.

No public good can be attained and no public necessity relieved by unconstitutional means.

New Orleans Gas Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 661, 29 L. ed. 521; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691; *Mugler* v. *Kansas*, 123 U. S. 661, 31 L. ed. 210.

There is no case known to English or American law, in which any man can maintain a claim that the use of property should be furnished or services performed for him at less than a reasonable compensation, unless under a specific contract for a less sum.

Railway companies, though creations of the legislatures, from which they derive their powers and to whose enactments they are subject, are no exception to this rule. Though the legislatures may regulate and to a reasonable extent prescribe their rates, it has been repeatedly held by this court, and is now fully settled, that they cannot be reduced below a just and reasonable amount, fixed in view of all the circumstances of the case.

Reagan v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 459, 33 L. ed. 982, 3 Inters. Com. Rep. 209; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636.

The true test of the constitutionality of a law which abridges the freedom of contract must necessarily be found in the reasonableness and justice of the contract abridged.

The legislature cannot create restrictions upon the freedom of contract which the established rules of law and dictates of justice do not justify, and which result in tak-

ing one man's property for the unjust benefit of another.

The legislature cannot prohibit all contracts it may desire or attempt to prohibit.

Gibbs v. *Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984; *Austin* v. *Murray*, 16 Pick. 121; *Waters* v. *Wolf*, 162 Pa. 153; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832; *Shaver* v. *Pennsylvania Co.* 71 Fed. Rep. 931; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 389; *Godcharles* v. *Wigeman*, 113 Pa. 431; *John Spry Lumber Co.* v. *Sault Sav. Bank Loan & T. Co.* 77 Mich. 199, 6 L. R. A. 204; *Kuhn* v. *Detroit*, 70 Mich. 534; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *State* v. *Julow*, 129 Mo. 163, 29 L. R. A. 257; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482; *Loop* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220.

These cases fully support the proposition that just, reasonable, and lawful contracts in relation to property or business cannot be made unlawful by legislative enactments.

The police power when invoked to prohibit any act which is otherwise lawful, while it may fall short of the demands of public necessity by reason of constitutional limitations upon its exercise, can never exceed that necessity.

Chy Lung v. *Freeman*, 92 U. S. 280, 23 L. ed. 552; *People* v. *Jackson & M. Pl. Road Co.* 9 Mich. 285.

The public is not entitled to the alleged benefit which is claimed to be the result of the prohibition of this agreement.

The alleged public interest which is sought to be made the basis of this extravagant measure is not the interest of the public, but of one class, which can only be secured at the expense and unjust loss of another.

Interstate Commerce Commission, 7th Ann. Rep. 32.

Railroad companies have, for a long time past, been entirely unable, in consequence of the number of roads and the excessive competition, to maintain rates that are fairly remunerative.

Nor is it true that even the shippers themselves are interested, in the long run, in obtaining the carriage of their goods at rates unreasonably low.

But such agreements between competing railway companies are in fact necessary as has been demonstrated by long and disastrous experience.

Re Southern R. & S. S. Asso. 1 Inters. Com. Rep. 288; Report of Interstate Commerce Commission, 1 Inters. Com. Rep. 653–671; *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 148; Second Annual Report of Interstate Commerce Commission, 2 Inters. Com. Rep. 249, 256; Third Annual Report of Interstate Commerce Commission, 23, 25, 41; Fourth Annual Report of Interstate Commerce Commission, 4, 19, 21, 33; Fifth Annual Report of Interstate Commerce Commission, 263; Judge Cooley in Railway Rev. April 26, 1884.

In recapitulation of the points above presented upon the question of the constitutionality of the Anti-Trust Act, if it is held applicable to the agreement in this case, we respectfully insist—

1. That the act deprives the defendant of both liberty and property by forbidding a contract just and reasonable in itself, essential to the use of their property and the prosecution of their business, and never before held or claimed to be unlawful or wrong, and by which they only agree to do what they have a right to do.

That no such contract can be prohibited by law without a violation of the constitutional provision, whatever advantage to the public in keeping down rates of transportation may be expected to result from it.

And that in attempting such a prohibition, the case contemplated by the Constitution is distinctly presented, in which the legislature deems that a public benefit is to be effected by depriving the citizen of his liberty or property without due process of law.

2. That even if such a deprivation could be justified in any case, the public good in this case does not in any sense require it, because—

(*a*) Those intended to be benefited are not the public, but only one class of the public who are seeking a business advantage over another and much larger class, which is equally entitled to protection.

(*b*) Even if such a class is held to constitute the public, it is not entitled to the suppression of all restriction upon competition, because such a suppression would be a plain and oppressive violation of the equal rights of the other class, inasmuch as it would compel the latter to serve the former by labor and property without a just compensation.

(*c*) The legislation in question is not necessary, even if it is admissible. The complete suppression of all the restriction upon competition to which the public has a right to object is already effectually provided for by full and careful congressional legislation, in which no defect or insufficiency can be pointed out; so that the further suppression now proposed only extends to those restrictions, just and reasonable in themselves, to which the public have not a right to object. And even without that or any legislation, it would be utterly impossible under existing facts, notorious and undisputed, for railway companies to restrict competition to a degree that would result in any injury to the public.

(*d*) That if all restrictions upon competition were prohibited, the result, instead of a public advantage, would be a public calamity, and would injure rather than benefit the very class in whose behalf it is contended for.

3. That if it were admitted that further legislation against restriction against competition was both constitutional and necessary, the provisions of this act in forbidding all such restrictions are not justly adapted to the only end that is admissible on the

score of the public good,—the maintenance of just and reasonable rates,—but must result in an infringement of the liberty and property of the defendants, to a degree far beyond what is necessary to that end, and in no way conducive to it.

Whatever the merits of the agreement in question may be, no case for an injunction is presented.

Even though the authority to make the decree sought exists, the bill is insufficient to invoke it.

Story, Eq. Pl. § 271, note; Id., § 27a, note; *Campbell* v. *Mackay*, 1 Myl. & C. 618.

Mr. **George F. Edmunds,** for the Pennsylvania Railroad Company, appellee:

Before the agreement in question was made the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation. This is admitted by the pleadings.

This being true, these rates could not have been either raised or lowered, under the existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations as follows:

(1) To aid in fulfilling the purposes of the Interstate Commerce Act; (2) to cooperate with each other and adjacent transportation associations; (3) to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic; (4) to prevent unjust discrimination, and to secure the reduction and concentration of agencies; (5) and the introduction of economies in the conduct of the freight and passenger service.

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other purpose, and no secret or covert design in respect to the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named."

The first six articles of the contract provide for organization and administration, in respect of which no criticism has been suggested except as to § 5 of article 5 in connection with the Solicitor General's contention in regard to article 7.

Article 7 is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides: "Section 1. The duly published schedules of rates, fares, and charges, and the rules applicable thereto, now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate), are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto."

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the preexisting just, reasonable, and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason, and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or in any sense whatever. In this first provision of the agreement, they have engaged to do that very thing, and that very thing only, in the form of specific language referring to a specific and existing just, reasonable, and lawful state of things which they were then acting upon.

Section 2, of article 7 is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer to this is that the pleadings distinctly admit that there was no evasive intention, or any other unjust purpose, in any part of the arrangement. It is therefore not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this

section, it is sufficient to say that the very next section of the same article declares—

"That the powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or of any other law applicable to the premises, or any provision of the charters or the law applicable to any of the companies parties hereto; and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce Act, or any other law, and so forth; and it commands the managers to co-operate to these ends with the Interstate Commerce Commission.

When the managers, then, come to act under these powers, how do they start?

They start with rates established, not by the agreement, but before it was made, and confirmed by it, which were confessedly in conformity with and in promotion of the Commerce Act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the 2d section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all; and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned, contained in the Commerce Act.

Can this be an authority to restrain trade, under any definition of the word "restraint?" The only restraint is a restraint against violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce Act. If we assume that the restraint of trade mentioned in the Trust Act may be a restraint of innocent and just proceeding, can anyone maintain that it makes illegal an agreement, not to violate law, but to obey it?

It was obvious when this agreement was made, that rates then existing and being in all particulars reasonable and equal might in the course of changes in production, trade, and other conditions over which the railways could have no control, become unjust and unreasonable and inapplicable to the new conditions, and that in such a case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice, and law should require under such conditions. It was to provide for this that §§ 2 and 3 of the 7th article were inserted. They were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable, and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbidden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company or any number of companies affected could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But, it is asked, would not this road thus refusing be subjected to fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could compel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce Act itself requires in terms the same reasonable and just conduct by railways towards each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of article 7 is perfectly valid under any possible construction of the language of the Trust Act, as well as in perfect conformity with and in aid of the Commerce Act.

I may as well here compare the provisions of article 7, which contains the great leading feature of the whole agreement, with the agreement in the Trans-Missouri case. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in § 1 of article 7 had already been independently established, were in fact reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interest of the country. It was an engagement to stand by that state of things, and for the express purpose of continuing that happy state of things,—exactly those that the law requires,—that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, etc., and, in the very words of the agreement, for the purpose of mutual protection and nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and evi-

dently did not intend to impose, the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping and increasing rates, instead of for the purpose of (as in the Joint Traffic Association) of keeping them just and in conformity with law, whether by reduction, increase, or other readjustment.

Other essential differences are stated in my brief, which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a co-operative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the Trans-Missouri case alleged—there being, it will be remembered, no previously established rates that were agreed upon—that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated on page 34 of my brief. The practical constructions by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts..

The next principal contention of my learned brother is that article 8 of the agreement violates the Trust Act by restraining trade.

The words of the article are as follows: "Article 8. Proportions of competitive traffic. The managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done."

This article provides that the managers shall endeavor so far, and only so far, as obedience to the law—that is to say, conformity with the Commerce Act and conformity with the Trust Act—will permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than the law shall permit. If therefore the Trust Act condemns the efforts referred to, then not to make the efforts. If the Interstate Commerce Act, either in terms or spirit, is adverse to such an effort, the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with the law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads was necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line, and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the 8th article, then, was wholesome, lawful, and necessary, and it was the very thing which one of the clauses in the Commerce Act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a restraint of trade in one sense or another. It will be seen on examining the agreement, that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the Association. This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can be established that the thirty days' notice was too long. It is a matter of history that when the Commerce Act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce Act for notice was much too short, and that unjust inequalities have arisen, again and again, from charges in rates by particular roads on short notice, that favored customers and favorite localities, etc., would get advantages over others, in violation of the spirit and substance of the Commerce Act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads, and all communities, that

this period of thirty days, instead of ten, was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as regards the provision I have just spoken of, as well as regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support and in promotion of trade. Trade is a general word, and its operation, like all other operations that require co-operating and associating forces and arrangement, are advanced by, and indeed, cannot be carried on truly and honestly for public interest without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain, but advance and promote, the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics the safety valve of a locomotive, with its counterweight, regulates and restrains or gives off the accumulating steam in the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it even as an incident. Wherever it is practised it is practised apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various points of importance to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one state to another.

I refrain from making any observation on the constitutional question arising if the Trust Aot is to be construed as forbidding innocent contracts promotive of public policy, which I have insisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter will be left entirely to my brother, Mr. Phelps.

In respect to the meaning of the words of the Trust Act, I beg Your Honor's careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and second to the citations I have made from law writers, showing a distinct and separate classification of the two phrases, "restraint of trade" in general, and "partial restraint of trade." If these writers are correct (as nobody doubts, I think, they are), and these two phrases were known and treated in the law at the time of the passage of the act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the act shall be assigned to the first class and not carried over into the second.

Mr. **John K. Richards,** Solicitor General, for the United States, appellant in reply:

1. It is claimed that because nothing has been done under the agreement, no irreparable injury has been or can be shown, and therefore no injunction lies. But the antitrust law makes the agreement illegal, and vests the court with jurisdiction to prevent violations of the act. The carrying out of an illegal contract will result in irreparable injury to the public, and this sufficiently appears from the provisions of the law declaring the illegality and authorizing the injunction proceedings.

Mr. Carter said he would not reargue the questions considered in the Trans-Missouri case, and then proceeded to discuss what constitutes an agreement among railroads in restraint of trade, insisting that one which only prevents competition for the purpose of maintaining reasonable rates is not one in restraint of trade.

In the Trans-Missouri case this court held that such an agreement is in restraint of trade, regardless of its purpose and the actual result of its operation. So, after all, the argument of Mr. Carter was directed to a discussion anew of the questions argued and considered and settled by this court in the Trans-Missouri case.

2. It is insisted that an agreement in restraint of trade must restrain trade,—that is, reduce, or diminish it; that trade must be injured.

An agreement in restraint of trade may or may not diminish or reduce trade. The injury sought to be averted by prohibiting such agreements is the injury to the public. The stifling of competition, the creation of a monopoly, may increase the trade in the product controlled, but nevertheless to the injury of the public. To stifle competition is to create a monopoly and place the public at the mercy of the monopoly. The benefits resulting from cheaper products through monopolies have never been held by courts or legislatures as sufficient to overbalance the evils to the government and people from the creation of monopolies. It is a question of method, rather than result. Trusts and monopolies are forbidden in order to preserve competition, and thereby, as far as possible,

freedom of action in industrial and commercial life.

3. It is said that competition is not trade, but a mere incident of trade; that what prevents competition does not necessarily injure trade; on the contrary to restrict competition may benefit trade; that the whole world is now groaning under competition; that the hard rule of the survival of the fittest bears heavily upon the masses of the people; that there is a spirit of unrest, of dissatisfaction, and that, to avoid the effects of a ruinous competition among employers and employees, combination is the rule.

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing circumstances presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it.

Competition goes along with freedom, with independent action. This country was founded on the principles of liberty and equality. It sought to secure to every citizen an equal chance under the law. That is all the people have demanded or do demand, —a fair show in the race of life. Undoubtedly there is unrest, dissatisfaction, tendencies to anarchy and socialism, but these result, not from competition, but the throttling of competition by trusts and combinations, which seek to control the production and transportation and dominate both workingmen and consumers. Against these the individual citizen protests. He does not demand no competition, but fair competition. Combinations of workingmen accompany aggregations of capital. Thus the masses are arrayed against the classes. If combinations of capital were prevented, if competition among employers of labor were enforced, the independent demand for labor from competing sources would tend to fair wages, such as prices might warrant.

4. It is insisted that this agreement among railroads to prevent competition is not only innocent, but wise and salutary, because in the case of railroads competition is ruinous; that if competition reduces rates below the point of profit for any line, it must ultimately be bankrupted, for it cannot stop running nor can the capital invested in it be withdrawn.

But this argument applies to all great modern industries, in manufacture as well as transportation. Capital fixed in a valuable plant cannot be withdrawn, nor can labor skilled in one industry be readily shifted to another. Both manufacturers and workingmen are subject to the contingencies of competition. The establishment of a new plant with modern improvements may destroy some old one, in which both have virtually risked their all.

Why are not men who put their capital or skill into a manufacturing plant just as much entitled to protection against ruinous competition as those who put their money or skill in a transportation plant? Why should the railroads be singled out from all the great interests of this country, and alone be authorized to combine and prevent competition and keep up prices?

Competition drives the weak to the wall; the fittest survive; but the greatest good to the greatest number results. The opening of new mines, the construction of new plants, the establishment of industries with improved methods of production and greater natural advantages, lower the cost of production of the commodity to the benefit of the public; but the person or corporation or region which cannot lower its cost of production to meet the new competition must suffer. Under competition the most improved plant, the best trained labor, the most economical management, the wisest business sagacity and foresight, is not only encouraged but demanded for success.

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to in the public interest. The poorer roads can get the business by putting themselves in shape to do the business. Roads equally fitted to the work will naturally divide the competitive business in equitable proportions. Competition for traffic by improved service and lower rates will result naturally, not in ruining the roads, but in building them up. Under competition the best road fixes the rate; under combination the poorest road.

Is it just to make the public pay rates from Chicago to the east fixed by the poorest system protected by the Joint Traffic agreement?

5. It is contended that there is no restraint on trade, because the railways still exist, with all their facilities for transportation, ready and willing to serve the public, and with no inducement for service weakened; that competition in every desirable aspect remains, the railroads being permitted to compete, but compelled to do it openly, under the provision that a deviation from the association rate cannot be made except by resolution of the board of managers and after thirty days' notice to the managers.

It is true that railways exist, with their original facilities, but the inducement for improvement by cheaper methods of transportation is weakened, the motive for competition removed, the means of competition destroyed, and competition itself absolutely forbidden. The natural result of preventing competition is to keep up rates. An excess in rates over what would obtain under competition amounts in effect to a tax on the things transported. This operates as a burden upon commerce and a restraint of trade.

If a state should levy a tax on goods transported through it, this court would hold such an act unconstitutional because it has laid a burden upon interstate commerce. Moreover, to increase rates and maintain them at a point above what would obtain under competition, decreases the business of railroads, but enhances the cost of it, and thus restrains trade or commerce. Lower rates mean more traffic, both freight and passenger. Higher rates mean less traffic. It

may be to the interests of the railroads to increase the rates and lessen the traffic. The profits may be as much or more, but it is done at the expense of the public and to the restraint of trade.

6. It is insisted that rates must be stable, not subject to change; that a manufacturer cannot safely make goods or a dealer buy them unless he knows the rates for transporting them to market, and may rely upon these rates continuing; therefore agreements for maintaining rates at a fixed point should be encouraged.

It is obvious the manufacturer or dealer must not only take into account the rates he will have to pay to market, but the rates his competitors from every quarter by land and water will have to pay. It is impracticable to attain a cast-iron uniformity of this kind, and neither the interstate commerce law nor the Joint Traffic agreement attempts it.

Moreover, the agreement does not assume to prevent a change of rates. It virtually takes the power to change from the companies, but gives it to the managers of the association. For natural it substitutes arbitrary change. The protest against any change in rates is a protest against progress. The history of railroads shows a constant tendency towards cheaper rates. This has resulted from improvements forced by competition. The interest of the public lies, not in maintaining but in reducing rates, and to effect such reduction competition is essential.

7. Uniformity in rates is declared to be essential, and it is urged that the provisions of the interstate commerce law favoring uniformity cannot be enforced except by suppressing competition through this agreement; and, to illustrate the need of uniformity, it is said that without it an industry in Michigan equidistant from market with a similar industry in Indiana might be wiped out of existence by reduced rates in favor of the Indiana industry.

But neither the Interstate Commerce Act nor this agreement would prevent the alleged injustice suggested. The case instanced involves a reduction of rates on local traffic, and the agreement only applies to competitive traffic. There is nothing in the agreement to prevent any member of the association from changing the rates from local points; the jurisdiction of the association is restricted to competitive traffic.

Suppose two similar industries located in Pennsylvania, each supplying the New York market, and each equally distant from New York, but one located on the Pennsylvania and the other on the Lehigh Valley system. For one industry the Lehigh Valley is the only line to New York; for the other the Pennsylvania. There is nothing in the Interstate Commerce Act, or in the Joint Traffic Agreement, to prevent the Pennsylvania from reducing the rate to New York; nothing to prevent the Lehigh Valley from reducing such rate.

The uniformity demanded by the Interstate Commerce Act is uniformity in the treatment by each railroad of its own patrons. The 2d section prohibits a common carrier from charging one person more than another for the same service; it does not prohibit a carrier from charging one person more or less than another railroad charges another person for the same distance. The 3d section forbids a common carrier to give any undue preference or advantage to any person or locality over any other. But this only applies to the action of a railroad toward the people or places served by it. And so, too, with reference to the long and short haul provisions in the 4th section.

The interstate commerce law declares that all charges must be just and reasonable. It provides no means for securing this desideratum except competition. The only method of stifling competition when the law was passed was the pooling agreement, and this was prohibited. Competition between railroads was preserved, and to secure the benefit of competition to all patrons of each road it was provided that the competition should be open and above board, so the people might be advised of the existing rates, and each railroad was required to treat its patrons with uniformity, without discrimination and without preferences.

The object of the law was to secure the benefit of competition to all, and not permit a road to charge those shippers for whose patronage it does not have to compete excessive rates, while secretly granting lower rates to those shippers for whose patronage it does have to compete. The competition was to be restricted to where it belongs; between the railroads, and not between the shippers. If a railroad can afford to carry freight of one shipper for a certain rate, it can afford to carry for the same rate like freight under similar conditions for every other shipper.

Chicago & N. W. R. Co. v. *Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 912, 3 C. C. A. 347, 4 Inters. Com. Rep. 257.

8. It is contended that uniform rates should be maintained on the trunk lines in order to keep the weaker roads in operation for the benefit of the sections through which they run.

As I have pointed out, the agreement does not apply to local traffic. As to it each road has a monopoly, with power to fix its own rates. The agreement applies only to competitive traffic between great centers. The argument, then, amounts to this, that rates on through traffic are to be kept up in order to preserve the weak roads as going concerns for the benefit of the sections through which they run. What is this but to tax the many for the benefit of the few? It is not the function of the government to neutralize the advantages of locality. The people pay for these and are entitled to them. If I settle in a flourishing region on a good line, I pay for the privilege in the cost of land, in taxes, etc. If I settle in an undeveloped region on a poor road, I pay little for either the privilege or the land, and must expect to help bear the cost of development.

9. It is said that the Interstate Commerce Act was passed to suppress competition and secure uniformity in rates.

It was not passed to suppress competition,

but to preserve it and secure its benefits to all. Competition between independent lines was preserved, and uniformity enforced to secure the benefit of this competition to all. Each carrier was required to treat its patrons with uniform fairness, without preference and without discrimination. The only effective arrangement used at that time by the trunk lines to stifle competition was the pooling agreement, and this was prohibited. It was recognized that competition would keep the rates reasonable, and the long and short haul provision was intended to secure to all points on each road the benefit of such competition. Unjust discrimination and undue preferences by a railroad among its patrons was prohibited. Thus the benefits of open competition were insured to all. The policy was, among the patrons of each road, uniformity, but between the roads open competition.

First Report of Interstate Commerce Commission 1887, p. 33.

10. The point is made that railways are public highways, and the furnishing of railway transportation is a governmental function; therefore the government should eliminate the advantage of locality by enforcing absolute uniformity in rates, or permit the railroads to do it by preventing competition and maintaining arbitrary rates.

It may be conceded that the furnishing of railroad transportation is a public function, and therefore the government may regulate it. Government, state and Federal, has done this by forbidding the consolidation of competing lines, by prohibiting pooling contracts, and by making illegal all agreements in restraint of trade.

The absolute uniformity demanded is neither practicable nor desirable. Absolute uniformity extending to every rate, from every point, on every railroad, means absolute consolidation of control and absolute arbitrary rates, and this is absolutely inconsistent with competition. It admits of no competition. The desirable uniformity is that which goes along with competition, and supplements it, and secures its benefits to all shippers without distinction. Each railroad should be required to treat its patrons—persons and places—with fairness and equality, without preference or discrimination. It should not be required, however, to treat its shippers no better than other lines treat theirs. On the contrary it should be induced to treat its shippers the very best it can, and thereby make it incumbent upon competing lines to treat their shippers as well. It should be induced to do this, not only in rates, but in service. The rigid, cast-iron, arbitrary rule of absolute uniformity as between railroads, contended for, would logically prevent all competition, whether in rates or service.

Ames v. *Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 276, 36 L. ed. 703. 4 Inters. Com. Rep. 92; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commissioners,* 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391; *Freight Bureau Cases,* 167 U. S. 479, 42 L. ed. 243; *Southern P. Co.* v. *Railroad Commissioners,* 78 Fed. Rep. 236.

11. If the railroads are not to be permitted to combine and prevent ruinous competition, and establish and maintain reasonable rates by arbitrary methods, then, it is said, they must either abandon transportation, or consolidate, or persistently violate the law.

There is a virtual consolidation now of these roads under the agreement. The public is not interested in consolidation except as it affects competition. The Constitutions and laws of many states prohibit the consolidation of railroads, but only of competing railroads. Lines which do not compete may consolidate, and the public thus gains the benefit of broader and more economical administration. Railroads which compete may not consolidate, because it prevents competition and keeps up rates.

Public policy has demanded the prohibition of the consolidation of competing lines; for the same reason Congress enacted the anti-pooling section of the Interstate Commerce Act. The pooling of freights and the division of earnings is not bad in itself. It is bad because used to stifle competition. Equally bad is the Joint Traffic Agreement before the court, which operates as effectually as any pooling arrangement ever devised. The people have not stopped to inquire whether consolidation would result of necessity in unreasonable rates; neither have they stopped to inquire whether pooling would result necessarily in unreasonable rates. It is the tendency, not the absolute result, which has operated to prohibit consolidation, to prohibit pooling, to prohibit contracts in restraint of trade.

Pearsall v. *Great Northern R. Co.* 161 U. S. 646, 676, 40 L. ed. 838, 848; *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 698, 40 L. ed. 849, 858.

The railroads say that if they are not permitted to prevent competition they will compete, and in doing so will violate the interstate commerce law; that they should be permitted to combine for the purpose of preventing violations of the law, even if in doing so competition be prevented.

But to prevent competition is in itself to violate the law. Better the chance to violate one law than the certainty of violating another. Better the motive to violate one law than the mandate to violate another. If the ability the railroads employ to circumvent the law were used to observe it, neither this agreement nor the arguments in support of it would be before the court. The railroads promise to obey one law if the court will permit them to violate another. Would they keep the compact, if made? Respect for the law based solely on self-interest is delusive and evanescent.

12. An attempt is made to distinguish this case from the Trans-Missouri case by saying that here the association simply adopted the admitted fair and reasonable rates then in force and filed with the Interstate Commerce Commission by the companies: while in the Trans-Missouri case the association was given power to fix rates. But in the

Trans-Missouri Agreement the association was only given power to fix reasonable rates, and the fact that the rates fixed by the association during its existence were fair and reasonable was admitted by the denials and allegations of the answer, which appear in the statement of the case. *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 303, 41 L. ed. 1015.

There is no less power in the Joint Traffic Association than in the Trans-Missouri, indeed more power with respect to rates; and it is with the power alone that the court is concerned, not how the power has been or may be exercised.

In the Trans-Missouri case the association had been dissolved. The only question was the legal effect of the authority conferred by the agreement. If there were no power under the Joint Traffic Agreement to change rates, nevertheless the power to maintain rates arbitrarily would involve the authority to keep them up after progress and invention should render them excessive and unreasonable. But in point of fact, as pointed out, the Joint Traffic Agreement vests in the association, through the managers, with appeal to the board of control, the authority to change rates. This authority is more coercive than that conferred by the Trans-Missouri Agreement.

Under the Trans-Missouri Agreement, five days' written notice prior to each monthly meeting was required to be given the chairman of any proposed reduction in rates. At each monthly meeting the association voted on all changes proposed. All parties were bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association. . . . Should any member insist upon a reduction of rates against the views of the majority, and if in the judgment of said majority the rates so made affect seriously the rates upon through traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates to take effect the same day." Moreover, each member of the Trans-Missouri Association might, at its peril, make a rate without previous notice to meet the competition of outside lines, giving the chairman notice of its action, so the good faith of the transaction might be passed upon by the association at its next meeting.

Thus, under the Trans-Missouri Agreement each member might, at its peril, make a rate to meet outside competition, and each member might, upon giving ten days' notice make an independent rate notwithstanding the action of the association. But under the Joint Traffic Agreement no company can deviate from the rates as fixed by the managers except by a resolution of its board of directors, and thirty days after a copy of such resolution is filed with the managers. This absolutely prevents competition, and the intention to prevent competition is plain from the provision (art. 7, § 2, close). The managers upon receipt of such notice shall act promptly upon the same for the protection of the parties hereto.

Mr. Carter in his argument explained the operation of this clause. Thirty days' notice of the intention of any company, by resolution of its board, to deviate from the rates fixed by the association through its managers, was required in order that the association might have time to determine its course of action. If it could meet the rate proposed by the deviating member, it would do so. If it could not, it would take steps, in Mr. Carter's language, "to exterminate" the recalcitrant company. In no other way, according to Mr. Carter, could ruinous competition be prevented and the interests of all members of the association protected.

13. It may be conceded that the public along each line is interested in the line getting its fair share of the through traffic and earnings; and this it will get under competition. The local public is not entitled, however, to an arbitrary share of the through traffic and earnings. It has a right to no more than the advantages of the line attract. To give it more is to take what belongs to another line and another section. A prosperous section, with an intelligent, progressive population, makes a good railroad, and a good railroad attracts through traffic; and it is not just or right to take this traffic away and give to a poor road, in order to do for it what the public along its line ought to do.

14. The provisions of the interstate commerce law preventing discrimination and undue preferences have been discussed; they can be enforced without preventing competition. The 10th article of the Joint Traffic Agreement provides that "the managers shall decide and enforce the course which shall be pursued with connecting companies not parties to this agreement, which fail or decline to observe the rates, fares, and rules established under this agreement," and it is contended that this provision is necessary to prevent discrimination against one company and in favor of another by connecting lines; but a reading of the 3d section of the Interstate Commerce Act shows that the mischief suggested is fully provided for in its concluding paragraph, which provides that every common carrier shall afford equal facilities for the interchange of traffic and for receiving and forwarding freight or passengers from connecting lines, and shall not discriminate in their rates and charges between such connecting lines."

15. It is insisted that if Congress had intended the anti-trust law to prohibit every contract in restraint of trade, whether partial or general, reasonable or unreasonable, it would have used the language "every contract in any restraint of trade," etc., "is hereby declared to be illegal." It seems to me, and I submit to the court, that the expression "every contract in restraint of trade" is quite as comprehensive as "every contract in any restraint of trade," and much better language.

16. The reply to Mr. Phelps's attack upon the constitutionality of the anti-trust law as construed by this court in the Trans-Mis-

souri case, is to be found in the argument of Mr. Carter that railways are public highways, and in furnishing public transportation perform in a sense a governmental function. The right of the government to regulate contracts between carriers and shippers and to place proper restrictions upon contracts among carriers themselves, in order to protect the interests of the public, as affected by these instrumentalities of commerce, has not heretofore been seriously questioned. The states regulate the construction, maintenance, and operation of railroads, prescribing and enforcing maximum rates, preventing the consolidation of competing lines, and securing to the public the benefit of competition.

The doctrine laid down in the case of *Munn* v *Illinois*, 94 U. S. 113, 24 L. ed. 77, applies. When a man devotes his property to a public use, to that extent he grants the public an interest in that use. The same policy which supports the prohibition against consolidation, and the 5th section of the interstate commerce law forbidding the pooling of freights or the division of earnings, is the justification for the declaration that all contracts in restraint of trade shall be deemed illegal. The result of the consolidation, the pooling, or combination in restraint of trade, is beside the question. Congress is entitled to pass judgment upon the tendency of a contract in restraint of trade. If it deems such a contract reprehensible, injurious in its tendencies, it may prohibit it, whether the act will result in a particular case in the establishment of reasonable or unreasonable rates.

17. As to the remedy in case of an unreasonably low rate. Judge Cooley, in a well-considered opinion, *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137, 2 Inters. Com. Com. 231, approved by this court in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 511, 42 L. ed. 257, held that under the interstate commerce law the Commission has no power to determine that a rate is unreasonably low, and to order the carrier to refrain from charging such rate on such ground.

18. As to the remedy in case of an unreasonably high rate.

The common law requires that rates should be reasonable and fair. So does the interstate commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The Commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it. The shipper is therefore left to recover the excess in rate paid. I know of no case where the excess charged over a reasonable rate on interstate commerce has been recovered back. The amount involved in any particular transaction would be small; it would require years to carry the case through the courts, and no individual shipper would invite the ill will of a powerful railroad by beginning such a contest.

Moreover, the man who actually pays the freight is not the man who suffers from the unreasonable charge. Take the case of grain. The farmer sells to the commission merchant. If the rates are excessive he gets so much less for his grain, or the purchaser from the commission merchant pays so much more for it. The commission merchant who pays the freight has no real interest in the charge. Of course this is not always true, but it does apply with respect to the great shipments handled by middlemen.

Finally, it is questionable under the Interstate Commerce Act whether a suit to recover back an excess paid above a reasonable rate can be maintained, if the rate charged was that fixed in the schedule filed with the commission and published under the interstate commerce law.

Van Patten v. *Chicago, M. & St. P. R. Co.* 81 Fed. Rep. 545.

19. As the law stands the Commission has no power to prescribe or enforce rates. Competition secures reasonableness; the law enforces uniformity. In *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, this court, speaking by Mr. Justice Brewer, held that if Congress had intended to give the Commission power over rates it would have done so in unmistakable language. So, too, when Congress sees fit to take the railroads out of the operation of the natural law of trade it will do so in plain terms, and for independent competition will substitute governmental regulation.

Messrs. James A. Logan and *John G. Johnson* filed a brief for the Pennsylvania Railroad Company and other railroad companies, appellees.

Messrs. Robert W. de Forest and *David Willcox* filed a brief for the Central Railroad Company of New Jersey, appellee.

*Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court: [558]

This case has been most ably argued by counsel both for the government and the railroad companies. The suit is brought to obtain a decree declaring null and void the agreement mentioned in the bill. Upon comparing that agreement with the one set forth in the case of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 [41:1007], the great similarity between them suggests that a similar result should be reached in the two cases. The respondents, however, object to this, and give several reasons why this case should not be controlled by the other. It is, among other things, said that one of the questions sought to be raised in this case might have been, but was not, made in the other; that the point therein decided, after holding that the statute applied to railroad *companies as common car- [559] riers, was simply that all contracts, whether in reasonable as well as in unreasonable restraint of trade, were included in the terms of the act, and the question whether the contract then under review was in fact in restraint of trade in any degree whatever was neither made nor decided, while it is plainly raised in this.

Again, it is asserted that there are differences between the provisions contained in the two agreements, of such a material and

fundamental nature that the decision in the case referred to ought to form no precedent for the decision of the case now before the court.

It is also objected that the statute, if construed as it has been construed in the Trans-Missouri case, is unconstitutional, in that it unduly interferes with the liberty of the individual, and takes away from him the right to make contracts regarding his own affairs, which is guaranteed to him by the Fifth Amendment to the Constitution, which provides that "no person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." This objection was not advanced in the arguments in the other case.

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention, because, as is stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-Trust Statute has been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the Trans-Missouri case clearly shows, not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case on the part of the government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and un-
[560] lawful on that account. If *the agreement did not in fact restrain trade, the government had no case.

If it did not in any degree restrain trade, it was immaterial whether the statute embraced all contracts in restraint of trade, or only such as were in unreasonable restraint thereof. There was no admission or concession in that case that the agreement did in fact restrain trade to a reasonable degree. Hence, it was necessary to determine the fact as to the character of the agreement before the case was made out on the part of the government.

The great stress of the argument on both sides was undoubtedly upon the question as to the proper construction of the statute, for that seemed to admit of the most doubt, but the other question was before the court, was plainly raised, and was necessarily decided. The opinion shows this to be true. At page 341 of the report the opinion contains the following language:

"The conclusion which we have drawn from the examination above made of the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

. . . . .

"Does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local.

"To that end the association is formed and a body created which is to adopt rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is *to [561]
put a restraint upon trade or commerce as described in the act. For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade, no matter what the intent was on the part of those who signed it."

The bill of the complainants in that case, while alleging an illegal and unlawful intent on the part of the railroad companies in entering into the agreement, also alleged that by means of the agreement the trade, traffic, and commerce in the region of country affected by the agreement had been and were monopolized and restrained, hindered, injured, and retarded. These allegations were denied by defendants.

There was thus a clear issue made by the pleadings as to the character of the agreement, whether it was or was not one in restraint of trade.

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court, and was consciously, purposely, and necessarily decided. It cannot, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was assumed that the agreement did to some reasonable extent restrain trade. In discussing the question as to the proper construction of the act, the court did not touch upon the other aspect of the case, in regard to the nature of the agreement itself, but when the question of construction was finished, the opinion shows that the question as to the nature of the agreement was then entered upon and discussed as a fact necessary to be decided in the case, and that it in fact was decided. An unlawful intent in entering into the agreement was held immaterial, *but only for the [562]
reason that the agreement did in fact and by its terms restrain trade.

Second. We have assumed that the agree-

ments in the two cases were substantially alike. This the respondents by no means admit, and they assert that there are such material and substantial differences in the provisions of the two instruments as to necessitate a different result in this case from that arrived at in the other.

The expressed purpose of the agreement in this case is, among other things, "to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic." The companies agree that the schedule of rates and fares already duly published and in force and authorized by the companies, parties to the agreement, and filed, as to interstate traffic, with the Interstate Commerce Commission, shall be reaffirmed, and copies of all such schedules are to be filed, with the managers constituted under the agreement within ten days after it becomes effective. The managers may from time to time recommend changes in the rates, etc., and a failure to observe the recommendations is deemed a violation of the agreement. No company can deviate from these rates except under a resolution of its board of directors, and such resolution can only take effect thirty days after service of a copy thereof on the managers who, upon receipt thereof, "shall act promptly for the protection of the parties hereto." For a violation of the agreement the offending company forfeits to the association a sum to be determined by the managers thereof, not exceeding five thousand dollars, or more upon the contingency named in the rule.

So far as the establishment of rates and fares is concerned, we do not see any substantial difference between this agreement and the one set forth in the Trans-Missouri case. In that case the rates were established by the agreement, and any company violating the schedule of rates as established under the agreement was liable to a penalty. A company could withdraw from the association on giving thirty days' notice, but while it continued a member it was bound to charge the rates fixed, under a penalty for not doing so. [563] In *this case the companies are bound to charge the rates fixed upon originally in the agreement or subsequently recommended by the board of managers, and the failure to observe their recommendations is deemed a violation of the agreement. The only alternative is the adoption of a resolution by the board of directors of any company providing for a change of rates so far as that company is concerned, and the service of a copy thereof upon the board of managers as already stated. This provision for changing rates by any one company is absent from the other agreement. It is this provision which is referred to by counsel as most material and important, and one which constitutes a material and important distinction between the two agreements. It is said to be designed solely to prevent secret and illegal competition in rates, while at the same time providing for and permitting open competition therein, and that unless it can be regarded as restraining competition so as to restrain trade, there is not even an appearance of restraint of trade in the agreement. It is obvious, however, that if such deviation from rates by any company, from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. In order, therefore, not only to prevent secret competition, but also to prevent any competition whatever among the companies parties to the agreement, the provision is therein made for the prompt action of the board of managers whenever it receives a copy of the resolution adopted by the board of directors of any one company for a change of the rates as established under the agreement. By reason of this provision the board undoubtedly has authority and power to enforce the uniformity of rates as against the offending company upon pain of an open, rigorous, and relentless war of competition against it on the part of the whole association.

*A company desirous of deviating from the [564]
rates agreed upon and which its associates desire to maintain is at once confronted with this probability of a war between itself on the one side and the whole association on the other, in the course of which rates would probably drop lower than the company was proposing, and lower than it would desire or could afford, and such a prospect would be generally sufficient to prevent the inauguration of the change of rates and the consequent competition. Thus the power to commence such a war on the part of the managers would operate to most effectually prevent a deviation from rates by any one company against the desire of the other parties to the agreement. Competition would be prevented by the fear of the united competition of the association against the particular member. Counsel for the association themselves state that the agreement makes it the duty of the managers, in case the defection should injuriously affect some particular members more than others, to endeavor to furnish reasonable protection to such members, presumably by allowing them to change rates so as to meet such competition, or by recommending such fierce competition as to persuade the recalcitrant to fall back into line. By this course the competition is open, but none the less sufficient on that account, and the desired and expected result is to be the yielding of the offending company, induced by the war which might otherwise be waged against it by the combined force of all the other parties to the agreement. Under these circumstances the agreement, taken as a whole, prevents, and was evidently intended to prevent, not only secret but any competition. The abstract right of a single company to deviate from the rates becomes immaterial, and its exercise, to say the least, very inexpedient, in the face of this power of the managers to enlist the whole associa-

tion in a war upon it. This is not all, however, for the agreement further provides that the managers are to have power to organize such joint freight and passenger agencies as they may deem desirable, and if established they are to be so arranged as to give proper representation to each company, and no soliciting or contracting passenger or freight
[565] agency can be maintained by any of the *companies, except with the approval of the managers. They are also charged with the duty of securing to each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done. The natural, direct, and necessary effect of all these various provisions of the agreement is to prevent any competition whatever between the parties to it for the whole time of its existence. It is probably as effective in that way as would be a provision in the agreement prohibiting in terms any competition whatever.

It is also said that the agreement in the first case conferred upon the association an unlimited power to fix rates in the first instance, and that the authority was not confined to reasonable rates, while in the case now before us the agreement starts out with rates fixed by each company for itself and filed with the Interstate Commerce Commission, and which rates are alleged to be reasonable. The distinction is unimportant. It was considered in the other case that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable. By this agreement the board of managers is in substance and as a result thereof placed in control of the business and rates of transportation, and its duty is to see to it that each company charges the rates agreed upon and receives its equitable proportion of the traffic.

The natural and direct effect of the two agreements is the same, *viz.*, to maintain rates at a higher level than would otherwise prevail, and the differences between them are not sufficiently imporcant or material to call for different judgments in the two cases on any such ground. Indeed, counsel for one of the railroad companies on this argument, in speaking of the agreement in the Trans-Missouri case, says of it that its terms, while substantially similar to those of the agreement here, were less explicit in making it just and reasonable.

Regarding the two agreements as alike in their main and material features, we are brought to an examination of the question of the constitutionality of the act, construed
[566] as it has *been in the Trans-Missouri case. It is worthy of remark that this question was never raised or hinted at upon the argument of that case, although, if the respondents' present contention be sound, it would have furnished a conclusive objection to the enforcement of the act as construed. The fact that not one of the many astute and able counsel for the transportation companies in that case raised an objection of so conclusive a character, if well founded, is strong evidence that the reasons showing the invalidity of the act as construed do not lie on the surface and were not then apparent to those counsel.

The point not being raised and the decision of that case having proceeded upon an assumption of the validity of the act under either construction, it can, of course, constitute no authority upon this question. Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guaranties furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining *trade and com- [567]
merce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop; the withdrawal from business of any farmer, merchant, or manufacturer; a sale of the goodwill of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract

of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of
[568] that term; *and the sale of a goodwill of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have in our judgment little or no bearing upon the question under consideration. In *Hopkins* v. *United States* [*post*,290], decided at this term, we have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several states, or otherwise, has the power to prohibit, as in
restraint *of interstate commerce, a contract **[569]**
or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between states it is interstate commerce. The agreement affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.

If it did not do that, its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and, if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If in the absence of any contract or combination among the railroad companies the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether the state should itself build them or permit others to do it. The state did not build them, and as their building required, among other things,
the appropriation of *land, private individ- **[570]**
uals could not enforce such appropriation without a grant from the state.

The building and operation of a railroad thus required a public franchise. The state would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government which, as counsel observed, requires them to perform the service upon equal terms to all. This public service, that of transportation

of passengers and freight, is a part of trade and commerce, and when transported between states such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of Congress by virtue of its power to regulate commerce among the several states.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think Congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise when granted by the state becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which Congress may make under its power to regulate commerce among the several states. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think that when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one state to another, that ordinary freedom of contract in the use and management of their property requires the
[571] right to combine *as one consolidatd and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the rates provided for in the agreement may for the time be not more than are reasonable. They may easily and at any time be increased. It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit.

The prohibition of such contracts may in the judgment of Congress be one of the reasonable necessities for the proper regulation of commerce, and Congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of Congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the Constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution or in any of the amendments to that instrument. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312–336 [37: 463–471]; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447–479 [38: 1047–1058, 4 Inters. Com. Rep. 545].

Among these limitations and guaranties counsel refer to those which provide that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

*As to the former, it is claimed that the [572]
citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer* v. *Louisiana,* 165 U. S. 578 [41: 832], is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the Fourteenth Amendment to the Constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary, and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is, whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the Fifth, or any other amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen," to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie* v. *United States,* 157 U. S. 160 [39: 657].

Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se,*
may yet be prohibited by the *legislation of [573]
the states or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce, and a valid regulation thereof. The question is, for us, one of power only, and not of

policy. We think the power exists in Congress, and that the statute is therefore valid.

Finally, we are asked to reconsider the question decided in the Trans-Missouri case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved, and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

[574] *This court, with care and deliberation, and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri case.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already, deliberately and earnestly, considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be *secured by the [575]
presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads, is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which

the roads are engaged, or unfavorable and in restraint of that commerce. Upon that question it is contended that agreements be-
[576]tween railroad companies of the *nature of that now before us are promotive instead of in restraint of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while at the same time otherwise valuable railroad property is thereby destroyed or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached by reason of the peculiar nature of railroad property which must be operated and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to, not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus, the indirect but final effect of competition is claimed to be the raising of rates and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

[577] *The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is matter of very great uncertainty, depending upon many contingencies and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may and often do continue in existence and engage in their lawful traffic at some profit, although they are competing railroads and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible, but probable, that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do, in regard to the various questions herein discussed, we
think it unnecessary to *further allude to [578]
the other reasons which have been advanced for a reconsideration of the decision in the Trans-Missouri case.

The judgments of the Circuit Court of the United States for the Southern District of New York and of the Circuit Court of Appeals for the Second Circuit are *reversed* and the case remanded to the Circuit Court with directions to take such further proceedings therein as may be in conformity with this opinion.

Mr. Justice **Gray**, Mr. Justice **Shiras** and Mr. Justice **White** dissented. Mr. Justice **McKenna** took no part in the decision of the case.

HENRY HOPKINS *et al.*, *Appts.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 578-604.)

Buying and selling live stock by members of a stock exchange is not interstate commerce—by-law as to commissions—stock sent from another state—by-law as to telegrams—agents soliciting consignments—stock yards partly in one state and partly in another—refusal to do business with persons not members—when agreement or combination is within the statute.

1. The business of buying and selling live stock at stock yards in a city by members of a stock exchange as commission merchants is not interstate commerce, although most of the purchases and sales are of live stock sent from

other states, and the members of the stock exchange are employed to sell by letter from the owners of the stock in other states, and send agents to other states to solicit business, and advance money to the cattle owners, and pay their drafts, and aid them in making the cattle fit for market.

2. A by-law of the Kansas City Live-Stock Exchange, which regulates the commissions to be charged by members of that association for selling live stock is not in restraint of interstate commerce, or a violation of the act of July 2, 1890, to protect commerce from unlawful restraints.

3. A commission agent who sells cattle at their place of destination, which are sent from another state to be sold, is not engaged in interstate commerce; nor is his agreement with others in the same business, as to the commissions to be charged for such sales, void as a contract in restraint of that commerce.

4. In order to come within the provisions of the statute, the direct effect of an agreement of combination must be in restraint of trade or commerce among the several states or with foreign nations.

5. Restrictions on sending prepaid telegrams or telephone messages, made by a by-law of a live-stock exchange, when these restrictions are merely for the regulation of the business of the members, and do not affect the business of the telegraph company, are not void as regulations of interstate commerce.

6. The business of agents in soliciting consignments of cattle to commission merchants in another state for sale, is not interstate commerce; and a by-law of a stock exchange restricting the number of solicitors to three does not restrain that commerce, or violate the act of Congress.

7. The fact that a state line runs through stock yards, and that sales may be made of a lot of stock in the yards which may be partly in one state and partly in another, has no effect to make the business of selling stock interstate commerce.

8. A combination of commission merchants at stock yards, by which they refuse to do business with those who are not members of their association, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce.

[No. 210.]

Argued February 28, March 1, 1898. Decided October 24, 1898.

ON A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to bring up the whole case in which that court had certified certain questions. The suit was brought by the United States against Henry Hopkins *et al.*, members of the Kansas City Live Stock Exchange, to obtain the dissolution of the exchange and perpetually enjoin the members from entering into or from continuing in any combination of a like character. The Circuit Court of the United States for the District of Kansas, First Division, granted the injunction, and from the order granting it an appeal was taken by the defendants to said Circuit Court of Appeals, and upon a writ of certiorari the whole case was brought here for decision. *Reversed,* and case remitted to the said Circuit Court, with directions to dismiss the suit with costs.

See same case below, 82 Fed. Rep. 529.

Statement by Mr. Justice **Peckham:**

*This suit was commenced by the United **[579]**
States attorney for the district of Kansas, acting under the direction and by the authority of the Attorney General of the United States, against Henry Hopkins and the other defendants, residents of the state of Kansas and members of a voluntary unincorporated association known and designated as the Kansas City Live Stock Exchange. The purpose of the action is to obtain the dissolution of the exchange and to perpetually enjoin the members from entering into or from continuing in any combination of a like character.

As a foundation for the relief sought it was alleged in the bill that the members of this association, known as the Kansas City Live Stock Exchange, have adopted articles of association, rules, and by-laws which they have agreed to be bound by; that the business of the exchange is carried on and conducted by a board of directors at the Kansas City stock yards, which are situated partly in Kansas City in the state of Missouri and partly in Kansas City in the state of Kansas, the building owned by the stock-yards company being located one half of it in the state of Missouri and the other half in the state of Kansas, and half of the defendants have offices and transact business in these stock yards and in that part of the building which is within the state of Kansas and the other half in that part of the building which is in the state of Missouri; that the Kansas City Stock Yards Company is a corporation owning the stock yards, where the business is done by the members of the exchange; that substantially all the business transacted in the matter of receiving, buying, selling and handling their live stock at Kansas City is carried on by the defendants herein and by the other members of the exchange as commission merchants, and that large numbers of the live stock, consisting *of cattle and **[580]**
hogs and sheep bought and sold and handled at the stock yards by the defendants and their fellow members in the exchange, are shipped from the states of Nebraska, Colorado, Texas, Missouri, Iowa, and Kansas and the territories of Oklahoma, Arizona, and New Mexico; that when this stock is received at the stock yards it is sold by the defendants, members of the exchange, to the various packing houses situated at Kansas City, Missouri, and Kansas City, Kansas, and it is also sold for shipment to the various other markets, particularly Chicago, St. Louis, and New York; that vast numbers of cattle, hogs, and other live stock are received annually at the stock yards and handled by the members of the exchange.

The bill also alleges that large numbers of the live stock sold at the stock yards by the defendants are encumbered by mortgages thereon, executed by their owners in the various states and territories, which mortgages have been given to various defendants as se-

curity for money advanced by them to the different owners to enable them to feed and prepare the cattle for market, and that when the live stock so mortgaged are ready for shipment, they are sent to the defendants who have advanced the money and received the mortgages. and on the sale of the stock the amount of these advances and interest is deducted from the proceeds of the sale of the cattle by the commission merchants owning the mortgages; that ninety per cent of the members of the exchange make such advances, and that the market is largely sustained by means of the money thus advanced to the cattle raisers by the defendants, and that Kansas City is the only place for many miles about which constitutes an available market for the purchase and sale of live stock from the large territory located in the states and territories already named; that it is the custom of the owners of the cattle, many of them living in different states, and who consign their stock to the Kansas City stock yards for sale, to draw drafts on the commission merchants to whom the live stock is consigned, which the consignors attach to the bill of lading issued by the carrier, and the money on these drafts is advanced by the local banks throughout the western states
[581] *and territories. These drafts are paid by the consignees and the proceeds remitted to the various owners through the banks.

The business thus conducted is alleged to be interstate commerce, and it is further alleged that if the person to whom the live stock is consigned at Kansas City is not a member of the exchange, he is not permitted to and cannot sell or dispose of the stock at the Kansas City market, for the reason that the defendants, and all the other commission merchants, members of the exchange, refuse to buy live stock or in any manner negotiate or deal with or buy from a person or commission merchant who is not a member of the exchange, and thus the owner of live stock shipped to the Kansas City market is compelled to reship the same to other markets, and by reason of the unlawful combination existing among the defendants and the other members of the exchange the owner is prevented from delivering this stock at the Kansas City stock yards, and the sale of stock is thereby hindered and delayed, entailing extra expense and loss to the shipper, and placing an obstruction and embargo on the marketing of all live stock shipped from the states and territories to the Kansas City market which is not consigned to the stock-yards company or to the defendants, or some of them, members of the stock exchange.

It is alleged that the defendants, as members of the exchange, have adopted certain rules, among them being rules 9 and 16, which are particularly alleged to be in restraint of trade and commerce between the states, and intended to create a monopoly, in contravention of the laws of the United States in that behalf.

Rule 9 provides as follows:

"Section 1. Commissions charged by members of this association for selling live stock shall not be less than the following named rates."

Sections 2, 3, 4, 5, 6, and 7 relate to the amounts of such commissions, and it is alleged that in some instances the commissions are greater than had theretofore been paid.

Section 8 permits the members to handle the business of *nonresident commission firms [582]
when the stock is consigned directly to or from such firm, at half the rates fixed by the rule, provided the nonresident commission firms are established at the markets named in the section.

Section 10 prohibits the employment of any agent, solicitor, or employee except upon a stipulated salary not contingent upon the commissions earned, and it provides that not more than three solicitors shall be employed at one time by a commission firm or corporation, resident or nonresident of Kansas City.

Section 11 forbids any member of the exchange from sending or causing to be sent a prepaid telegram or telephone message quoting the markets or giving information as to the condition of the same, under the penalty of a fine as therein stated. The rule, however, permits prepaid messages to be sent to shippers quoting actual sales of their stock on the date made; also to parties desiring to make purchases on the market.

Rule 16 provides, in section 1, "that no member of the exchange shall transact business with any persons violating any of the rules or regulations of the exchange, or with an expelled or suspended member after notice of such violation, suspension, or expulsion shall have been issued by the secretary or board of directors of the exchange."

It is alleged that the defendants in adopting these rules and in forming the exchange and carrying out the same have violated and are violating the statute of the United States, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," and it is charged that it was the purpose of the defendants. in organizing the exchange and in adopting the rules mentioned, to prevent the shipment or consignment of any live stock to the Kansas City market unless it was shipped or consigned to the Kansas City stock yards and to some one or other of the defendants, members of the exchange, and to compel the shippers of live stock from other states and from the territories to pay to the defendants the commissions and charges provided for in rule 9, and to prevent such shippers *from placing their property on sale [583]
at the Kansas City market unless these commissions were paid.

The answer of the defendants admitted their forming the exchange and becoming members thereof, and adopting, among others, the rules specially mentioned in complainant's bill. They denied that the exchange itself engaged in any business whatever, and alleged that it existed simply in order to prescribe rules and provide facilities for the transaction of business by the members thereof, and to govern them by such rules and regulations as have been evolved and sanctioned by the developments of commerce, and which are universally recognized to be just and fair to all concerned.

It was further set up in the answer that

each member of the organization was in fact left free to compete in every manner and by all means recognized to be fair and just for his share of the business which comes to the point at which the members of the organization do business; that in adopting their rules they followed in all substantial respects the provisions which had been made upon the same subject respectively by the exchanges theretofore established at Chicago and East St. Louis, Illinois, and which have been since established at St. Louis, Omaha, Indianapolis, Buffalo, Sioux City, and Fort Worth. That the exchange at no time refused to admit as a member any reputable person who was willing to comply with the conditions of membership and to abide by the rules of the organization.

Various allegations in the bill as to the effect of the organization in precluding any sales or purchases of cattle other than by its members are denied.

The defendants also deny that the exercise of their occupation as commission merchants, doing business as members of the exchange, constitutes or amounts to interstate commerce within the meaning of the Constitution or laws of the United States. They allege that they have no part in or control over the disposition of the live stock sold by them to others, nor of live stock purchased by them as commission merchants acting for others. They allege that the stock-yards company permits any person whatsoever to
[584] transact business at its yards who *will pay the established charges of that company for its services, and that in point of fact a very large part of the business done at said yards is transacted by persons who are not members of the exchange and without the interposition of such members. It is also alleged in their answer that they are under no obligations to extend the privileges of the exchange to a person who is not a member thereof, who has violated its rules and been suspended from membership, and who has voluntarily withdrawn therefrom and announced his purpose to carry on his business as a competitor of the members of such exchange to the destruction of said organization and its rules and to the injury of his competitors.

It is also set up that defendants cannot be compelled to deal with a nonmember of their organization, or a person violating its rules, or with one who has been suspended for such violation, or who has withdrawn therefrom, or who has announced his intention to destroy said organization and to compete with the members thereof, and the defendants allege that they cannot be compelled to deal with any person whatsoever, and that they had a right to establish said exchange, and now have the right to maintain the same, and to require the observance of its rules and regulations on the part of their associates so long as they desire to retain the privileges of membership in the body. They allege that their rules are in harmony with the rules and regulations of commercial exchanges which have existed for more than a hundred years, and which are now to be found in every state almost in the United States and throughout the world, and that such rules and regulations are in all respects legal and binding. They deny all general and special allegations of illegal agreements, combinations, or conspiracies to violate any law of the United States or of the state of Kansas.

The complainants, in addition to their bill, used several affidavits, the tendency of which was to show that by virtue of the adoption of rules 9 and 16, the members of the exchange refused to deal with one who had violated a rule and had been suspended by reason thereof, and that by reason of this refusal to do business, the member thus suspended was *substantially incapacitated from [585]
carrying on his business as a commission merchant, and that by this combination defendants, in forming such rule and in adhering to it, have greatly injured the business of such member.

The defendants read counter-affidavits for the purpose of sustaining their answer, which were replied to by the complainants filing affidavits in rebuttal, and upon these affidavits and the pleadings above described an application for an injunction was made to the circuit court of the United States for the district of Kansas, first division. That court, after argument, granted an injunction restraining the defendants from combining by contract, express or implied, so as by their acts, conduct, or words to interfere with, hinder, or impede others in shipping, trading, selling, or buying live stock that is received from the states and territories at the stock yards in Kansas City, Missouri, and Kansas City, Kansas; also enjoining them from acting under the rules of the exchange known as rules 9 and 16, and from attempting to impose any fines or penalties upon members for trading or offering to trade with any person respecting the purchase and sale of any live stock; and also from discriminating in favor of any member of the exchange because of such membership, and especially from discriminating against any person trading at the stock yards, and from refusing, by united or concerted action, or by word, persuasion, threat, or by other means, to deal or trade with persons with respect to such live stock who are not members of the association, because they are not members of such association, or in any manner from interfering with the right and freedom of all and any persons trading or desiring to trade in such live stock at the stock yards, the same as if the exchange did not exist. The defendants were also enjoined from agreeing or attempting to limit the right of any person in business at the Kansas City stock yards to employ labor or assistance in soliciting shipments of live stock from other states or territories, and from enforcing any agreement not to send prepaid telegrams from the stock yards to any other state or territory.

The district judge delivered an opinion upon granting the *injunction, which will be [586]
found reported in 82 Fed. Rep. 529. From the order granting it an appeal was taken by the defendants to the United States circuit court of appeals for the eighth circuit, which court certified to this court certain questions

under the provisions of section 6 of the act of March 3, 1891, and thereupon a writ of certiorari was issued from this court, and the whole case brought here for decision.

Messrs. **L. C. Krauthoff,** *Gustavus A. Koerner,* and *John S. Miller,* for appellants.
Messrs. **Samuel W. Moore,** Special Assistant to the Attorney General, and *John K. Richards,* Solicitor General, for appellees.

[586] *Mr. Justice **Peckham,** after stating the facts, delivered the opinion of the court:

The relief sought in this case is based exclusively on the act of Congress approved July 2, 1890, chap. 647, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly spoken of as the anti-trust act. 26 Stat. at L. 209.

The act has reference only to that trade or commerce which exists, or may exist, among the several states or with foreign nations, and has no application whatever to any other trade or commerce.

The question meeting us at the threshold, therefore, in this case is, What is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several states or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several states or with foreign nations?

[587] *That part of the bill which alleges that no one is permitted to do business at the cattle market at Kansas City unless he is a member of this exchange, does not mean that there is any regulation at the stock yards by which one who is not a member of the exchange is prevented from doing business, although ready to pay the established charges of the stock-yards company for its services; but it simply means that by reason of the members of the exchange refusing to do business with those who are not members the nonmember cannot obtain the facilities of a market for his cattle such as the members of the exchange enjoy. It is unnecessary at present to discuss the question whether there is any illegality in a combination of business men who are members of an exchange not to do business with those who are not members thereof, even if the business done were in regard to interstate commerce. The first inquiry to be made is as to the character of the business in which defendants are engaged, and if it be not interstate commerce, the validity of this agreement not to transact their business with nonmembers does not come before us for decision.

We come, therefore, to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner?

As set forth in the record, the main facts are that the defendants have entered into a voluntary association for the purpose of thereby the better conducting their business, and that after they entered into such association they still continued their individual business in full competition with each other, and that the association itself, as an association, does no business whatever, but is simply a means by and through which the individual members who have become thus associated are the better enabled to transact their business; to maintain and uphold a proper way of doing it; and to create the means for preserving business integrity in the transaction *of the business itself. The [588]
business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stock yards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the state from other states or from the territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city.

If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stock yards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas *City personally, while in [589]
the other they are rendered under written instructions from the owner given in another

state. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City, is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another state.

The by-laws of the exchange relate to the business of its members who are commission merchants at Kansas City, and some of these by-laws, it is claimed by the government, are in violation of the act of Congress because they are in restraint of that business which is in truth interstate commerce. That one of the by-laws which relates to the commissions to be charged for selling the various kinds of stock, is particularly cited as a violation of the act. In connection with that by-law it will be well to examine with some detail the nature of defendants' business.

It is urged that they are active promoters of the business of selling cattle upon consignment from their owners in other states, and that in order to secure the business the defendants send their agents into other states to the owners of the cattle to solicit the business from them; that the defendants also lend money to the cattle owners and take back mortgages upon the cattle as security for the loan; that they make advances of a portion of the purchase price of the cattle to be sold, by means of the payment of drafts drawn upon them by the shippers of the cattle in another state at the time of the shipment. All these things, it is said, constitute intercourse and traffic between the citizens of different states, and hence the by-law in question operates upon and affects commerce between the states.

The facts stated do not, in our judgment, in any degree alter the nature of the services performed by the defendants, nor do they render that particular by-law void as in re-
[590] straint *of interstate trade or commerce because it provides for a minimum amount of commissions for the sale of the cattle.

Objections are taken to other parts of the by-laws which we will notice hereafter.

Notwithstanding these various matters undertaken by defendants, we must keep our attention upon the real business transacted by them, and in regard to which the section of the by-law complained of is made. The section amounts to an agreement, and it relates to charges made for services performed in selling cattle upon commission at Kansas City. The charges relate to that business alone. In order to obtain it the defendants advance money to the cattle owner: they pay his drafts, and they aid him to keep his cattle and make them fit for the market. All this is done as a means towards an end; as an inducement to the cattle owner to give one of the defendants the business of selling the cattle for him when the owner shall finally determine to sell them. That business is not altered in character because of the various things done by defendants for the cattle owner in order to secure it. The competition among the defendants and others who may be engaged in it, to obtain the business, results in their sending outside the city, to cattle owners, to urge them by distinct and various inducements to send their cattle to one of the defendants to sell for them. In this view it is immaterial over how many states the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.

The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a *combination in regard to [591]
the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other states are not necessarily a violation of the act, although such agreements may undoubtedly affect that commerce.

The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of and which itself constitutes interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for

services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself;
[592] they are charges for the *facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold.

The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands* v. *Manistee River Improvement Company,* 123 U. S. 288 [31: 149]; *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, 329, 330 [37: 463,469]; *Kentucky & I. Bridge Company* v. *Louisville & N. Railroad Company,* 37 Fed. Rep. 567 [2 L. R. A. 289, 2 Inters. Com. Rep. 351].

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act. The state may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to nonresidents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly. *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 1 [36:601, 4 Inters. Com. Rep. 79]. Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would in our judgment improperly extend the act to matters which are not of an interstate commercial nature.

[593] *It is not difficult to imagine agreements of the character above indicated. For example, cattle, when transported long distances by rail, require rest, food, and water. To give them these accommodations it is necessary to take them from the car and put them in pens or other places for their safe reception. Would an agreement among the landowners along the line not to lease their lands for less than a certain sum be a contract within the statute as being in restraint of interstate trade or commerce? Would it be such a contract even if the lands, or some of them, were necessary for use in furnishing the cattle with suitable accommodations? Would an agreement between the dealers in corn at some station along the line of the road not to sell it below a certain price be covered by the act, because the cattle must have corn for food? Or would an agreement among the men not to perform the service of watering the cattle for less than a certain compensation come within the restriction of the statute? Suppose the railroad company which transports the cattle itself furnishes the facilities, and that its charges for transportation are enhanced because of an agreement among the landowners along the line not to lease their lands to the company for such purposes for less than a named sum, could it be successfully contended that the agreement of the landowners among themselves would be a violation of the act as being in restraint of interstate trade or commerce? Would an agreement between builders of cattle cars not to build them under a certain price be void because the effect might be to increase the price of transportation of cattle between the states? Would an agreement among dealers in horse blankets not to sell them for less than a certain price be open to the charge of a violation of the act because horse blankets are necessary to put on horses to be sent long journeys by rail, and by reason of the agreement the expense of sending the horses from one state to another for a market might be thereby enhanced? Would an agreement among cattle drivers not to drive the cattle after their arrival at the railroad depot at their place of destination, to the cattle yards where sold, for less than a minimum sum, come within the statute? Would an agreement among
themselves *by locomotive engineers, firemen, [594]
or trainmen engaged in the service of an interstate railroad not to work for less than a certain named compensation be illegal because the cost of transporting interstate freight would be thereby enhanced? Agreements similar to these might be indefinitely suggested.

In our opinion all these queries should be answered in the negative. The indirect effect of the agreements mentioned might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce. As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate. *New York, Lake Erie & W. Railroad Company* v. *Pennsylvania,* 158 U. S. 431, at 439 [39: 1043, 1045].

An agreement may in a variety of ways

affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct. *Sherlock* v. *Alling*, 93 U. S. 99-103 [23: 819,820]; *United States* v. *E. C. Knight Company*, 156 U. S. 1, 16 [39: 325, 330]; *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590-597 [39: 544-547, 5 Inters. Com. Rep. 18]; *Parkersburg & O. River Transportation Company* v. *Parkersburg*, 107 U. S. 691 [27: 584]; *Ficklen* v. *Shelby County Taxing Dist. supra.* Reasonable charges for the use of a facility for the transportation of interstate commerce have heretofore been regarded as valid in this court, even though such charges might necessarily enhance the cost of doing the business. *Northwestern U. Packet Company* v. *St. Louis*, 100 U. S. 423 [25: 688]; *Cincinnati, P. B. S. & P. Packet Company* v. *Catlettsburg Trustees*, 105 U. S. 559 [26: 1169]; *Parkersburg & O. River Transportation Company* v. *Parkersburg*, 107 U. S. 691 [27: 584]; *Huse* v. *Glover*, 119 U. S. 543 [30: 487]; *Ouachita & M. R. Packet Company* v. *Aiken*, 121 U. S. 444 [30: 976, 1 Inters. Com. Rep. 379]; *St. Louis* v. *Western U. Telegraph Company*, 148 U. S. 92 [37: 380]. An agreement among the owners of such facilities, to charge not less than a minimum rate for their use, cannot be condemned as illegal under the act of Congress.

The fact that the above-cited cases relate to tangible property, the use of which was
[595] charged for, does not alter the *reasoning upon which the decisions were placed. The charges were held valid because they related to facilities furnished in aid of the commerce and which did not constitute a regulation thereof. Facilities may consist in privileges or conveniences provided and made use of, or in services rendered in aid of commerce, as well as in the use of tangible property, and so long as they are facilities and the charges not unreasonable an agreement relating to their amount is not invalid. The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle, and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle.

In *Brown* v. *Maryland*, 12 Wheat. 419 [6: 678], Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid.

The same view is enforced in *Emert* v. *Missouri*, 156 U. S. 296 [39: 430, 5 Inters. Com. Rep. 68].

The right of the cattle owners themselves to sell their own cattle is not affected or touched by the agreement in question, while the privilege of having their cattle sold for them at the market place frequented by defendants, and with the aid of one of them, is a privilege which they are charged for, and which is not annexed to their right to sell their own cattle.

It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge upon commerce itself might have. In
a case *like that the remedy would probably [596]
be forthcoming. *Parkersburg & O. River Transportation Company* v. *Parkersburg*, 107 U. S. 691 [27:584]. As was said by Mr. Justice Field, in *Sands* v. *Manistee River Improvement Company, supra*, "should there be any gross injustice in the rate of tolls fixed, it would not in our system of government remain long uncorrected." Pages 294, 295 [31:151].

But whether the charges are or are not exorbitant is a question primarily of local law, at least in the absence of any superior or paramount law providing for reasonable charges. (107 U. S. [27:] *supra.*) This case does not involve that question.

If charges of the nature described do not amount to a regulation of interstate trade or commerce because they touch it only in an indirect and remote way, or else because they are in the nature of compensation for the use of property or privileges as a mere facility for that commerce, it would for a like reason seem clear that agreements relating to the amounts of such charges among those who furnish the privileges or facilities are not in restraint of that kind of trade. While the indirect effect of the agreements may be to enhance the expense to those engaged in the business, yet as the agreements are in regard to compensation for privileges accorded for services rendered as a facility to commerce or trade, they are not illegal as a restraint thereon.

The facilities or privileges offered by the defendants are apparent and valuable The cattle owner has the use of a place for his cattle furnished by the defendants and all the facilities arising from a market where the sales and purchases are conducted under the auspices of the association of which the defendants are members, and in a manner the least troublesome to the owners and at the same time the most expeditious and effective. Each of these defendants has the right to have the cattle which are consigned to him taken to the cattle yards, where, by virtue of the arrangements made by defendants with the owners of the yards, the cattle are placed in pens, watered and fed, if necessary, and a sale effected at the earliest moment. It is these facilities and services which are paid for by a commission on the sale effected by the commission men. *If, as is [597]
claimed, the commission men sometimes own the cattle they sell, then the rules do not apply, for they relate to charges made for sell-

ing cattle upon commission and not at all to sales of cattle by their owners.

Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri,* 91 U. S. 275 [23: 347]; *County of Mobile* v. *Kimball,* 102 U. S. 691 [26: 238]; *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S. 196 [29: 158, 1 Inters. Com. Rep. 382]; *Hooper* v. *California,* 155 U. S. 648, at 653 [39: 297, 300, 5 Inters. Com. Rep. 610]; *United States* v. *E. C. Knight Company,* 156 U. S. 1 [39: 325].

But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility.

The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a broker whose principal lives outside of New York state, and who sends him the shares of stock or the bonds of a corporation created and doing business in another state, for sale, engaged in interstate commerce? If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or
[598] *bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western state to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different states and sells them on 'change in New Orleans, and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other states, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all of the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from states different from the one in which the exchange is situated and the sale made.

The theory upon which we think the bylaw or agreement regarding commissions is not a violation of the statute operates also in the case of the other provisions of the by-laws. The answer in regard to all objections is, the defendants are not engaged in interstate commerce.

But special weight is attached to the objection raised to section 11 of rule 9 of the bylaws, which provides against sending prepaid telegrams, as set forth in the statement of facts herein. It is urged that the purpose of this section is to prevent the sending of prepaid telegrams by the defendants* to their [599]
various customers in the different states tributary to the Kansas City market, and that the section is a part of the contract between the members of the exchange, and is clearly an attempt to regulate and restrict the sending of messages by telegraph and telephone between citizens of the various states and territories, and operates upon and directly affects the interstate business of communicating between points in different states by telegraph or telephone.

An agreement among the defendants to abstain from telegraphing in certain circumstances and for certain purposes is so clearly not an attempt to regulate or restrain the general sending of telegrams that it would seem unnecessary to argue the question. An agreement among business men not to send telegrams in regard to their business in certain contingencies, when the agreement is entered into only for the purpose of regulating the business of the individuals, is not a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different states may be commerce among the several states, yet an agreement or by-law of the nature of the one under consideration is not a burden, or a regulation of, or a duty laid upon, the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce.

The argument of counsel in behalf of the United States, that because none of the states or territories could enact any law interfering with or abridging the right of persons in Kansas or Missouri to send prepaid telegrams of the nature in question, therefore an agreement to that effect entered into between business men as a means towards the

proper transaction of their legitimate business would be void, is, as we think, entirely unsound. The conclusion does not follow from the facts stated. The statute might be illegal as an improper attempt to interfere with the liberty of transacting legitimate business enjoyed by the citizen, while the agreement among business men for the
[600] better conduct of their own *business, as they think, to refrain from using the telegraph for certain purposes, is a matter purely for their own consideration. There is no similarity between the two cases, and the principle existing in the one is wholly absent in the other. The private agreement does not, as we have said, regulate commerce or impose any impediment upon it or tax it. Communication by telegraph is free from any burden so far as this agreement is concerned and no restrictions are placed on the commerce itself.

The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements.

The next by-law which complainants object to is section 10 of the same rule 9, which prohibits the hiring of a solicitor except upon a stipulated salary not contingent upon commissions earned, and which provides that no more than three solicitors shall be employed at one time by a commission firm or corporation.

The claim is that these solicitors are engaged in interstate commerce, and that such commerce must be free from any state legislation and free from the control or restraint by any person or combination of persons. They also object that the rule is an unlawful inhibition upon the privilege possessed by each person under the Constitution to make lawful contracts in the furtherance of his business, and they allege that in this respect these members have surrendered their dominion over their own business and permitted the exchange to establish a species of regency, and that the by-law in regard to the employment of solicitors is one which directly affects interstate commerce.

McCall v. *California,* 136 U. S. 104 [34: 391, 3 Inters. Com. Rep. 181] is cited for the proposition that the solicitors employed by these defendants are engaged in interstate commerce. In that case the railroad company was itself engaged in such commerce, and its agent in California was taxed by rea-
[601] son of his business in soliciting *for his company that which was interstate commerce. The fact that he did not sell tickets or receive or pay out money on account of it was not regarded as material. His principal was a common carrier, engaged in interstate commerce, and he was engaged in that commerce because he was soliciting for the transportation of passengers by that company through the different states in which the railroad ran from the state of California. In the case before us the defendants are not employed in interstate commerce, but are simply engaged in the performance of duties or services relating to stock upon its arrival at Kansas City. We do not think it can be properly said that the agents of the defendants whom they send out to solicit the various owners of stock to consign the cattle to one of the defendants for sale are thereby themselves engaged in interstate commerce. They are simply soliciting the various stock owners to consign the stock owned by them to particular defendants at Kansas City, and until the arrival of the stock at that point and the delivery by the transportation company no duties of an interstate commerce nature arise to be performed by the defendants. As the business they do is not interstate commerce, the business of their agents in soliciting others to give them such business is not itself interstate commerce. Not being engaged in interstate commerce, the agreement of the defendants through the by-law in question, restricting the number of solicitors to three, does not restrain that commerce, and does not therefore violate the act of Congress under discussion.

The position of the solicitors is entirely different from that of drummers who are traveling through the several states for the purpose of getting orders for the purchase of property. It was said in *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489 [30: 694, 1 Inters. Com. Rep. 45], that the negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce.

But the solicitors for these defendants have no property or goods for sale, and their only duty is to ask or induce those who own the property to agree that when they send it to *market for sale they will consign it to the [602]
solicitor's principal, so that he may perform such services as may be necessary to sell the stock for them and account to them for the proceeds thereof. Unlike the drummer who contracts in one state for the sale of goods which are in another, and which are to be thereafter delivered in the state in which the contract is made, the solicitor in this case has no goods or samples of goods and negotiates no sales, and merely seeks to exact a promise from the owner of property that when he does wish to sell he will consign to and sell the property through the solicitor's principal. There is no interstate commerce in that business.

Hooper v. *California,* 155 U. S. 648 [39: 297, 5 Inters. Com. Rep. 610], is another illustration of the meaning of the term "commerce" as used in the Constitution of the United States. In that case contracts of marine insurance are stated not to appertain to interstate commerce, and cases are cited upon the nature of the contract of insurance generally at page 653 [39: 300, 5 Inters. Com. Rep. 615] of the opinion.

It is also to be remarked that the effect of the agreement as to the number of solicitors to be employed by defendants can only be remote and indirect upon interstate commerce. The number of solicitors employed has no direct effect upon the number of cattle transported from state to state. The solicitors

do not solicit transportation of the cattle. They are not in the interest of the transportation company, and the transportation is an incident only. They solicit a consignment of cattle to their principals, so that the latter may sell them on commission and thus transact their local business. The transportation would take place anyway, and the cattle be consigned for sale by some one of the defendants, or by others engaged in the business. It is not a matter of transportation, but one of agreement as to who shall render the services of selling the cattle for their owner at the place of destination.

We say nothing against the constitutional right of each one of the defendants, and each person doing business at the Kansas City stock yards, to send into distant states and territories as many solicitors as the business
[603] of each will warrant. This *original right is not denied or questioned. But cannot the citizen, for what he thinks good reason, contract to curtail that right? To say that a state would not have the right to prohibit a defendant from employing as many solicitors as he might choose proves nothing in regard to the right of individuals to agree upon that subject in a way which they may think the most conducive to their own interests. What a state may do is one thing, and what parties may contract voluntarily to do among themselves is quite another thing.

The liberty of contract as referred to in *Allgeyer* v. *Louisiana*, 165 U. S. 578, [41: 832], is the liberty of the individual to be free, under certain circumstances, from the restraint of legislative control with regard to all his contracts, but the case has no reference to the right of individuals to sometimes enter into those voluntary contracts by which their rights and duties may properly be measured and defined and in many cases greatly restrained and limited.

We agree with the court below in thinking there is not the slightest materiality in the fact that the state line runs through the stock yards in question, resulting in some of the pens in which the stock may be confined being partly in the state of Kansas and partly in the state of Missouri, and that sales may be made of a lot of stock which may be at the time partly in one state and partly in the other. The erection of the building and the putting up of the stock pens upon the ground through which the state line ran were matters of no moment so far as any question of interstate commerce is concerned. The character of the business done is not in the least altered by these immaterial and incidental facts.

It follows from what has been said that the complainants have failed to show the defendants guilty of any violations of the act of Congress, because it does not appear that the defendants are engaged in interstate commerce, or that any agreements or contracts made by them and relating to conduct of their business are in restraint of any such commerce.

Whether they refused to transact business which is not interstate commerce, except with those who are members of the exchange, and whether such refusal is justifiable or not, *are questions not open for discussion [604]
here. As defendant's actions or agreements are not a violation of the act of Congress, the complainants have failed in their case, and *the order for the injunction must be reversed,* and the case remitted to the Circuit Court of the United States for the District of Kansas, First Division, with directions to dismiss the bill with costs.

Mr. Justice **McKenna** took no part in the decision of this case.

J. C. ANDERSON *et al., Appts.,*
v.
UNITED STATES.

(See S. C. Reporter's ed. 604-620.)

Agreement among yard traders as to buying cattle—rule of a live-stock exchange—when not void.

1. An agreement among persons engaged in the common business, as yard traders, of buying at a city stock-yard cattle which came from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, or buy cattle from those who also sell to yard traders who are not members of the association, is not a violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies.
2. A rule of a live-stock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange.
3. Rules to enforce the purpose and object of such exchange, if reasonable and fair, cannot, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890.

[No. 181.]

Argued February 25, 28, 1898. Decided October 24, 1898.

ON A CERTIFICATE from and writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an order of the Circuit Court of the United States for the Western Division of the Western District of Missouri in an action brought by the United States against J. C. Anderson and other members of the Traders' Live-Stock Exchange, that the defendants be enjoined as associates of the Traders' Live-Stock Exchange from hindering others in selling at the stock yards at Kansas City, Missouri, live stock shipped there from other states and territories, and from interfering with freedom of access of others and equal facilities to and

in said stock yards, and from enforcing certain rules, etc. The order was taken by appeal to said Circuit Court of Appeals and the entire record removed therefrom to this court for final disposal. *Order reversed*, and case remanded to said Circuit Court of the United States for the Western Division of the Western District of Missouri, with directions to dismiss the action, with costs.

Statement by Mr. Justice **Peckham:**

[605] *This suit is somewhat similar to the Hopkins suit, just decided, and was brought by the United States against the defendants named, who were citizens and residents of the western division of the western district of Missouri, and members of a voluntary unincorporated association known and designated as the Traders' Live Stock Exchange, the suit being brought for the purpose of obtaining a decree dissolving the exchange and enjoining the members thereof from entering into or continuing any sort of combination to deprive any people engaged in shipping,
[606] selling, buying, and handling *live stock (received from other states and from the territories, intended to be sold at the Kansas City market), of free access to the markets at Kansas City, and to the same facilities afforded by the Kansas City stock yards, to defendants and their associate members of the Traders' Live Stock Exchange.

The bill was filed under the direction of the Attorney General of the United States by the United States district attorney for the western district of Missouri. It alleged in substance that the exchange was governed by a board of eight directors, who carried on the business thereof with the consent and approbation of the defendants, they personally being members of the exchange. It then made the same allegations in relation to the stock yards being partly in Kansas City, Kansas, and partly in Kansas City, Missouri, that are contained in the bill in the *Hopkins Case*, reported *ante*, 290, and also as to the sales of herds or droves of cattle which were at the time of the sale partly in one state and partly in another. It is further alleged that the Kansas City stock yards is a public market, and, next to the market at Chicago in the state of Illinois, is the largest live-stock market in the world, and vast numbers of cattle, hogs, and other live stock are received annually at the market, shipped from various states and from the territories, and are sold at the market to buyers who reside in other states and territories, and who reship the stock; that the stock is shipped to the market under contracts by which the shipper is permitted to unload the stock at the Kansas City stock yards, rest, water, and feed the same, and is accorded the privilege of selling the stock on the Kansas City market if the prices prevailing at the time justify the sale, and many head of such stock are so sold; that prior to the month of March, 1897, as alleged, the defendants herein were engaged as speculators at the Kansas City stock yards, and were buying upon the market and reselling upon the same market and reshipping to other markets in other states the cattle so received at the Kansas City stock yards; that all the live stock shipped to and received at these stock yards is consigned to commission merchants, who take charge of the stock when it is received, and who sell the same *to packing houses lo- [607]
cated at Kansas City, Missouri, and Kansas City in the state of Kansas, and they sell large numbers of cattle to the defendants herein.

The bill then alleges that the defendants "have unlawfully entered into a contract, combination, and conspiracy in restraint of trade and commerce among the several states and with foreign nations, in this, to wit, that they have unlawfully agreed, contracted, combined, and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market at the Kansas City stock yards as aforesaid; that the commission firm, person, partnership, or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to and cannot sell or dispose of said cattle at the Kansas City market as aforesaid to any buyer or speculator at the Kansas City stock yards unless said buyer or speculator is a member of the Traders' Live Stock Exchange, and these defendants, and each of them, unlawfully and oppressively refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator at the said Kansas City stock yards who is not a member of the said Traders' Live Stock Exchange; that by and through the unlawful agreement, combination, and conspiracy of these defendants the business and traffic in cattle at the said Kansas City stock yards is interfered with, hindered, and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the states and territories aforesaid to the Kansas City stock yards."

It is further alleged that, acting in pursuance of the unlawful combination above described, the board of directors of the exchange have imposed fines upon certain members of the exchange "who had traded with persons, speculators upon the markets, who were not members of the said live-stock exchange, and within three months last past have imposed fines upon members of said live-stock exchange who have traded with commission firms at said Kansas City stock yards *which said [608]
commission firms had bought from, and sold cattle to, speculators upon said market who were not members of the said live-stock exchange."

It was further stated in the bill that in carrying out the purposes and aims of this exchange and by the conduct of its members engaged in this alleged combination, conspiracy, and confederation, they were acting in violation of the laws of the United States, and particularly in violation of section 1 of the act of Congress, approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Mo-

nopolies," and in the prosecution of this unlawful combination they had agreed to hinder and delay the business of buying and selling cattle at the market named, and had confederated together in restraint of trade and commerce between the states, and that the object of the defendants in organizing the exchange was to prevent the sale by any commission merchant at the Kansas City stock yards of any cattle to any person who might be a buyer and speculator upon the market who is not a member of the exchange.

Accompanying this bill were several affidavits of individuals not members of the exchange, but who were traders or speculators at the stock yards, and those persons said that they were acquainted with the association in question and with the officers and members, and that they did everything in their power to prevent other persons who were not members from trading at the stock yards, and a number of instances were given in which the affiants who were not members of the exchange were endeavoring to do business with commission merchants and others at the exchange in question, when the affiants were notified that they could not continue in business unless they became members of the association, and where partnerships were engaged in business where one partner was a member of the association, the partner who was a member was notified that he could not continue in the partnership business with the other unless such other also became a member; that they had attempted to buy cattle from a great many commission firms and from their salesmen at these stock yards,
[609] *but as soon as they went into the yards where the cattle were that were consigned to commission firms, and attempted to purchase them, some of the defendants would appear, call the salesman aside, and, after having a conversation with such salesman, the latter would invariably return to affiant and say that he could not price cattle to the affiant or sell the same to him, as he had been warned by members of the exchange not to do so; that the Traders' Live Stock Exchange would not permit other traders and speculators upon the market, and that the exchange does not permit commission firms at the stock yards to sell cattle consigned to them to any trader or speculator upon the market who is not a member of the exchange, and that commission firms had been notified by the officers of the stock exchange not to sell to speculators on the market who were not members of the Live Stock Exchange, and where commission firms sold cattle to traders and speculators upon the market who were not members of the exchange, the association and members thereof would boycott the commission firm making such sales, and refuse to purchase any cattle from them, and refuse to go into the lots and look at cattle which had been consigned to them.

Upon the bill and affidavits application was made to the circuit court for the western division of the western district of Missouri for an injunction as prayed for in the bill, in opposition to which application various affidavits were read on the part of the defendants, and copies of the articles of association and by-laws of the exchange were attached to the affidavit of the president of the exchange and read on the motion.

Among other affidavits was that of the general superintendent of the stock-yards company, who said that he had known the organization, the Traders' Live Stock Exchange, since its formation, and that it had been a benefit to the live-stock market at Kansas City by furnishing constant buyers for cattle shipped to the market, no matter how large the receipts for any one day or series of days might be, and also by raising the standard of business integrity among its members, because it required every member to comply with his business promises *and verbal agree- [610]
ments; that no embargo was placed upon anyone purchasing or desiring to purchase cattle at the yards, but a free and open market was offered to all buyers and sellers; that the members of the organization were engaged in the business of buying and selling cattle on the market, and were competitors among and against each other; that their organization did not restrain or interfere with interstate or local commerce, and the members did not monopolize or attempt to monopolize the business of buying and selling cattle at Kansas City, nor did the organization in any manner tend to limit or decrease the number of cattle marketed at Kansas City, but that it had the contrary effect; that about eighty-five per cent of the total receipts for the years 1895, 1896, and 1897, at the Kansas City market of cattle had been billed to the Kansas City market alone for purposes of sale there.

Other affidavits were presented to the same effect. Also the affidavit of the president of the exchange. The president denied all allegations in relation to conspiracies to prevent other persons than members of the exchange from buying and selling cattle upon the Kansas City market, and on the contrary alleged that in buying cattle the defendants were in competition with each other, with the representative buyers of all the packing houses, with the representatives of the various commission merchants, who buy constantly on orders from a distance, and with others who buy on orders on their own account, none of whom are members of the exchange, and that with these various classes of buyers the defendants constantly deal, and that in selling cattle they compete with each other and with shippers and commission merchants offering stock for sale on the market, that the business in which these defendants are engaged is that of buying and selling cattle known as "stockers and feeders;" that the business is purely local to that market; that the defendants do not deal in quarantine cattle subject to government inspection or cattle shipped through to other markets, with or without the privilege of the Kansas City market, nor in fat cattle sold on the local market shipped to other states or to foreign countries; that except in rare instances both purchases and sales made *by the defendants [611]
are made from and to persons not members of the exchange, and that in the judgment of the president about ninety-nine per cent of

the transactions by the defendants are with persons not members of the exchange.

A copy of the articles of association is annexed to the affidavit, which contains the following preamble:

"We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interest connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions, or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization."

Rules 10, 11, 12, and 13 are as follows:

"Rule 10. This exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange.

"Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange.

"Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange.

"Rule 13. No member of this exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

These are the rules which are specially obnoxious to the complainants, and are alleged to be in their effect in violation of the Federal statute above mentioned.

Messrs. **R. E. Ball**, *I. P. Ryland*, and *John L. Peak*, for appellants:

Conceding all the facts charged in the bill, even those in which the bill contradicts itself, the appellants are not engaged in, and their organization does not relate to, interstate commerce.

Coe v. *Errol*, 116 U. S. 517, 29 L. ed. 715; *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257; *Hynes* v. *Briggs*, 41 Fed. Rep. 468; *United States* v. *E. C. Knight Co.* 60 Fed. Rep. 306; *Re Greene*, 52 Fed. Rep. 104; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 539, 5 Inters. Com. Rep. 30.

No act or agreement of appellants, charged in the bill, and no act or agreement not so charged, but from the doing or enforcing of which they are enjoined, constitutes any violation of the act of Congress, or is otherwise unlawful.

Prescott & A. C. R. Co. v. *Atchison, T. & S. F. R. Co.* 73 Fed. Rep. 438; *Mogul S. S. Co.* v. *McGregor*, L. R. 23 Q. B. Div. 544; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 387; *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*, 143 Ill. 210, 18 L. R. A. 190; *Dueber Watch Case Mfg. Co.* v. *E. Howard Watch & Clock Co.* 35 U. S. App. 16, 66 Fed. Rep. 637, 14 C. C. A. 14; *United States* v. *Addyston Pipe & Steel Co.* 78 Fed. Rep. 712.

The decree is violative of the rights secured by the Fifth Amendment to the Constitution of the United States, forbidding that any person be deprived of liberty or property without due process of law; and, if the act of July 2d, 1890, is correctly construed by the circuit court, it is itself violative of said amendment.

Munn v. *Illinois*, 94 U. S. 123, 24 L. ed. 83; *Kuhn* v. *Detroit*, 70 Mich. 534; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Godcharles* v. *Wigeman*, 113 Pa. 431; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Ritchie* v. *People*, 155 Ill. 108, 29 L. R. A. 79; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389; *Caldwell* v. *Texas*, 137 U. S. 697, 34 L. ed. 818; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832.

Messrs. **John R. Walker** and *John K. Richards*, Solicitor General, for appellee:

The transportation of persons from one state into another is interstate commerce.

Norfolk & W. R. Co. v. *Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178; *Philadelphia & R. R. Co.* v. *Pennsylvania*, 15 Wall. 232, 21 L. ed. 146; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *State, Wolf*, v. *Pullman Palace Car Co.* 16 Fed. Rep. 193.

Telegraph messages passing over lines from one state to another constitute a portion of interstate commerce.

Western U. Teleg. Co. v. *James*, 162 U. S. 650, 40 L. ed. 1105; *Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Western U. Teleg. Co.* v. *Ratterman*, 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co.* v. *Norman*, 77 Fed. Rep. 13; *St. Louis* v. *Western U. Teleg. Co.* 39 Fed. Rep. 59.

The right to import from one state into another carries with it, by necessary implication, the right of sale at the place where the importation terminates.

Lyng v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 58; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347.

Not until merchandise in the original packages is once sold by the importer does it become subject to taxation by the state.

Waring v. *Mobile,* 8 Wall. 110, 19 L. ed. 342.

The right to bring an article into a state carries with it the right to sell it.

Spellman v. *New Orleans,* 45 Fed. Rep. 3, 3 Inters. Com. Rep. 575; *Re Harmon,* 43 Fed. Rep. 372.

The buying, selling, and transportation incident thereto, constitute commerce.

United States v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325; *Lehigh Valley R. Co.* v. *Pennsylvania,* 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87; *Re Rahrer,* 140 U. S. 545, 35 L. ed. 572; *McCall* v. *California,* 136 U. S. 104, 34 L. ed. 392; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Welton* v. *Missouri,* 91 U. S. 275, 23 L. ed. 347; *W. A. Vandercook Co.* v. *Vance,* 80 Fed. Rep. 786.

The statutes of the state intended to regulate or tax, or to impose any other restrictions upon, the transmission of persons or property, or telegraphic messages from one state to another, are void.

Wabash, St. L. & P. R. Co. v. *Illinois,* 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785.

No state can impose a tax on persons engaged in the sale of goods in such state, which are introduced into the state from other states.

Walling v. *Michigan,* 116 U. S. 446, 29 L. ed. 691; *Cook* v. *Pennsylvania,* 97 U. S. 566, 24 L. ed. 1015; *Hall* v. *DeCuir,* 95 U. S. 485, 24 L. ed. 547; *Hannibal & St. J. R. Co.* v. *Husen,* 95 U. S. 465, 24 L. ed. 527; *Welton* v. *Missouri,* 91 U. S. 275, 23 L. ed. 347; *Ward* v. *Maryland,* 12 Wall. 418, 20 L. ed. 449; *Re Lebolt,* 77 Fed. Rep. 587.

No state can, under any pretense whatever, interfere with the right of any person who engages in interstate commerce, whether in the sale of goods introduced into the state from other states, or in soliciting orders for goods to be so introduced.

Ex parte Loeb, 72 Fed. Rep. 657; *Southern R. Co.* v. *Asheville,* 69 Fed. Rep. 359; *Ex parte Hough,* 69 Fed. Rep. 330, 5 Inters. Com. Rep. 327; *Re Minor,* 69 Fed. Rep. 233, 5 Inters. Com. Rep. 329; *Aultman, M. & Co.* v. *Holder,* 68 Fed. Rep. 467; *Ex parte Scott,* 66 Fed. Rep. 45; *Re Schechter,* 63 Fed. Rep. 695, 4 Inters. Com. Rep. 849; *Re Mitchell,* 62 Fed. Rep. 576, 4 Inters. Com. Rep. 767; *Re Worthen,* 58 Fed. Rep. 467, 4 Inters. Com. Rep. 484; *Re Rozelle,* 57 Fed. Rep. 155; *Re Ware,* 53 Fed. Rep. 783; *Re Sanders,* 52 Fed. Rep. 802, 18 L. R. A. 549, 4 Inters. Com. Rep. 305; *Re McAllister,* 51 Fed. Rep. 282; *Re Nichols,* 48 Fed. Rep. 164; *Re Tyerman,* 48 Fed. Rep. 167; *Re Houston,* 47 Fed. Rep. 539, 14 L. R. A. 719; *Re Kimmel,* 41 Fed. Rep. 775, 3 Inters. Com. Rep. 114; *Adams Exp. Co.* v. *Ohio State Auditor,* 165 U. S. 194, 41 L. ed. 683; *Osborne* v. *Florida,* 164 U. S. 650, 41 L. ed. 586; *Brennan* v. *Titusville,* 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658; *Harman* v. *Chicago,* 147 U. S. 396, 37 L. ed. 216; *Crutcher* v. *Kentucky,* 141 U. S. 47, 35 L. ed. 649; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Asher* v. *Texas,* 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Corson* v. *Maryland,* 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Moran* v. *New Orleans,* 112 U. S. 69, 28 L. ed. 653; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *The Daniel Ball,* 10 Wall. 557, 19 L. ed. 999; *Sinnot* v. *Davenport,* 22 How. 227, 16 L. ed. 243; *Smith* v. *Turner,* 7 How. 283, 12 L. ed. 702; *Re Bell,* 25 U. S. App. 379, 68 Fed. Rep. 183, 15 C. C. A. 360.

The conduct and method of doing business by the members of this Traders' Live Stock Exchange is an interference with interstate commerce, and the association is illegal.

Allgeyer v. *Louisiana,* 165 U. S. 578, 41 L. ed. 832; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *Re Rahrer,* 140 U. S. 545, 35 L. ed. 572.

*Mr. Justice **Peckham,** after stating the facts, delivered the opinion of the court: [612]

There is really no dispute in regard to the facts in the case. Although the bill contains various allegations in regard to conspiracies, agreements, and combinations in restraint of trade and in violation of the Federal statute, yet there is no evidence of any act on the part of the defendants preventing access to the yards or preventing purchases and sales of cattle by anyone, other than as such sales may be prevented by the mere refusal on the part of the defendants as "yard traders" to do business with those who are also yard traders, but are not members of the exchange, or with commission merchants where such commission merchants themselves do business with yard traders who are not members of the exchange. In other words, there is no evidence and really no charge against the defendants that they have done anything other than to form this exchange and adopt and enforce the rules mentioned above, and the question is whether by their adoption and by peacefully carrying them out without threats and without violence, but by the mere refusal to do business with those who will not respect their rules, there is a violation of the Federal statute.

This case differs from that of *Hopkins* v. *United States, ante,* 290, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins Case* were only commission merchants who sold the cattle upon commission as a compensation for their services.

Counsel for the government assert that any agreement or combination among buyers of cattle coming from other states, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce.

The facts first set forth in the complainants' bill, upon which to base the claim that the business of defendants is interstate commerce, we have already decided in the *Hopkins Case* to be immaterial. The particular situation of the yards, partly in Kansas and

partly in Missouri, we there held was a fact without any weight, and one which did not [613] make business interstate *commerce which otherwise would not partake of that character.

There remain in the bill of the complainants the allegations that the cattle come from various states and are placed on sale at these stock yards which form the only available market for many miles around, and that they are sold by the commission merchants and are bought in large numbers by the defendants who have entered into what the complainants allege to be a contract, combination, and conspiracy in restraint of trade and commerce among the several states, which contract, etc., it is alleged is carried out by defendants unlawfully and oppressively refusing to purchase cattle from a commission merchant who sells or purchases cattle from any speculator (yard trader) who is not a member of the exchange; and it is further alleged that by these means the traffic in cattle at the Kansas City stock yards is interfered with, hindered, and restrained, and extra expense and loss to the owner incurred, and that thereby the defendants have placed an obstruction and embargo on the marketing of cattle shipped from other states. All these results are alleged to flow from the agreement among the defendants as contained in the by-laws of their association, particularly those numbered ten, eleven, twelve, and thirteen, copies of which are set forth in the statement of facts herein.

There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading, or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock-yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to.

In regard to rule 10, the question is whether, without a violation of the act of Congress, persons who are engaged in the common business as yard traders of buying [614] cattle at the *Kansas City stock yards, which come from different states, may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the association.

It will be remembered that the association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction.

The defendants are engaged in buying what are called "stockers and feeders;" being cattle not intended for any other market, and the demand for which is purely local. They have arrived at their final destination when offered for sale, and there is free and full competition for their purchase between all the members of the exchange, as well as between them and all buyers not members thereof, who are not also yard traders. With the latter the defendants will not compete, nor will they buy of the commission men if the latter continue to sell cattle to such yard traders.

Have the defendants the right to agree to conduct their own private business in this way?

Whether there is any violation of the act of Congress by the adoption and enforcement of the other rules of the association, above referred to, will be considered hereafter.

It is first contended on the part of the appellants that they *are not engaged in inter- [615]
state commerce or trade, and that therefore their agreement is not a violation of the act. They urge that the cattle, by being taken from the cars in which they were transported and placed in the various pens hired by commission merchants at the cattle yards of Kansas City, and there set up for sale, have thereby been commingled with the general mass of other property in the state, and that their interstate commercial character has ceased within the decisions of this court in *Brown* v. *Houston*, 114 U. S. 622 [29: 257], and *Pittsburg & S. Coal Company* v. *Bates*, 156 U. S. 577 [39: 538].

On the other hand, it is answered that the cases cited involved nothing but the general power of the state to tax all property found within its limits, by virtue of general laws providing for such taxation, where no tax is levied upon the article or discrimination made against it by reason of the fact that it has come from another state, and it is maintained that the agreement in question acts directly upon the subject of interstate commerce and adds a restraint to it which is unlawful under the provisions of the statute.

In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement as evidenced by the by-laws is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act.

It has already been stated in the *Hopkins Case*, above mentioned, that in order to come within the provisions of the statute the di-

rect effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states, or with foreign nations. Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld
[616]as *not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. As is said in *Smith* v. *Alabama,* 124 U. S. 465, 473 [31; 508, 510, 1 Inters. Com. Rep. 804]: "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations." The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise, there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void. We think, within the plain and obvious construction to be placed upon the act, and following the rules in this regard already laid down in the cases heretofore decided in this court, we must hold the agreement under consideration in this suit to be valid.

From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to insure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements
[617]have been voluntary, and the *penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce. The agreement now under discussion differs radically from those of *United States* v. *Jellico Mountain Coal & Coke Company,* 46 Fed. Rep. 432 [3 Inters. Com. Rep. 626, 12 L. R. A. 753]; *United States* v. *Coal Dealers' Association,* 85 Fed. Rep. 252, and *United States* v. *Addyston Pipe & Steel Company* [54 U. S. App. 723], 85 Fed. Rep. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration that they form no basis for its decision. This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of *cattle for sale [618]
is therefore furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof.

The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If, while enforcing the rules, those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such trade

or commerce can be affected thereby only most remotely and indirectly, and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits, and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted. *Sherlock* v. *Alling*, 93 U. S. 99 [23: 819]; *Smith* v. *Alabama*, 124 U. S. 465, 473 [31: 508, 510]; *Pittsburg & S. Coal Company* v. *Louisiana*, 156 U. S. 590, 598 [39: 544, 548, 5 Inters. Com. Rep. 18].

If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible
[619] effect of such a course *of conduct upon interstate commerce is quite remote, not intended, and too small to be taken into account.

The agreement lacks, too, every ingredient of a monopoly. Everyone can become a member of the association, and the natural desire of each member to do as much business as he could would not be in the least diminished by reason of membership, while the business done would still be the individual and private business of each member, and each would be in direct and immediate competition with each and all of the other members. If all engaged in the business were to become members of the association, yet, as the association itself does no business, it can and does monopolize none. The amount and value of interstate trade is not at all directly affected by such membership; the competition among the members and with others who are seeking purchasers would be as large as it would otherwise have been, and the only result of the agreement would be that no yard traders would remain who were not members of the association. It has no tendency, so far as can be gathered from its object or from the language of its rules and regulations, to limit the extent of the demand for cattle or to limit the number of cattle marketed or to limit or reduce their price or to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market. While in case all the yard traders are not induced to become members of the association, and those who are such members refuse to recognize the others in business, we can see no such direct, necessary or natural connection between that fact and the restraint of interstate commerce as to render the agreement not to recognize them void for that reason. A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid.

This case is unlike that of *Hopkins* v. *Oxley Stave Company* [49 U. S. App. 709] 83 Fed. Rep. 912, to which our attention has been called. The case cited was decided without reference to the act of Congress *upon [620]
which alone the case at bar is prosecuted, and the agreement was held void at common law as a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. It was also said that the fact could not be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seemed to the court to be one of great utility. No question as to interstate commerce arose and none was decided.

From what has already been said regarding rule 10, it would seem to follow that the other rules (11, 12, and 13) are of equal validity as rule 10, and for the same reasons. The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress.

We are of opinion, therefore, that *the order* in this case *should be reversed* and the case remanded to the Circuit Court of the United States for the Western Division of the Western District of Missouri with directions to dismiss the complainants' bill with costs.

Mr. Justice **Harlan** dissented.

Mr. Justice **McKenna** took no part in the decision of this case.

NORTHWESTERN NATIONAL BANK, Riordan Mercantile Company, and Arizona Lumber & Timber Company, *Appts.*,

v.

B. N. FREEMAN, F. L. Kimball, and J. H. Hoskins, Copartners, as the Arizona Central Bank, and John Vories.

(See S. C. Reporter's ed. 620-631.)

Chattel mortgage; when valid—notice to subsequent assignee—mortgage of domestic animals.

1. A chattel mortgage of a given number of articles out of a larger number is valid as against those who know the facts.
2. The record of a chattel mortgage to other mortgagees is not notice to an assignee of a subsequent mortgage; but he is chargeable with notice of the record of a prior mortgage on the same property by the same mortgagor to his assignor.

8. A mortgage of domestic animals covers their increase, although it is silent as to such increase.

[No. 18.]

Argued April 15, 18, 1898. Decided October 24, 1898.

APPEAL from the Supreme Court of the Territory of Arizona to review a judgment of that Court affirming a judgment of the District Court of that Territory in favor of the appellees, B. N. Freeman *et al.*, deciding the priority of mortgages, etc.

Statement by Mr. Justice **McKenna:**

[621] *The appellees recovered judgment in the district court, which was affirmed on appeal to the supreme court of the territory, from which an appeal has been taken to this court.

The facts found by the territorial supreme court are as follows:

"On July 10, 1890, Harry Fulton, one of the defendants in the court below, executed an alleged chattel mortgage for $7,500, payable in one year, in favor of the Arizona Central Bank, one of the appellees herein and plaintiffs in the court below; that the description in said mortgage of the property purporting to be covered by it is as follows: '1,200 lambs, marked, ewes with hole in left ear and split in right, wethers, hole in right ear and split in left ear; 1,600 ewes marked hole in left ear and split in right ear; 2,200 wethers marked hole in right ear and split in left ear, making 5,000 sheep in all with the Fulton brand.'

"That on said day said Fulton executed another alleged mortgage for $4,000, payable in ninety days, in favor of John Vories, one of the appellees herein and one of the defendants in the court below; that the description in said alleged mortgage is as follows: 'Wethers and dry ewes to the number of 1,000, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right.'

"That on said day said Fulton owned and possessed 6,200 sheep that were herded and run together, and this was all he owned, said sheep being marked as follows: 'Ewes and ewe lambs split in the right ear, hole in the left; wethers and wether lambs reverse;' and both of the said appellees had knowledge of this fact at the time they accepted their alleged mortgages, the one on 5,000 head and
[622] the other on 1,000 head, 200 head *not being included in either of said mortgages, all of said sheep having the same mark and running in the same herd, and none of them being capable of identification save only by the ear mark put on them as aforesaid, and that therefore there was no way by which any of said sheep could be distinguished from any of the others.

"That said Fulton continued in the ownership and possession of all of said sheep, save only such as died, were sold by him, consumed, or lost, until the 18th December, 1893. At no time did appellees, or either of them, ever take or ever have possession of said sheep, or any of them, or of the increase thereof, nor were any of said sheep or the increase thereof ever by anyone identified, designated, or in any way segregated, apportioned or substituted to the or on account of the said pretended mortgages, or of either thereof. From date of said mortgages (July 10, 1890) to January 4, 1893, said Fulton from time to time sold of said sheep as follows: 1,700 head, at $3 per head, that were by said Fulton accounted for, and the proceeds of which he deposited with the appellee Arizona Central Bank; that both of said appellees knew of these sales and consented to them.

"On January 4, 1893, said Fulton executed a mortgage for $8,885 in favor of Arizona Lumber & Timber Company, one of appellants herein and one of the defendants in the court below, covering, among other property, the following described sheep: 'About 3,000 ewes, 1,000 wethers, and 2,000 lambs, same being all the sheep now owned by mortgagor, and including all wool and increase which may be produced by said sheep marked, ewes, split in right ear, hole in left; wethers reverse.' At the instance of appellees said appellant, Arizona Lumber & Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5,000 of above sheep to Arizona Central Bank, and one on 1,000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear *to foreclose [623]
their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn.

"That to August 30, 1893, $3,000 of the amount claimed to be due on the mortgage of January 4, 1893, was paid out of wool proceeds, and that on said day said Fulton, for the purpose of securing a $500 advance, and applying the remainder as a payment on said mortgage of January 4, 1893, executed his promissory negotiable note, payable in ninety days, securing the same by a chattel mortgage for the sum of $6,000 to the Arizona Lumber & Timber Company.

"That said mortgage was a conveyance, as a security for the payment of said note, of sheep, the same being in said mortgage described as follows, namely: 'About 3,200 ewes, more or less; about 1,300 wethers, more or less; about 1,400 lambs, more or less, being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep,—marked, ewes and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse.'

"That in said last-mentioned mortgage no recital or reference was made in any way, nor in any manner, to the existence of any other mortgage or mortgages whatsoever.

"That on the 29th day of September, 1893, and prior to the maturity of said last-mentioned note of $6,000, said appellant Arizona Lumber & Timber Company, representing that said mortgage was a first and prior lien

on said described sheep, and by means thereof, sold, assigned, indorsed, and delivered said note and mortgage to the Northwestern National Bank, one of the appellants herein and one of the defendants in the court below, said Northwestern National Bank becoming an innocent purchaser for value.

"That on December 18, 1893, said Fulton, being then indebted to Riordan Mercantile Company, one of the appellants herein and a defendant in the court below, in the sum of $810.91, it brought its action in said district court against said Fulton whereby to collect the same, and at the same time caused to be issued out of the clerk's office of said court a writ of attachment, which was then levied [624] on the property following, *namely: 'All the right, title, and interest of the defendant Harry Fulton in and to the following-described sheep: 2,926 ewes, marked hole in left ear, split in right; 900 wether sheep, marked hole in right ear, split in left ear; 1,287 lambs, ewe lambs marked hole in left ear, split in right, wether lambs marked hole in right ear, split in left;118 rams,' same being all of the sheep then owned by said Fulton.

"That on 16th March, 1894, judgment was rendered in said suit in favor of said plaintiff company and against said Fulton, for said amount, and said attachment lien was foreclosed; that on the 31st day of March, 1894, the sheriff of said county of Coconino, by virtue of and pursuant to said judgment, sold said property and delivered the same to the appellant Riordan Mercantile Company, who then entered into the possession thereof, was so in the possession thereof when this cause was tried in the lower court, and are still in possession thereof.

"That by virtue of said writ of attachment the sheriff attached all the sheep then owned by said Fulton, and that on said day, to wit, on the 18th day of December, 1893, there were of said sheep only 1,000 head of ewes remaining out of all the sheep that existed on July 10, 1890, the date of said alleged mortgages to appellees; that the remainder of said ewes, all the male sheep and the lambs, had by that time died, been consumed, sold, or lost.

"That subsequent to the making of said alleged mortgages to said appellees, an oral agreement between them and the said Fulton was made that the securities of appellees were to be kept good out of the increase by substitution, the consideration therefor being that said Fulton might sell and dispose of the said sheep without interference from appellees.

"That Sisson, a witness for appellants in this case, is and was during all of said transactions the treasurer of both the Riordan Mercantile Company and the Arizona Lumber & Timber Company, appellants herein, and that these two corporations have practically the same officers.

"That in said district court said Arizona Central Bank brought its suit as plaintiff against said Fulton, Vories, Donahue as sheriff, the Arizona Lumber & Timber Company, 25] the *Riordan Mercantile Company, and the Northwestern National Bank, as defendants, asking for a foreclosure of its said alleged mortgage, the same being the above-entitled cause.

"That said action was tried and judgment was rendered foreclosing said alleged mortgages of both of appellees herein and also the said mortgage dated January 4, 1893, of said Arizona Lumber & Timber Company and the mortgage owned by said Northwestern National Bank as aforesaid, in which said judgment said court adjudged that appellees have a prior and first lien on said property, *viz.*, the Arizona Central Bank upon 5,000 sheep of the Fulton mark by reason of its said mortgage and the said Vories on 1,000 sheep of the Fulton mark by reason of his said mortgage; and said court decreed and ordered that an order of sale issue for the sale of all of said property to the sheriff of said county, and that the proceeds arising therefrom be divided by the sheriff and applied as follows, namely, at the ratio of five dollars to said Arizona Central Bank and one dollar to said Vories; that in case anything should be left after the payment of said two mortgages to said bank and Vories, the same should be applied to the payment of the judgments of said Northwestern National Bank and said Arizona Lumber & Timber Company and Riordan Mercantile Company in the order named."

There are seventeen assignments of errors, which are somewhat confused. They are grouped and presented by counsel under seven heads as follows:

"First. In the first assignment of error it is set forth that the trial court erred in adjudging, and the territorial supreme court erred in affirming said judgment, that the mortgages of the appellees were prior liens on *all* of the sheep owned by defendant Fulton at the time of the execution of said mortgages, even though said mortgages had been good and prior liens on the sheep specified therein.

"Second. In the second, third, fifth, and eighth assignments of error it is set forth that the trial court, and the territorial supreme court in sustaining its holding, erred in admitting in evidence the mortgages from defendant Fulton *to the appellees, marked [626] Exhibit 'A' and 'B,' against the objections of the appellants, and in overruling motion of appellants to strike out of the evidence the said mortgages, and in holding that said mortgages were valid and subsisting liens on all of said property, and in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description.

"Third. In the fourth and seventh assignments it is set forth that the court erred in admitting, over the objection of the appellants, testimony concerning a conversation between J. H. Hoskins, John Vories, F. W. Sisson, and Harry Fulton, and evidence relative to an alleged agreement, and evidence tending to prove a breach of contract between the appellees and appellant Arizona Lumber & Timber Company.

"Fourth. The trial court erred, as set forth in the fifteenth and sixteenth assignments,

in adjudging that on the date of its decree herein the mortgage of said appellee bank covered five thousand head of sheep of the Fulton herd and mark, such adjudication attempting to substitute five thousand head of sheep after the making of said two mortgages to appellees; the trial court erred in attempting said substitution, and then holding it good as to appellants Riordan Mercantile Company, and Northwestern National Bank.

"Fifth. The trial court erred, as set forth in the eleventh assignment, in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton, notwithstanding said mortgages, and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central Bank and said Vories, in the proportion of five dollars to the former and one to the latter.

"Sixth. The trial court erred, as set forth in the seventeenth assignment, in adjudging that appellant Northwestern National Bank was bound by said pretended agreement of substitution or was bound by said pretended mortgages of appellees, or that said mortgages were prior liens on said property, or on any of it, to the mortgage owned by said appellant.

"Seventh. In the sixth, ninth, tenth,
[627] twelfth, thirteenth, and fourteenth assignments it is set forth that the court erred in denying and overruling defendants' motion for a new trial of said cause; and in deciding that the mortgage to said appellee, the Arizona Central Bank, conveyed five thousand head of sheep, marked: ewes with hole in left ear and split in right, wethers with hole in right ear and split in left ear, and that a thousand more of said sheep were conveyed by mortgage to said appellee Vories, with the same marks; and in adjudging that the property included in the said attachment lien of the said Riordan Mercantile Company and sold and delivered to said company thereunder was the same property that is conveyed, or attempted to be conveyed, by the mortgages of said appellees; and in adjudging that the rights, title, and interests obtained by said Riordan Mercantile Company, by virtue of said attachment lien and sale, was subject to the alleged rights of said appellees by virtue of their said pretended mortgages; and in adjudging that appellants Riordan Mercantile Company and Arizona Lumber & Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees; and in adjudging that F. W. Sisson, as the treasurer of said Riordan Mercantile Company, agreed with said appellees that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep, and that the wool was released by said agreement to said company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of said appellees."

Messrs. **A. B. Browne**, *E. E. Ellenwood*, and *A. T. Britton*, for appellants:

A chattel mortgage must contain terms of description that will serve to distinguish the property embraced therein from all other property of the same kind.

Pingree, Chat. Mortg. § 142.

Where there is a larger number of the same kind in the possession of the mortgagor, and no particular description otherwise than that applicable to all of that class, nor any selection nor delivery, nor any specification as to which are intended out of a larger lot on hand, such mortgage will be ineffectual to pass any title to any particular property, or any interest in the property on hand.

Stonebraker v. *Ford*, 81 Mo. 538; *Fowler* v. *Hunt*, 48 Wis. 345; *Richardson* v. *Alpena Lumber Co.* 40 Mich. 203; *Blakely* v. *Patrick*, 67 N. C. 40, 12 Am. Rep. 600; *Kelly* v. *Reid*, 57 Miss. 89; *Parsons Sav. Bank* v. *Sargent*, 20 Kan. 576; *Rood* v. *Welch*, 28 Conn. 157; *Newell* v. *Warner*, 44 Barb. 258; *Payne* v. *Wilson*, 74 N. Y. 348.

There can be no agreement by the parties, which will bind others, that there shall be a substitution of other property for that first specified.

Hutton v. *Arnett*, 51 Ill. 198; *Elliott* v. *Long*, 77 Tex. 467.

That the mortgages were to be kept good out of the increase by substitution, the consideration therefor being that Fulton might sell and dispose of the sheep without interference from appellees, would of itself render the mortgage absolutely void.

Peiser v. *Peticolas*, 50 Tex. 638, 32 Am. Rep. 621.

The increase of the sheep attempted to be mortgaged, if there were increase, would therefore not be covered thereby.

Winter v. *Landphere*, 42 Iowa, 471; *Enright* v. *Dodge*, 64 Vt. 502; *Darling* v. *Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Rogers* v. *Gage*, 59 Mo. App. 107.

Substituted property is not held by virtue of the mortgage, but by virtue of the agreement of the parties, whereby an equitable lien, cognizable only in a court of equity, arises in favor of the mortgagee.

Pom. Eq. Jur. § 1235; *Simmons* v. *Jenkins*, 76 Ill. 479.

There can be no substitution or exchange of property by the parties to the mortgage, that will bind third parties, unless the mortgagee takes actual possession of the substituted articles before the rights of third parties intervene.

Pom. Eq. Jur. § 726; *Hunt* v. *Bullock*, 23 Ill. 320; *Powers* v. *Freeman*, 2 Lans. 127; *Titus* v. *Mabbe*, 25 Ill. 257; *Rhines* v. *Phelps*, 8 Ill. 455.

Where an equitable mortgage is claimed as the result of an agreement, there must be, at the time such agreement is made, such identification of the property that the equitable mortgagee may see with a reasonable degree of certainty what property it is that is subject to his lien.

Payne v. *Wilson*, 74 N. Y. 352; *Newell* v. *Warner*, 44 Barb. 258.

To be held in equity, the description of the property mortgaged must be certain.

Hughes v. *Menefee*, 29 Mo. App. 192; *Morrill* v. *Noyes*, 56 Me. 458, 96 Am. Dec. 486.

The claim of the mortgage is to be enforced on the identical property included in the mortgage.

Kelly v. *Reid,* 57 Miss. 89.

Upon breach of the conditions the mortgagee may take possession of the property, and henceforth treat it as his own. He may sell it or give it away, squander or destroy it.

Heyland v. *Badger,* 35 Cal. 404; *Wright* v. *Ross,* 36 Cal. 414; Pom. Eq. Jur. § 1229; *Parshall* v. *Eggert,* 54 N. Y. 18; *Blake* v. *Corbett,* 120 N. Y. 327; *Tompkins* v. *Batie,* 11 Neb. 147, 38 Am. Rep. 361.

Messrs. **Fred Herrington** and *Cass E. Herrington,* for appellees:

A mortgage of a certain number out of a larger number is not void.

Oxsheer v. *Watt,* 91 Tex. 124; *Leighton* v. *Stuart,* 19 Neb. 546; *Frost* v. *Citizens' Nat. Bank,* 68 Wis. 234; *Gurley* v. *Davis,* 39 Ark. 394.

Such mortgage is good as to parties having notice.

Clapp v. *Trowbridge,* 74 Iowa, 550.

The rights of appellants are to be determined by the circumstances existing at the time their rights were acquired.

Cole v. *Green,* 77 Iowa, 307; *Interstate Galloway Cattle Co.* v. *McLain,* 42 Kan. 680.

Appellee bank's mortgage covered the increase.

Pyeatt v. *Powell,* 10 U. S. App. 200, 51 Fed. Rep. 551, 2 C. C. A. 367; *Arkansas Valley Land & Cattle Co.* v. *Mann,* 130 U. S. 78, 32 L. ed. 857; *Fowler* v. *Merrill,* 11 How. 375, 13 L. ed. 736; *Cahoon* v. *Miers,* 67 Md. 573; *Meyer* v. *Cook,* 85 Ala. 417; *Funk* v. *Paul,* 64 Wis. 35, 54 Am. Rep. 576.

Where two mortgages are of record, one of which correctly describes the property and refers to the other as being upon the same property, the description of such other mortgage is rendered definite, and the record is sufficient to impart notice to the world.

Tompson v. *Anderson,* 94 Iowa, 554; *Newman* v. *Tymeson,* 13 Wis. 172, 80 Am. Dec. 735.

Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself.

Cordova v. *Hood,* 17 Wall. 1, 21 L. ed. 587.

The holder of a mortgage "in terms" made subject to another mortgage cannot defeat it upon technical grounds.

Eaton v. *Tuson,* 145 Mass. 218; *Flory* v. *Comstock,* 61 Mich. 522; *Gammon* v. *Bull,* 86 Iowa, 754; *Cassidy* v. *Harrelson,* 1 Colo. App. 458; *Clapp* v. *Halliday,* 48 Ark. 258; *Hoagland* v. *Shampanore,* 37 N. J. Eq. 588.

A written agreement, although not signed by the parties, will, if orally assented to by them, constitute the agreement between them.

Dutch v. *Mead,* 4 Jones & S. 427; *Farmer* v. *Gregory,* 78 Ky. 475; *Bacon* v. *Daniels,* 37 Ohio St. 279.

A party is presumed to have actual notice and to have consented to all that appears in his own conveyance.

Finley v. *Simpson,* 22 N. J. L. 311, 53 Am. Dec. 252.

*After stating the case, Mr. Justice **McKenna** delivered the opinion of the court: **[627]**

The contest is for priority. The territorial supreme court awarded it to the mortgages of the appellees. The appellants *contend that this was error because of the fact **[628]** that the mortgages respectively covered 5,000 and 1,000 head of sheep, and that Fulton owned 6,200 head, and that hence the mortgages were invalid on account of insufficient descriptions. The mortgages do not state that Fulton owned a greater number than those he mortgaged, but the fact is found by the court.

The rule is laid down that, as to third persons who have acquired interests, a description in a mortgage of a given number of articles out of a larger number is not sufficient. Jones, Chatt. Mortg. §§ 56 *et seq.,* and cases cited.

But such a mortgage is valid against those who know the facts. *Cole* v. *Green,* 77 Iowa, 307; *Clapp* v. *Trowbridge,* 74 Iowa, 550.

The mortgage of January 4, 1893, executed by Fulton to the Arizona Lumber & Timber Company was undoubtedly taken by the latter, not only with actual notice, but it was expressly made subject to the prior ones to appellees. The finding of the court is: "At the instance of appellees said appellant, Arizona Lumber & Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5,000 of above sheep to Arizona Central Bank, and one on 1,000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear to foreclose their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn."

The court further finds that on August 30, 1893, Fulton paid to the Arizona Lumber & Timber Company $3,000 out of the proceeds of the wool from the mortgaged sheep, secured from the company an advance of $500, and for that and the amount due on his note "executed his negotiable promissory note payable in ninety days, securing the same by a chattel mortgage for the sum of $6,000." In this mortgage there was no recital or reference to the existence of any other mortgage. On the 29th of September, 1893, and prior to this *maturity, the "appellant, the **[629]** Arizona Lumber & Timber Company, representing that said mortgage was a first lien, sold, indorsed, and delivered the note and mortgage to the appellant the Northwestern National Bank." It is this note and mortgage that are in controversy and which are claimed as prior liens to the mortgages of appellees. The bank is found to be an innocent purchaser for value. By this is meant that it had no actual notice of the prior mortgages. Did the law impute notice to it? Certainly not by the record of the mortgages to appellees. Did it by the record of the mortgage of January 4, 1893, to the Arizona

Lumber & Timber Company? If the bank was charged with notice of that mortgage it was charged with notice of its contents. "Notice of a deed is notice of its whole contents, so far as they affect the transaction in which notice of the deed is acquired." [*Hamilton* v. *Royse*] 2 Sch. & Lef. 315, cited and approved in *Boggs* v. *Varner*, 6 Watts & S. 473.

A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. Secs. 710 and 710*a*, Devlin, Deeds, and cases cited. The mortgage of January 4, 1893, to the Arizona Lumber & Timber Company was by the same mortgagor as that of August the 30th, the one sold to the Northwestern National Bank, and covered the same sheep, and hence, under the rule announced, the bank was charged with notice of it and of its recitals. It was not given up or satisfied. It was preserved as an independent lien.

It was not satisfied, appellants say, because it covered other property beside the sheep. This is an insufficient reason. If the debt it secured was paid there was no reason for retaining the lien on any property. But, whatever the reason, it was retained and affected the title. That is the material circumstance, and not in whose name it stood. It was in the chain of the title and affected it. It would have been found if looked for, and would have notified the bank of the transactions which conducted to it and caused it to be made subject to the mortgages of the

[630]appellees. We therefore think the *territorial courts committed no error where they assigned priority to those mortgages. Nor was it error to subordinate the attachment and judgment of the Riordan Mercantile Company to them. That company had, according to the finding of the court, actual notice.

The territorial court found that on the 18th of December, 1893, there were one thousand head of ewes remaining out of all the sheep which existed on July 10, 1890, the date of the mortgages to appellees; that the remainder of the ewes, all of the male sheep and the lambs had died, been consumed, sold, or lost. The findings are absolutely silent as to whether there were or were not other sheep in existence at that time, or at the time the decree was entered. We infer from the briefs of counsel that there were others, —the increase of those mortgaged; and there is a contention as to whether these are covered by the lien of the mortgages.

Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase. This court said in *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U. S. 69 [32: 854], by Mr. Justice Harlan, . . . "according to the maxim, *partus sequitur ventrem*, the brood of all tame and domestic animals belongs to the owner of the dam or mother." 2 Bl. Com. 390. See also *Pyeatt* v. *Powell*, decided by the circuit court of appeals for the eighth circuit, 10 U. S. App. 200, and cases cited.

But whatever was doubtful or disputable in the mortgages of appellees as to the increase was resolved and settled by agreement between all who had interests, and was expressed in the mortgage of January 4, 1893. There is nothing in the record to show a substitution except by the increase, and therefore we are not called upon to pass upon some of the interesting questions argued by appellants. Nor are we embarrassed by considerations of the increase being in or having passed out of the "period of nurture." Such considerations are only important when a subsequent purchaser or mortgagee has taken without notice, actual or constructive, which we have seen the Northwestern National Bank did not.

*The objections to testimony assigned as [631]
error in the fourth and seventh assignments of error were not well taken. The testimony showed the transactions and the relations of the parties to them.

Decree affirmed.

CYRUS A. BROWN, *Plff. in Err.*,
v.
UNITED STATES.

GEORGE CURLEY, alias George Cully, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 631-638.)

Appellate jurisdiction of the United States court for the northern district of the Indian territory—capital case.

1. The appellate jurisdiction of a capital case from the United States court for the northern district of the Indian territory, given by act of Congress of March 1, 1895, to the appellate court of the United States for that territory, is exclusive, and supersedes the provisions of the acts of February 6, 1889, and March 3, 1891, respecting the jurisdiction of the Supreme Court of the United States.
2. This court has no appellate jurisdiction of capital cases from the United States court for the northern district of the Indian territory. Such appellate jurisdiction is vested exclusively in the United States court of appeals in the Indian territory.

[Nos. 249, 250.]

Submitted April 25, 1898. Decided October 24, 1898.

IN ERROR to the United States Court in the Indian Territory to review judgments by which Cyrus A. Brown and George Curley, alias George Cully, were severally convicted of murder, and sentenced to death. On motion to dismiss in each of said cases on the ground that this court has no appellate jurisdiction of said causes. Both cases *dismissed.*

Statement by Mr. Justice **Shiras:**

Cyrus A. Brown, plaintiff in error in case No. 249, was indicted in the United States

court for the northern district of the Indian territory, charged with the crime of murder, which indictment was filed in the United States court for the Indian territory, northern district, sitting at Muscogee on the 10th day of December, A. D. 1896.

On the 17th day of December, A. D. 1897, he was convicted of the crime of murder in said court, and the judgment of the court sentencing him to death was made on the 24th day of December, A. D. 1897. On the 1st day of February, A. D. 1898, the plaintiff in error filed a petition in said court for a writ of error from the Supreme Court of the United States, and filed an assignment of errors. On February 8, A. D. 1898, a writ of error was allowed in said cause, and on the same day a citation was issued in said cause, service of which was acknowledged on the 16th day of February, A. D. 1898. Pursuant to the writ of error in said cause a transcript of the record in said cause was filed in the office of the clerk of the Supreme Court of the United States on the 23d day of February, A. D. 1898. The government has filed its
[632] motion to *dismiss the writ of error in said cause, for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

George Curley, alias George Cully, plaintiff in error in case No. 250, was indicted in the United States court for the northern district of the Indian territory, sitting at Vinita, charged with the crime of murder, which indictment was filed in open court on the 21st day of October, A. D. 1897. On the same day the defendant took a change of venue to the United States court at Muscogee, and a transcript of the record and the original indictment was forwarded to the clerk of the United States court at Muscogee, Indian territory. On the 13th day of December, A. D. 1897, at the December term of the United States court for the northern district of the Indian territory, at Muscogee, the indictment heretofore found was referred to the grand jury, and upon the same day the grand jury returned into open court at Muscogee, Indian territory, a new indictment against the defendant for murder. On the 22d day of December, A. D. 1897, the defendant was found guilty of the crime of murder, and on the 24th day of December, A. D. 1897, judgment of the court was pronounced upon said defendant, sentencing him to death.

On February 11, 1898, plaintiff in error, through his attorney, W. H. Twine, filed a petition for a writ of error from the Supreme Court of the United States, and also filed his specification of error. A writ of error was allowed, on the 19th day of February, 1898, and on the 23d day of February, 1898, service of the citation issued out of this court was acknowledged. A transcript of the entire record was filed in the office of the clerk of the Supreme Court of the United States on March 1, 1898. The government has filed its motion to dismiss the writ of error in said case for the reason that the Supreme Court of the United States has no jurisdiction under the law to entertain said writ of error, nor to pass upon any of the alleged errors in said record, because said court has no appellate jurisdiction of said cause.

Messrs. **John K. Richards,** Solicitor General, and **P. L. Soper,** United States Attorney, Northern District of the Indian Territory, for the United States, in support of the motions to dismiss.

Messrs. **John H. Koogler** and **John Watkins** for plaintiff in error Cyrus A. Brown, in opposition to motion to dismiss in No. 249.

Mr. **W. H. Twine** for plaintiff in error George Curley, in opposition to motion to dismiss in No. 250.

*Mr. Justice **Shiras** delivered the opinion [633]
of the court:

By the act of Congress approved March 1, 1889 (Sup. R. S. vol. 1, 2d ed. 670), there was established a United States court for the Indian territory. The act conferred no jurisdiction over felonies, but by the fifth section, exclusive original jurisdiction was conferred over all offenses against the laws of the United States committed within the Indian territory, not punishable by death or by imprisonment at hard labor. Jurisdiction was conferred in all civil cases between citizens of the United States who are residents of the Indian territory where the value of the thing in controversy shall amount to one hundred dollars or more. The final judgment or decree of the court, where the value of the matter in dispute, exclusive of costs, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court.

On March 1, 1895, Congress passed an act (Sup. R. S. vol. 2, pp. 392-398) dividing the Indian territory into three judicial districts, and providing for the appointment of two additional judges. This act extended the jurisdiction of the United States court in said territory to capital cases and other infamous crimes, the jurisdiction over which had theretofore been vested in the United States courts at Fort Scott, Kansas, Fort Smith, Arkansas, and Paris, Texas, and provided that all such offenses should be prosecuted in the United States court in the Indian territory after the first day of September, 1896.

The eleventh section is as follows:

"That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission *as chief [634]
justice of said court. And said court shall have such jurisdiction and powers in said Indian territory, and such general superintending control over the courts thereof, as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said state, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as

they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of cases, so far as they are applicable, shall be and they are hereby extended over and put in force in the Indian territory.

"And appeals and writs of error from said court in said districts to said appellate court in criminal cases shall be prosecuted under the provisions of chapter forty-six of Mansfield's Digest, by this act put in force in the Indian territory."

These enactments clearly provide that writs of error in criminal cases shall be taken to the appellate court of the United States for the Indian territory, and dispose of the question before us unless there are other provisions of the acts of Congress which prevent such a conclusion.

The counsel for defendants in error contend that the act of February 6, 1889 (Sup. R. S. vol. 1, 2d ed. 638), gave to the Supreme Court the right to review. The sixth section of that act is in the following words:

"That hereafter, in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe."

It will be observed that when this law was passed the United States court for the Indian territory did not possess jurisdiction in capital cases. That jurisdiction was *subsequently* conferred. But, even if it be conceded that the provisions of the act of February 6, 1889, might have attached or become applicable to the judgments of the United States court for the Indian territory when jurisdiction in capital cases was
[635] extended *to that court, the intention of Congress is manifested to have been otherwise by the provision above cited from the act of March 1, 1895, whereby it is provided that writs of error in capital cases shall be taken to the court of appeals of the United States for the Indian territory.

This court had occasion to consider the effect of the act of Feruary 6, 1889, in respect to the judgments of the supreme court of the District of Columbia in capital cases, in the case of *Cross* v. *United States*, 145 U. S. 571 [36: 821], and it was there said:

"It is contended on behalf of the government that the writ of error will not lie because the supreme court of the District of Columbia is not a court of the United States, within the intent and meaning of the section. *McAllister* v. *United States*, 141 U. S. 174 [35: 693], is cited with the decisions referred to therein as sustaining that view, but it is to be remembered that that case referred to territorial courts only, and, moreover, if the disposal of the motion turned on this point, the words 'any court of the United States,' are so comprehensive that, used as they are in connection with convictions subject to the penalty of death, the conclusion might be too technical that Congress intended to distinguish between courts of one class and of the other. But the difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of a trial court that may be re-examined upon the application of the respondent, and it is to that court that the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at *nisi prius*. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error 'shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such
*time, not exceeding sixty days next after the [636]
expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.' This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court. And the case before us shows this."

It is true that, in the present cases the writs of error were sued out directly to the trial court, whereas in the case of Cross the writ of error was taken to the judgment of the supreme court of the District affirming the judgment of the trial court, and therefore some of the language quoted from the opinion in the latter case is not strictly applicable. But the reasoning of the court, showing that it was unlikely that Congress intended a review by two other courts than the trial court, is applicable. It is not to be supposed that Congress, when it provided by the act of March 1, 1895, for a review or writ of error in the court of appeals for Indian territory, regarded the sixth section of the act of February 6, 1889, as also applicable.

The counsel for the defendants in error cite in their briefs the fifth and thirteenth sections of the act of March 3, 1891, establishing the United States circuit courts of appeals, providing that appeals or writs of error may be taken from the district or circuit courts direct to the Supreme Court of the United States in cases of capital crimes, and providing that appeals and writs of error may be taken from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the cirucit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States.

Of course as, when this act was passed, the United States court in the Indian territory

had no jurisdiction over capital crimes, Congress did not contemplate any appeal or writ of error in such cases. And when, by the act of March 1, 1895, jurisdiction of the United States court in the Indian territory was extended to capital cases, and a court of
[637] appeals was *established, with power to entertain appeals and writs of error, the act of March 3, 1891, cannot be regarded as applicable in such cases. Where a statute provides for a writ of error to a specified court of appeals it must be regarded as a repeal of any previous statute which provides for a writ of error to another and different court.

The decisions of the court of appeals of the United States in the Indian territory are final except so far as they are made subject to review by some express provision of law. In the eleventh section of the act of March 1, 1895, it is provided that "appeals and writs of error from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States;" but it is not claimed by the counsel for the plaintiff in error that this provision applies to capital cases; and see the case of *Folsom* v. *United States,* 160 U. S. 121 [40: 363].

It has been held by this court that the court established in the Indian territory, though a court of the United States, is not a district or circuit court of the United States. *Re Mills,* 135 U. S. 268 [34: 110].

We accept the contention of the Solicitor General on behalf of the government, that the court of appeals in the Indian territory, being a court of the United States, is analogous to the supreme court of the District of Columbia, and bears the same relation to the trial court in the Indian territory as the supreme court of the District of Columbia bore to the trial court in the District.

And it was held in *Ex parte Bigelow,* 113 U. S. 329 [28: 1006], that no appeal could be taken or writ of error sued out to the supreme court of the District of Columbia in a capital case, the court saying: "No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain." *Re Heath,* 144 U. S. 92 [36: 358]; *Cross* v. *Burke,* 146 U. S. 84 [36: 897].

[638] *Our conclusion is that we have no appellate jurisdiction of capital cases from the United States court for the northern district of the Indian territory, and that such appellate jurisdiction is vested exclusively in the United States court of appeals in the Indian territory.

The motion is allowed, and the writs of error in these cases are dismissed.

WILLIAM NAEGLIN, Annie Naeglin, Administratrix of Henry Korte, Deceased, *et al., Appts.,*

v.

DOLORITAS MARTIN DE CORDOBA, José Manuel Cordoba, Josefita Martin de Duran, *et al.,*

(See S. C. Reporter's ed. 638-641.)

Appeal from supreme court of territory—release by mother of illegitimate children—when will not cut off inheritance.

1. On appeal from the supreme court of a territory, when no jury was had and there are no questions as to the admission or exclusion of testimony, the only question to consider is whether the findings of fact sustain the decree.
2. A release by the mother of illegitimate children, in her own right and for them, of all claims against the father, without the sanction of any tribunal, will not cut off a right of the children to inherit from him.
3. A natural guardian has no power to release the claim of a ward to an inheritance without the sanction of some tribunal.

[No. 35.]

Argued October 13, 1898. Decided October 24, 1898.

APPEAL from the Supreme Court of the Territory of New Mexico reversing the decree of the District Court of the County of Mora, Fourth Judicial District in said Territory, in favor of the defendants, and remanding the case to the District Court with instructions to enter a decree in favor of the plaintiffs, in an action brought by Doloritas Martin de Cordoba *et al.* against William Naeglin *et al.* to establish the right of the plaintiffs as the children and heirs of one Frederick Metzger. *Affirmed.*

See same case below, 7 N. M. 678.

Statement by Mr. Justice **Brewer:**

On March 29, 1886, the appellees, Doloritas Martin de Cordoba *et al.,* filed their bill in the district court of the county of Mora, fourth judicial district, territory of New Mexico, to establish their rights as the children and heirs of one Frederick Metzger. After answer the case was referred to a master, who reported findings of fact and conclusions of law in favor of the plaintiffs. Upon a hearing in the district court a decree was entered adversely to the conclusions of the master and for the defendants. On appeal to the supreme court of the territory that decree was on August 24, 1895, reversed, and one entered remanding the case to the district court, with instructions to enter a decree in conformity with the findings and conclusions of the master. Thereupon the defendants appealed to this court.

At the time of entering the decree, and also
[639] of overruling a *petition for rehearing, no statement of facts was prepared by the supreme court, and no other determination of the facts than such as appears from the direction to enter a decree in conformity with the findings and recommendations of the master. But after the supreme court had adjourned, an application was made to have the findings of fact made by the master incorporated into the record as a statement and finding of facts by that court, for the purpose of an appeal, and upon that application the following order was entered:

And now the foregoing statement and finding as to the facts proven and established by the evidence in each of said causes are ordered to be incorporated in the record of said supreme court as part thereof as fully as we may be thereunto empowered, the July term of the supreme court having been adjourned on the 26th day of September, A. D. 1896, and this order made and signed by each of the judges while in his district respectively. Thomas Smith, Chief Justice.

Needham C. Collier, Associate Justice, Supreme Court of New Mexico.

Signed at Silver City, in the third judicial district.

Gideon D. Bantz, Associate Justice of the Supreme Court of New Mexico and Presiding Judge of the Third Judicial District Court.

Signed at Santa Fé, N. M., in the first judicial district.

N. B. Laughlin, Associate Justice of the Supreme Court and Judge of the First Judicial District.

It appears from the bill, answer, and findings that Frederick Metzger, though an unmarried man, was the father of several children by different women, and this suit is one between the several illegitimate children to determine their respective rights to share in his estate. The counsel for appellants says in his brief: "The bill of complaint and the testimony present for determination of the court two
[640] questions: First, What estate *and property did Metzger own at the time of his death? and, second, Who is entitled to that estate?"

Mr. **Harvey Spalding** for appellants.
No counsel for appellees.

[640] *Mr. Justice **Brewer** delivered the opinion of the court:

No question is made in this record as to the admission or exclusion of testimony. There being no jury the case comes here on appeal, and the only question we can consider is whether the findings of fact sustain the decree. 18 U. S. Stat. 27; *Stringfellow* v. *Cain*, 99 U. S. 610 [25:421]; *Cannon* v. *Pratt*, 99 U. S. 619 [25:446]; *Neslin* v. *Wells*, 104 U. S. 428 [26:802]; *Hecht* v. *Boughton*, 105 U. S. 235, 236 [26:1018]; *Gray* v. *Howe*, 108 U. S. 12 [27:634]; *Eilers* v. *Boatman*, 111 U. S. 356 [28:454]; *Zeckendorf* v. *Johnson*, 123 U. S. 617 [31:277]; *Sturr* v. *Beek*, 133 U. S. 541 [33:761]; *Mammoth Min. Co.* v. *Salt Lake Foundry & Machine Co.* 151 U. S. 47 [38:229].

The order signed in vacation by the several members of the supreme court cannot be considered an order of the court. Assuming, however, for the purposes of this case, that, in view of the general language in the opinion of the court, we may take the findings of the master as its statement of facts, we observe that no doubtful question of law is presented for our determination. The master finds that Metzger was the father of the appellees, and that he owned certain property. These are questions of fact, resting upon testimony, concluded, so far as this court is concerned, by the findings, and into which it is not our privilege to enter.

While under the common law illegitimate children did not inherit from their father, the statutes of New Mexico introduced a new rule of inheritance (Comp. Laws New Mexico, 1884, § 1435, p. 680): "Natural children, in the absence of legitimate, are heirs to their father's estate, in preference to the ascendants, and are direct heirs to the mother if she die intestate." In other words, under this statute, *there being no legiti- [641]
mate children, illegitimate children inherit.

It appears that on March 19, 1875, and while Metzger was living, the mother of these plaintiffs, then minors, in her own right and for the minors, receipted and relinquished all claims against him. Without stopping to consider what was meant by that release, and giving to it all the scope which its language may suggest, we remark that a natural guardian has no power to release the claim of a ward to an inheritance without the sanction of some tribunal. Woerner's American Law of Guardianship, p. 185, and following.

The decree is *affirmed*.

LEWIS PIERCE *et al.*, *Plffs. in Err.*,
v.
SOMERSET RAILWAY.

(See S. C. Reporter's ed. 641-650.)

Federal question—when state judgment will not be reviewed—Federal right may be waived—question of waiver is not Federal question.

1. The question whether a state statute impairs the obligation of a contract is a Federal question; but the question whether the defense of estoppel by laches and acquiescence is established is not a Federal question.
2. A judgment of the state court, based on two distinct grounds, each of which is sufficient to sustain the judgment, and one of which involves no Federal question, cannot be reviewed on writ of error by this court.
3. A person may, by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States.
4. Whether or not a person has lost a right under the Federal Constitution by his action or failure to act is not a Federal question which will sustain a writ of error to a state court.

[No. 12.]

Argued October 11, 12, 1898. Decided October 31, 1898.

IN ERROR to the Supreme Judicial Court of the State of Maine to review a judgment of that court in favor of the defendant in error, the Somerset Railway, in an action commenced by it against Lewis Pierce *et al.* to enjoin the further prosecution of certain actions and for other relief. *Dismissed.*

See same case below, 88 Me. 86.

The facts are stated in the opinion.

Messrs. **D. D. Stewart** and *H. B. Cleaves* for plaintiffs in error.

Messrs. **Josiah H. Drummond, Edmund F. Webb,** and *Joseph W. Symonds* for defendant in error.

[642] *Mr. Justice **Peckham** delivered the opinion of the court:

This is a writ of error directed to the Supreme Judicial Court of the state of Maine, for the purpose of reviewing a judgment of that court in favor of the defendant in error, who was plaintiff below. (88 Me. 86-100.) The facts necessary to an understanding of the case are as follows:

The Somerset Railroad Company was organized in 1871, pursuant to an act of the legislature of the state of Maine, for the purpose of building and operating a railroad between Oakland, in the county of Kennebec, and Solon, in the county of Somerset, in that state. In order to obtain the money to build its road, the company, on the first day of July, 1871, executed a mortgage to three trustees, covering its railroad and franchises and all its real estate and personal property then possessed by it or to be thereafter acquired. By the terms of the mortgage the trustees were to hold in trust for the holders of the bonds of the railroad company, to be issued by it, payable as therein mentioned. The company thereupon issued and sold its bonds, secured by the mortgage, to the amount of $450,000, with proper coupons for interest attached, payable semiannually on the first days of January and July in each year, at the rate of seven per cent, the principal of the bonds becoming due on the first of July, 1891. The proceeds of the sale of these bonds were applied to the building, equipping, and operating of the road from Oakland to North Anson, a station between Oakland and the proposed terminus of the road at Solon. In 1876 the road had been completed as far as the village of Anson, twenty-five miles from Oakland, and it was opened and its cars commenced running in that year between those points. The company continued to so operate its road until September, 1883. It had, however, become insolvent some time prior to April first, 1883, and at that time its coupons for interest on the bonds secured by the above-mentioned mortgage had been unpaid
[643] for more *than three years. At the time when this mortgage was given, corporations could be formed by the holders of bonds secured by a railroad mortgage, in the manner provided for by the statute. (Rev. Stat. 1871, chap. 51.) In 1878, seven years after the execution of the mortgage, the provision for the formation of corporations by the holders of bonds was extended so as to include the case of railroad corporations where the principal of the bonds should have remained overdue for the space of three years, and by an act of March 6, 1883, the provision was still further extended so as to apply to the case in which no interest had been paid thereon for more than three years.

By virtue of the provisions of the Revised Statutes of 1871, as amended and extended by the statutes of 1878 and 1883 (both statutes, as will be seen, being subsequent to the execution of the mortgage), the holders of bonds of the Somerset Railroad Company, following the method provided by those statutes, and on the 15th day of August, 1883, formed a new corporation under the name of the Somerset Railway. The capital stock of this new corporation was $736,648.76, made up of the principal of $450,000 of the unpaid outstanding bonds, and $286,648.76 of interest thereon up to the 15th of August, 1883. This was in accordance with the provisions of the statute that the new company should issue the capital stock to the holders of the bonds, secured by the mortgage, in the proportion of one share of stock for each one hundred dollars worth of bonds and interest. On the 1st of September, 1883, the Somerset Railway took possession of the railroad from Oakland to Anson (which was as far as it had then been completed), and of all the other property embraced in the mortgage, and it has ever since held and operated the same. Its capital stock was divided into shares of one hundred dollars each to the amount of the bonds and overdue coupons as the law provided. The stockholders of the old company had previously and on the 13th of July, 1883, at their annual meeting, voted that the bondholders should organize a new corporation under the statutes of the state, and take possession of the railroad, and at the same meeting voted to surrender possession of the road to the new corporation, the Somerset Railway.

*The holders of a very large majority of [644]
these bonds, including some held by the parties in whose interest the plaintiffs in error now act, participated in the formation of this corporation, but the holders of all the bonds did not so participate, a majority being sufficient under the statute for the regular formation of the corporation. Bonds largely exceeding a majority of those which were issued under the mortgage were surrendered to the Somerset Railway, and are now held by it, and the stock issued therefor, the amount being at the time the suit herein was instituted $339,400; and the amount of bonds not surrendered was $110,600, not counting overdue coupons.

From the time the new company took possession of the railroad it has continued to operate it as far as it was then completed, and it has also extended the same some sixteen miles, and as extended it has continued to operate it.

To obtain the funds necessary for the completion of the sixteen miles of extension

the new company, under what is claimed to be due authority of law, issued its bonds on the first day of July, 1887, to the amount of $225,000, payable in twenty years from their date, and to secure payment of the same mortgaged its entire railroad from Oakland to Bingham, forty-one miles. These bonds were sold by the company and the proceeds applied towards the completion of the road. The mortgage given by the Somerset Railroad Company in 1871 included the roadbed from Oakland to the terminus of the road in Solon. The mortgage given by the new company in 1887 embraced the railroad so far as it had been constructed by the old company, as well as the sixteen miles constructed by the new company after it took possession of the road. The giving of this mortgage in 1887 was a matter of public notoriety, well known to the trustees of the original mortgage, and no objection was made in behalf of anyone; on the contrary, the trustees stood by and saw this mortgage of 1887 given and the bonds sold to innocent parties and the money expended in extending the railroad sixteen miles, and it was not until more than five years afterwards, when the road had been built and completed and was in operation to Bingham, that the trustees took action.

[645] *In December, 1892, the trustees in the mortgage of 1871 commenced two actions at law, one in each of two counties in which the railroad was situated, in which actions the president of the new corporation, its superintendent, treasurer, accountant, and various station agents and conductors, were made parties defendant because they were in possession of the road, and the plaintiffs, trustees, claimed to recover from the defendants, as disseisors, the possession of the railroad, and from the defendants, as individuals, the sum of $180,000 as mesne profits.

The ground upon which the trustees based their action was that the new company was never legally organized; that by the terms of the mortgage the trustees alone could take proceedings to foreclose the mortgage, and that the acts of the legislature passed subsequently to the execution of the mortgage, and under which the new company was formed, could and did have no validity as against the contract rights of the plaintiffs, secured to them by the law as it stood at the time of the execution of the mortgage of 1871.

Upon these facts and many others which are not now material to be stated, the new company commenced this suit in equity against the trustees in the mortgage of 1871, who were plaintiffs in the two actions at law, to enjoin the further prosecution of those actions, and for other relief as mentioned in their complaint. In this suit the new company alleged (among other things) that the trustees in the mortgage of 1871 and their successors had stood by, allowed, and encouraged the formation of the new company and the surrendering of the bonds and the issuing of the stock in lieu thereof, and also the execution of the mortgage by the new company to secure the payment of the $225,000 borrowed for the extension of its road; also the contracting of debts and the expending of large amounts of money in useful repairs and improvements; and that all this was done without the trustees making known to the new company that they or those whom they represented as bondholders had any claim or cause of action against the new company; and the complainants therefore averred that the trustees and those whom they represented had been guilty of such delay and laches as to estop them *from denying the validity of the [646]
new corporation or its title or possession. The new company also alleged the entire validity of the proceedings resulting in its formation.

Answering that complaint, the trustees denied that the new company was ever established under any law of Maine; they denied that it ever had any legal organization or any legal existence; they denied that the mortgage of July 1, 1871, had ever been legally foreclosed, and they alleged that neither the original board of trustees named in the mortgage, nor their successors, had ever taken any steps towards a legal foreclosure, or had ever determined that there had been a breach of the conditions of that mortgage, and that the attempted foreclosure of that mortgage was in violation of the contract rights secured to the trustees thereunder at the time of its execution, and the attempted foreclosure of that mortgage was therefore utterly void; they denied that any statute of the state had been enacted, or could be enacted, which would or could deprive the bondholders or trustees of the rights secured to them by virtue of their contract of July 1, 1871, and the laws of the state in force when the contract was made. They alleged that the contract rights of all the parties to the mortgage of July 1, 1871, were fixed by the laws in force when the mortgage was executed, and that no law of the state of Maine then existing authorized the organization of the new corporation in the manner attempted herein, and that the laws then existing formed a part of the mortgage contract, and provided a mode by which the mortgage could be legally foreclosed and a new company formed for the benefit of all the bondholders; and they alleged that the rights of the bondholders who took no part in the formation of the new company were fixed by the mortgage contract, and could not be affected in any way except by payment. Various other matters were set up in their answer, which it is not now necessary to mention.

The supreme judicial court of Maine upon these issues held: "(1) That the new company was legally organized; that the various acts of the legislature of Maine, passed subsequently to the execution of the mortgage, did not impair the obligations of the contract contained in the mortgage, *but simply [647]
afforded a more convenient and quicker remedy for a violation of the agreement and for the foreclosure of the mortgage than existed at the time of its execution." (2) The court also stated and held as follows: "The new corporation took possession of the mort-

gaged property on the first day of September, 1883, and has ever since held it and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since has been acquiesced in by all the trustees. It is too late for the trustees or dissenting bondholders now to object to technical irregularities, if any exist, especially as the Somerset Railway has since extended the railroad from North Anson to Bingham, a distance of abount sixteen miles; built a branch railroad of one mile in length of great importance to the productiveness of the main line; placed a mortgage upon the road for $225,000 to make these extensions and other improvements; and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation."

The court further held that, under the statutes of Maine, the bondholders who had refused to take stock in the new company still retained the same rights under their bonds as the holders of the stock in the new company which had been given in exchange for bonds, and that if any bondholder declined ultimately to exchange his bonds for stock he could not be compelled to do so, and that the net earnings of the company when distributed in the form of dividends or otherwise must be distributed to its stockholders and to the holders of any unexchanged bonds in equal proportions; that if the holders of unexchanged bonds chose to take stock they could do so at any time, or they might retain their present possessions and receive their share of the net earnings *pro rata* with the stockholders.

[648] *It is thus seen that there were two questions determined by the state court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Rutland Railroad Co.* v. *Central Vermont Railroad Co.* 159 U. S. 630 [40: 284]; *Seneca Nation* v. *Christy*, 162 U. S. 283 [40: 970].

A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one.

In the above case of *Eustis* v. *Bolles* the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of a contract. This court held that, whether that view of the case was sound or not, it was not a Federal question, and therefore not within the province of this court to inquire about.

Mr. Justice Shiras, in delivering the opinion of the court, said:

"The defendant in the trial court depended on a discharge obtained by them under regular proceedings under the insolvency statutes of Massachusetts. This defense the plaintiffs met by alleging that the statutes under which the defendants had procured their discharge had been enacted after the promissory note sued on had been executed and delivered, and that to give effect to a discharge obtained under such subsequent laws would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts it is plain that a Federal question decisive of the case was presented, and that if the judgment of *the supreme judicial court [649]
of Massachusetts adjudged that question adversely to the plaintiffs it would be the duty of this court to consider the soundness of such a judgment.

"The record, however, further discloses that William T. Eustis, represented in this court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the court below, conceding that his cause of action could not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment.

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of *Clay* v. *Smith*, 3 Pet. 411 [7: 723], where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another state. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

Eustis had a right which was protected by the Constitution of the United States. This right, the state court held, he had waived by his action, and this court said whether the state court was right or not was not a Federal question.

In *Seneca Nation* v. *Christy*, *supra*, it was [650] held by *the state court that even if there were a right of recovery on the part of the plaintiffs in error because the grant of 1826 was in contravention of the Constitution of the United States, (which the court held was not the case), yet that such recovery was barred by the New York statute of limitations. This court held that as the judgment of the state court could be maintained upon the latter ground, it was without jurisdiction because the decision of the state court upon that ground involved no Federal question.

In this case there being two distinct grounds upon which the judgment of the state court was based, each of which is sufficient, and one of which involves no Federal question, we must, upon the authority of the cases above cited, hold that this court is without jurisdiction, and the writ of error must be *dismissed.*

Mr. Justice **Harlan** and Mr. Justice **White** were of opinion that the decree should be affirmed.

LEWIS PIERCE *et al., Plffs. in Err.,*
v.
JOHN AYER *et al.*

(See S. C. Reporter's ed. 650.)

Pierce v. *Somerset Railway, ante,* p. 316, followed.

[No. 13.]

Argued October 11, 12, 1898. Decided October 31, 1898.

IN ERROR to the Supreme Judicial Court of the State of Maine.

This case was argued with *Pierce* v. *Somerset Railway, ante,* p. 316.

Messrs. **D. D. Stewart** and *H. B. Cleaves* for plaintiffs in error.

Messrs. **Josiah H. Drummond, Edmund F. Webb,** and *Joseph W. Symonds* for defendants in error.

This writ of error is controlled by the decision in the case just announced. The writ will, therefore, be *dismissed.*

THE ST. LOUIS MINING & MILLING COMPANY of Montana, and Charles Mayger, *Plffs. in Err.,*
v.
MONTANA MINING COMPANY, Limited.

(See S. C. Reporter's ed. 650-658.)

Compromise as to mining claim, when valid.

A compromise of a dispute as to a mining claim, whereby an action to determine the right thereto is dismissed, in consideration of an interest in the ground when thereafter patented by the applicant, is valid, in the absence of any statutory provision.

[No. 305.]

Submitted October 10, 1898. Decided October 31, 1898.

IN ERROR to the Supreme Court of the State of Montana to review a decree of that court affirming the decree of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke in favor of the plaintiff, the Montana Mining Company, in an action brought by it against the St. Louis Mining & Milling Company of Montana *et al.* for a decree that defendants shall convey to plaintiff by a good and sufficient deed a portion of a mining claim. On motion to dismiss or affirm. *Affirmed.*

See same case below, 20 Mont. 394.

Statement by Mr. Chief Justice **Fuller:**

*This was a suit for specific performance [651] brought by the Montana Mining Company against the St. Louis Mining & Milling Company of Montana and Charles Mayger in the district court of the first judicial district of the state of Montana, in and for the county of Lewis and Clarke.

The complaint alleged that on March 7, A. D. 1884, plaintiff's predecessors in interest, Robinson, Huggins, Sterling, DeCamp, and Eddy, were the owners of and in possession, and legally entitled to the use, occupation, and possession, of a certain portion of the Nine Hour Lode and Mining Claim, which embraced in all an area of 12,844.5 feet, together with the minerals therein contained.

That Mayger applied to the United States land office at Helena for a patent to the St. Louis Lode Mining Claim, owned by him, and that in the survey he caused to be made of his claim he included that part of the Nine Hour Lode Mining Claim described in the complaint; whereupon an action was commenced by Robinson and Huggins against Mayger in the district court of the third judicial district of the then territory of Montana to determine the right to the possession of the particular premises. That on said 7th of March, for the purpose of settling and compromising that action, and settling and agreeing upon the boundary lines between the Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, Mayger made, executed, and delivered to Robinson, Huggins, and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the action and the withdrawal of the protest and adverse claim, he covenanted and agreed that when he should obtain a patent as applied for, he would. on demand, make, execute, and deliver to Robinson, Huggins, and Sterling, or their assigns, a good *and sufficient deed for the premises [652] described in the complaint; and thereupon Robinson, Huggins, and Sterling dismissed their said action, withdrew their adverse claim, and performed all of the conditions of the bond on their part.

That Mayger then proceeded with his ap-

plication and obtained a patent, but that he gave no notice to plaintiff, or any of its predecessors in interest, of the obtaining of the patent until some time in November, 1889.

That when the bond for a deed was executed, plaintiff's predecessors in interest were in possession of the premises, and have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour Lode Claim; that by mesne conveyances the title to this claim, including the portion in dispute in this suit, had come to plaintiff; that it is entitled to a conveyance of the premises from Mayger; that Mayger, on or about June 10, 1893, assumed to convey said piece of ground to the St. Louis Mining & Milling Company, which then had full knowledge and notice of the making, execution, and delivery of the bond for a deed by Mayger, and of the rights and equities of the Montana Mining Company thereunder; that the St. Louis Company has instituted a number of suits in the Circuit Court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also the right to recover certain sums of money for ores alleged to have been wrongfully extracted therefrom. The bond referred to was appended to the complaint. The prayer was that the court should decree that defendants should convey to plaintiff a good and sufficient deed to the premises in controversy.

The answer denied all the material allegations of the complaint, and affirmatively alleged that the adverse claim interposed to the application of Mayger for a patent was for the purpose of harassing and hindering Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience, and public policy.

The case was tried by the district court without a jury, and the court made and filed findings of fact and conclusions of law. It was found that plaintiff's predecessors in in-
[653] terest *were at the time mentioned in the complaint the owners of, in possession, and entitled to the possession, of the Nine Hour Lode Mining Claim as described, and that the strip of ground in dispute was at the time and continued to be a part of said claim; that the bond was executed and delivered by Mayger to the parties therein named, binding Mayger to convey to them or their assigns the ground in question when Mayger obtained a patent therefor; that it was given as a compromise and settlement of the controversy as to the land now in dispute, and then in litigation between the parties, and for the purpose of fixing and determining the boundary line beween the Nine Hour Lode Mining Claim and the St. Louis Mining Claim, as alleged in the complaint, and that Mayger thereafterwards did obtain a patent covering the premises in dispute; that plaintiffs in the adverse mining suit, on the execution to them of the bond by Mayger, dismissed their action and performed all the conditions of the contract on their part; that at the time of the execution of the bond the predecessors of plaintiff were in actual possession of the ground in dispute, and that they and plaintiff have ever since remained in possession thereof, claiming and holding the same as a part of the Nine Hour Lode Mining Claim; that at the date of the execution and delivery of the bond, it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the strip should be a portion of the Nine Hour Lode Mining Claim; that plaintiff is the successor in interest of Robinson, Huggins, and Sterling, the obligees named in the bond, and also of De Camp and Eddy, who were cotenants with said obligees in the premises at the date of the execution of the bond; that the mesne conveyances introduced in evidence on the part of plaintiff embraced and were intended to include the ground in question, and conveyed to the grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises, covering as well their interest in the ground in dispute as in every other part and parcel of the Nine Hour Lode Mining Claim.

That in July, 1893, plaintiff duly demanded a deed to the *ground in dispute from defend- [654]
ants, which defendants refused to execute; that in June, 1893, Mayger assumed to convey the controverted ground to the St. Louis Mining & Milling Company, but that at the date of his conveyance the St. Louis Company had full notice and knowledge of plaintiff's equities in and to the disputed strip, and of its possession thereof; that defendants wrongfully asserted title to the ground in controversy, and thereby clouded plaintiff's title thereto, which cloud plaintiff had a right to have removed.

The district court concluded as matter of law that plaintiff was entitled to the conveyance prayed for, and that defendants should be enjoined from asserting any right, title or interest in or to the ground in dispute, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with the findings of fact and conclusions of law, a decree was entered for plaintiff, and defendants appealed to the supreme court of the state of Montana, by which it was affirmed. [20 Mont. 394] 51 Pac. 824.

This writ of error was then sued out, and defendants in error now move to dismiss the writ, or that the decree be affirmed.

Messrs. **Charles J. Hughes, Jr.**, and **W. E. Cullen** for defendant in error in favor of motion to dismiss or affirm.

Messrs. **W. W. Dixon, Edwin W. Toole,** *McConnell, Clayberg, & Gunn*, and *Thomas C. Bach* for plaintiffs in error in opposition to motion.

*Mr. Chief Justice **Fuller** delivered the [654]*
opinion of the court:

While it is conceded by plaintiffs in error that there is no express prohibition on the transaction involved in the record, it is contended that the contract was contrary to the policy of the law, and that the question thus

raised is necessarily a Federal question. [655] Granting that this is so, and that the *motion to dismiss must therefore be overruled, we are of opinion that there was color for the motion, and that the case may properly be disposed of on the motion to affirm.

The supreme court of Montana ruled that, in the absence of statutory prohibition, there was no reason in law or equity why the contract sought to be enforced should be held illegal, and we concur in this disposition of the Federal question suggested.

The public policy of the government is to be found in the Constitution and the laws, and the course of administration and decision. *License Tax Cases,* 5 Wall. 462 [18: 497]; *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 340 [41: 1027].

The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition.

Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the mineral lands act against alienation, and he may sell it, mortgage it, or part with the whole or any portion of it as he may see fit. *Forbes* v. *Gracey,* 94 U. S. 766 [24: 314]; *Manuel* v. *Wulff,* 152 U. S. 510 [38: 534]; *Black* v. *Elkhorn Mining Company,* 163 U. S. 449 [41: 223].

The location of the Nine Hour Lode was in all respects sufficient and valid. When the dispute afterwards arose between Robinson and Mayger as to a portion of it, there was nothing to compel the filing of an adverse claim. The settlement made gave Robinson an equitable title immediately, and ultimately he was to have the complete legal title, to a piece of ground which, it seems, rightfully belonged to him. The government was not [656] defrauded in any way, nor *was there any legal or moral fraud involved in the transaction. The settlement and adjustment of the dispute with reference to the right of possession appears upon its face to have been satisfactory to the parties when made, and should be upheld unless contravening some statute or some fundamental principle of law recognized as the basis of public policy. There was no such statute, and settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored, and are apparently of frequent occurrence in regard to mining land claims; nor is there anything in the decisions of this court to throw doubt on their validity.

In *Ducie* v. *Ford,* 138 U. S. 587 [34: 1091], a contract of the character of that under consideration was passed on in a suit brought to enforce its specific performance, and it was assumed that the contract was not void as in contravention of any statute of the United States, or contrary to public policy. In *Myers* v. *Croft,* 13 Wall. 291 [20: 562], this court was asked to hold that the prohibition against alienation found in the last clause of the 12th section of the pre-emption act of 1841 extended from the date of entry to the actual issue of patent. This the court declined to do, and decided that the object of the act was attained when the pre-emptor went with clean hands to the land office and proved up and paid for his land. And the court said: "Restrictions upon the power of alienation after this would injure the pre-emptor, and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the general land office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners until the government should choose to issue the patent."

*In *Davenport* v. *Lamb,* 13 Wall. 418 [20: [657]
655], a covenant made by certain grantors "that if they obtain the fee simple to said property from the government of the United States, they would convey the same to the grantee, his heirs or assigns, by deed of general warranty," made with reference to a tract of land taken up under what was known as the Oregon donation act, was upheld although the point that the covenant was against public policy was distinctly made.

In *Lamb* v. *Davenport,* 18 Wall. 307 [21: 759], Mr. Justice Miller, speaking of claims under that act, said: "They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of their own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions on such contracts."

And to the same effect see *Gaines* v. *Molen,* 30 Fed. Rep. 27, where the subject was considered by Mr. Justice Brewer, then circuit judge.

Anderson v. *Carkins,* 135 U. S. 483 [34: 272], involved a contract made by a homesteader to convey a portion of a tract when he should acquire title thereto from the United States, and was disposed of on different grounds. It was stated in the opinion that "the theory of the homestead law is

that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person.' And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated, except
[658]*as provided in section twenty-two hundred and eighty-eight,' which section provides for alienation for 'church, cemetery, or school purposes, or for the right of way of railroads.' The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. . . . There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right."

In the case at bar there was no statute which, in express terms, or by any fair implication, forbade the making of such a contract as that proceeded on here. *Decree affirmed.*

PEOPLE OF THE STATE OF NEW YORK. *ex rel.* PARKE, DAVIS, & COMPANY, *Plff. in Err.*,

v.

JAMES A. ROBERTS, Comptroller of the State of New York.

(See S. C. Reporter's ed. 658-683.)

Tax on capital of a corporation—Federal question—question of fact—tax valid.

1. The equal protection of the laws is not denied to a foreign corporation which manufactures goods in other states and sends them into the state for sale, by a tax on the amount of capital employed by it within the state, because of an exemption of corporations which are wholly engaged in manufacturing within the state, when the statute makes no discrimination between foreign and domestic corporations.
2. Error in the estimate of the amount of capital employed in a state and subject to tax therein does not present a Federal question on writ of error to a state court.
3. The relation of a person to the business of a corporation is one of fact, which is not open to inquiry on writ of error to a state court.
4. A franchise or business tax on the amount of capital stock employed within the state by a foreign corporation organized to conduct strictly private business is not invalid because a portion of its business is the importation and sale of articles in original packages.

[No. 21.]

Argued April 20, 21, 1898. Decided October 31, 1898.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court entered in pursuance of the decision of the Court of Appeals of that state quashing a writ of certiorari and confirming the comptroller's assessment of and tax upon the capital employed within the state, owned by Parke, Davis, & Company, a corporation of Michigan. *Affirmed.*

See same case below, 91 Hun, 158, 149 N. Y. 608.

Statement by Mr. Justice **Shiras:**

*Parke, Davis, & Company in the name of **[659]**
a corporation organized under the laws of the state of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. The factory is situated in the city of Detroit. The corporation has a warehouse and depot in the city of New York, and there keeps on hand varying quantities of its manufactured products, which are there sold at wholesale in original packages. The concern is represented in New York by John Clay as manager, who is paid a salary. The business of selling the manufactured articles is carried on in all respects like the ordinary sales of consigned goods. Clay, in his own name, but for the use of the company, imports crude drugs from foreign countries at the port of New York. Such crude drugs are, in large part, sent to the Detroit factory for use, but some portions are sold in the original packages in the city of New York.

The corporation pays an annual rental for its place of business in New York of $12,500, employs there a force of over fifty persons, and expended for the New York branch annually, for the years 1890 to 1894, inclusive, from $102,000 to $172,000. The property owned in New York, in the way of business fixtures, is valued at $15,000; the average stock of goods sent from Michigan and carried in New York during those years was $50,000. It also employed in New York during that period a continuing capital, used in the purchase and sale of crude drugs, of from $23,000 to $62,000 per year.

Upon this state of facts the comptroller of New York imposed for 1894, and five previous years, an annual tax based upon the sum of $90,000 as "capital employed within the state."

*At the time of the imposition of this tax **[660]**
the provisions of the statute here drawn in question were as follows (Laws 1880, chap. 542, § 3, as amended by Laws 1881, chap. 361; Laws 1885, chap. 359; Laws 1889, chaps. 193, 353):

"Every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this state or in any other state or country, and doing business in this state, except only savings banks and in-

stitutions for savings, life insurance companies, banks, foreign insurance companies, *manufacturing or mining corporations or companies wholly engaged in carrying on manufacture* or *mining ores within this state*, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting, and power companies, shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

Then come provisions grading the tax according to annual dividends. The tax originally fell upon the entire capital of a corporation, but the statute was amended in 1885 so as to read:

"The amount of capital stock *which shall be the basis* for tax under the provisions of section three (*supra*) in the case of every corporation, joint-stock company, and association liable to taxation thereunder, shall be the amount of capital stock employed within this state."

Parke, Davis, & Company, through their said manager, filed a petition in the New York supreme court, praying for a writ of certiorari directed to the comptroller, in order to subject his assessment to correction. In the petition it was alleged that the only capital in any proper sense employed by the company within the state of New York in the sale of its products was its leasehold of the warehouse and the office furniture and fixtures, not exceeding in value $15,000; that said company, being a manufacturing corporation, was exempt from taxation under the laws of the state of New York; that the comptroller erred in deciding that goods
[661] manufactured *by said corporation and stored at its depot in New York are capital employed in said state within the meaning of the statute; that if said statute was correctly interpreted by the comptroller, then said statute was unconstitutional and void as in contravention of the Constitution of the United States and the amendments thereof.

To the certiorari granted upon said petition the comptroller duly made a return, alleging that his acts and proceedings were valid.

The cause was heard at the December term, 1895, of said court, and judgment was entered quashing the writ of certiorari, and confirming the comptroller's assessment. From that judgment an appeal was taken to the court of appeals of the state of New York, and on June 9, 1896, the cause was heard, the order and judgment of the supreme court were affirmed, and the record remitted to the supreme court. 91 Hun, 158, 149 N. Y. 608.

Whereupon the cause was brought to this court by a writ of error duly prayed for and allowed.

Mr. **James McKeen,** for plaintiff in error:

The New York statute imposes a discriminating tax upon these relators for selling in New York, in the original packages, their products made in Michigan.

Tiernan v. *Rinker,* 102 U. S. 123, 26 L. ed. 103: *Walling* v. *Michigan,* 116 U. S. 446, 29 L. ed. 691; *Welton* v. *Missouri,* 91 U. S. 275, 23 L. ed. 347; *Minnesota* v. *Barber,* 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Brimmer* v. *Rebman,* 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485; *Voight* v. *Wright,* 141 U. S. 62, 35 L. ed. 638; *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 689, 39 L. ed. 312, 5 Inters. Com. Rep. 1.

Taxation upon the "franchises or business" of importing goods and once selling them is a power unequivocally surrendered by the states to the Federal government.

Brown v. *Maryland,* 12 Wheat. 419, 6 L. ed. 678.

The tax upon the franchise or business of selling their own goods in New York, imposed upon the relators, is unconstitutional in the absence of permission from Congress.

Leisy v. *Hardin,* 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727, 28 L. ed. 1137.

The tax here in question cannot be maintained as one imposed to reimburse the state for any police supervision over foreign corporations there selling their own goods.

Charlotte, C. & A. R. Co. v. *Gibbes,* 142 U. S. 386, 35 L. ed. 1051.

Where exemptions are so incorporated in a tax law as to result in unconstitutional discrimination the whole law falls.

Spraigue v. *Thompson,* 118 U. S. 90, 95, 30 L. ed. 115, 117; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. ed. 220.

Messrs. **Theodore E. Hancock,** Attorney General of New York, and *William Henry Dennis,* for defendant in error:

It is not sufficient to show that a Federal question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the state court to the case.

Hagar v. *California,* 154 U. S. 639, 24 L. ed. 1044; *Crowell* v. *Randell,* 10 Pet. 368, 9 L. ed. 458; *Edwards* v. *Elliott,* 21 Wall. 532, 22 L. ed. 487; *Ocean Ins. Co.* v. *Polleys,* 13 Pet. 157, 10 L. ed. 105; *Walker* v. *Villavaso,* 6 Wall. 124, 18 L. ed. 853; *Rector* v. *Ashley,* 6 Wall. 142, 18 L. ed. 733; *Gibson* v. *Chouteau,* 8 Wall. 314, 19 L. ed. 317; *Phœnix Ins. Co.* v. *The Treasurer,* 11 Wall. 204, 20 L. ed. 112; *Otis* v. *Oregon S. S. Co.* 116 U. S. 548. 29 L. ed. 719.

The return of the comptroller must be taken as conclusive as to the facts.

People, Sims, v. *New York Fire Comrs.* 73 N. Y. 437; *People, Roebling's Sons Co.* v. *Wemple,* 138 N. Y. 582; *People, Press Pub. Co.,* v. *Martin,* 142 N. Y. 228.

The tax, although upon the franchise or business of a corporation, is measured by the amount of its capital employed in the state.

Horn Silver Min. Co. v. *New York,* 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57; *Home Ins. Co.* v. *New York,* 119 U. S. 129, 30 L. ed. 350.

Taxation is measured by the amount of capital employed in the state.

People, Seth Thomas Clock Co., v. *Wemple*, 133 N. Y. 323.

The statute is not an infringement of the interstate commerce clause of the Federal Constitution.

People, American Contracting & D. Co., v. *Wemple*, 129 N. Y. 558; *Woodruff* v. *Parham*, 8 Wall. 136, 19 L. ed. 386; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *People, Southern Cotton Oil Co.*, v. *Wemple*, 131 N. Y. 64.

A corporation, whether domestic or foreign, cannot claim exemption because of doing a manufacturing business outside of the state of New York.

People, Tiffany, v. *Campbell*, 144 N. Y. 166; *People, Western Electric Co.*, v. *Campbell*, 145 N. Y. 587; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57; *Southern Cotton Oil Co.* v. *Wemple*, 44 Fed. Rep. 24.

A state may discriminate in favor of domestic as against foreign corporations, and may require a franchise or business tax from the latter as a condition of being allowed to do business within the state.

Ducat v. *Chicago*, 10 Wall. 410, 19 L. ed. 972; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *People* v. *Formosa*, 131 N. Y. 478; *Demarest* v. *Flack*, 128 N. Y. 205, 13 L. R. A. 854; *Ashley* v. *Ryan*, 153 U. S. 437, 38 L. ed. 774, 4 Inters. Com. Rep. 664; *Lafayette Ins. Co.* v. *French*, 18 How. 404, 21 L. ed. 451.

[661] *Mr. Justice **Shiras** delivered the opinion of the court:

The construction put upon the statute of the state of New York by its courts is, of course, binding upon this court, and that portion of the contention which questioned the action of the comptroller on the ground of a misinterpretation of the law is thus disposed of.

It must be regarded as finally settled by frequent decisions of this court that, subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign
[662] corporation to do business *within its limits as it may judge expedient; and that it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state. *Paul* v. *Virginia*, 8 Wall. 168 [19: 357]; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305 [36:164, 4 Inters. Com. Rep. 57].

Accordingly the counsel for the plaintiff in error disavows in his brief any wish to bring those decisions into further review, but his contention is that this Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the state, is denied the equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the state; that such a tax is an unjust discrimination against this corporation, whose place of manufacture is in the state of Michigan. By this contention it is not meant, of course, that this particular corporation is, in terms, discriminated against in the New York statute, but that all corporations which manufacture their goods wholly in other states and send them for sale in New York are discriminated against in favor of such corporations, whether foreign or domestic, as manufacture their goods within the state of New York.

To sustain this contention the well-known line of cases is cited, wherein this court has had to deal with state legislation imposing discriminating taxes against the products of other states. *Walling* v. *Michigan*, 116 U. S. 446 [29: 691]; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 [30: 694]; *Minnesota* v. *Barber*, 136 U. S. 313 [34: 455, 3 Inters. Com. Rep. 185].

If the object of the law in question was to impose a tax upon products of other states while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that, obviously, such is not the purpose of this legislation. "Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this state or in any *other state or country and [663]
doing business in this state . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows."

It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations *wholly engaged in carrying on manufacture or mining ores within the state of New York* are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state.

In construing this statute it was held in the case of *People, Blackinton Co.*, v. *Roberts*, 4 App. Div. 388, that a New York corporation which carried on a manufacturing business in another state was liable to this tax; and this decision was affirmed by the New York court of appeals. 151 N. Y. 652.

The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corporation; but the statute was amended in 1885 so as to read: "The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint-stock company, and association liable to taxation thereunder, shall be the amount of capital stock employed within this state."

So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states to the detriment of the latter, or to subject property out of the state to taxation.

In the present case, indeed, complaint is made of the action of the comptroller in determining the "amount of the capital stock employed within the state,"—that the amount fixed by him was too large. The action of the comptroller was subject to revision, and the corporation's complaints in respect thereto were heard and passed upon by the supreme court of New York. The estimate of the comptroller, in determining the amount of capital employed in the state,
[664]would not be judicially *interfered with unless it was clearly shown that the same was erroneous; and, even then, such errors would not present a Federal question for our consideration.

Nor can we consider the further contention that portions of the business which were made the basis of the assessment were improperly treated as business of the corporation, whereas they should have been regarded as pertaining to the personal transactions of Mr. Clay, the company's agent. The true relation of Mr. Clay to the corporation's business was one of fact, in respect to which a hearing was afforded to the corporation, and this court is in no position to enter into such an inquiry.

Again, it is said that, even assuming that the importation of crude drugs and their sale in the original packages constituted a portion of the corporate business, no tax could be imposed by the state under the doctrine of *Brown* v. *Maryland,* 12 Wheat. 419 [6: 678].

But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested. *Society for Savings* v. *Coite,* 6 Wall. 594 [18: 897]; *Provident Institution for Savings* v. *Massachusetts,* 6 Wall. 611 [18: 907]; *Pembina Consol. Silver Mining & Mill. Co.* v. *Pennsylvania,* 125 U. S. 181 [31:650, 2 Inters. Com. Rep. 24]; *Home Insurance Co.* v. *New York,* 134 U. S. 594 [33: 1025].

When a corporation of one state, whose business is that of a common carrier, transacts part of that business in other states, difficult questions have arisen, and this court has been called upon to decide whether certain taxing laws of the respective states infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different states and the
[665]subject has been much *discussed in several recent cases. *Western U. Teleg. Co.* v. *Atty. Gen. of Massachusetts,* 125 U. S. 530 [31: 790]; *Pittsburgh, Cincinnati, C. & St. L. R. W. Co.* v. *Backus,* 154 U. S. 421 [38: 1031]; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]; *Adams Express Co.* v. *Ohio,* 165 U. S. 194 [41: 683]. It is not necessary in this case to enter into a subject so difficult, but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.

The corporation concerned in the present litigation is of the latter character, and the case comes within the doctrine of *Paul* v. *Virginia,* 8 Wall. 168 [19: 357], and of subsequent cases affirming that one. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305 [36: 164, 4 Inters. Com. Rep. 57], may be specially mentioned, as it involved a similar question and the same statute which are before us in the present case. The Horn Silver Mining Company was a corporation of the territory of Utah, where it carried on a mining and manufacturing business. It also carried on business in the state of New York, and was there subjected to an annual tax upon its corporate franchise or business, as prescribed in the statute of the state of New York. The company refusing to pay the tax, proceedings to enforce its payment were resorted to, which resulted in the case being brought to this court, where some of the questions raised in the present case were considered and determined. The conclusions reached were that the law in question did not tax property not within the state, nor regulate interstate commerce, nor deny to the corporation the equal protection of the laws, nor impose a tax beyond the constitutional power of the state.

It is said that the operation of that portion of this taxing law, which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, *it is [666]
not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.

The judgment of the Supreme Court of the State of New York is accordingly affirmed.

Mr. Justice **White** was not present at the argument, and took no part in the decision of the case.

Mr. Justice **Harlan,** dissenting:

It seems to me that the opinion and judgment in this case are not in harmony with former decisions of this court.

The comptroller of New York has imposed upon the plaintiff in error, a Michigan corporation doing business in New York, an annual tax for the year 1894 and the preceding five years, upon the sum of $90,000 "as capital employed" in the latter state. The authority for this tax was found in a statute of New York providing that "every corporation, joint-stock company, or association whatever, now or hereafter incorporated, or-

ganized, or formed under, by, or pursuant to law in this state or in any other state or country, and doing business in this state, except only savings banks and institutions for savings, life insurance companies, banks, foreign insurance companies, manufacturing or mining corporations, or companies *wholly engaged in carrying on manufacture* or mining ores *within this state*, and agricultural and horticultural societies or associations, which exceptions, however, shall not include gas companies, trust companies, electric or steam heating, lighting, and power companies, shall be liable to and shall pay a tax, as a tax upon its franchise or business, into the state treasury annually, to be computed as follows," etc. Laws of N. Y. 1889, 112th Sess. chap. 353, p. 467.

The goods sold by the plaintiff in error, by its agents in New York, are manufactured in the state of Michigan. If the plaintiff had been wholly engaged in carrying on manufacture in New York it would have been exempted by the statute from the taxes in question.

So that the question in this case is, whether it is competent for New York to impose a tax upon the franchise or business
[667] *of manufacturing corporations or companies, foreign or domestic, *not* "wholly engaged" in carrying on manufacture within its limits, while at the same time it exempts from such taxation like corporations or companies wholly engaged in carrying on manufacture in that state.

Is not such legislation an injurious discrimination against the manufacturing business and the manufactured goods of other states, in favor of the manufacturing business and the manufactured goods of New York, which is forbidden by the Constitution of the United States? Let us see. The question presented for consideration is of such importance as to justify an extended reference to our former decisions.

In *Woodruff* v. *Parham*, 8 Wall. 123, 140 [19: 382, 387], it was contended that a provision in the charter of the city of Mobile, Alabama, authorizing the collection of a tax on sales at auction, was invalid in its application to auctioneers who sold in that state in the original packages goods and merchandise the product of states other than Alabama. This court said: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other. There is no attempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

At the same term of the court *Hinson* v. *Lott*, 8 Wall. 148, 150 [19: 387, 388], was decided. That case involved the validity of a statute of Alabama declaring that "before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this state, such dealer or dealers introducing any such liquors into the state for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per *gallon upon each and every gallon [668]
thereof." This court said: "If this section [the one just quoted] stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the state from other states and offered for sale, whether in the original casks by which they came into the state, or by retail in smaller quantities, would be subject to a heavy tax, *while the same class of liquors manufactured in the state would escape the tax.* It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the state. If this can be done in reference to liquors, it can be done with reference to all the products of a sister state, and *in this mode one state can establish a complete system of non-intercourse in her commercial relations with all the other states of the Union.*" Again: "But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the supreme court of Alabama delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the states was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the states as to essentially impede or seriously interfere with it is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the states that it has to regulate commerce with foreign nations, and that whenever it exercises that power all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the state of Alabama was an exercise of the concurrent right of regulating commerce remaining with the state until some regulation on the subject had been made *by Congress. But, assuming [669]
the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister states, and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between

the states, under the cloak of the taxing power, we are not prepared to admit that a state can exercise such a power, though Congress may have *failed* to act on the subject in any manner whatever." Referring to the doctrine announced in *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299 [13: 996], that there is a class of legislation of a general nature affecting the commercial interests of all the states, which, from its essential character, is national, and which must, so far as it affects those interests, belong exclusively to the Federal government, the court said: "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other states, in favor of those of Alabama, and involving a principle which might lead to actual commercial nonintercourse, would, in our opinion, belong to that class of legislation, and be forbidden by the clause of the Constitution just mentioned." Upon examining the entire revenue statute of Alabama it was found that it did not injuriously discriminate against the products of other states, and the court said: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the people of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

In *Ward* v. *Maryland*, 12 Wall. 418, 429 [20: 449, 452], the court held to be unconstitutional a statute of Maryland, making it a penal offense for any person, "not being a permanent resident" of that state, to sell, offer, or expose for sale, within the city of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in the state of Maryland, without first obtaining a license
[670] so to do,—*such license being fixed at $300 per year, while the license fees or taxes required of resident traders were from $15 to $150. The statute was adjudged to be void because it discriminated against the people and products of other states. After referring to some of the former decisions, this court said: "Taxes, it is conceded in those cases, may be imposed by a state on all sales made within the state, whether the goods sold were the produce of the state imposing the tax, or of some other state, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other states of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. Imposed as the exaction is upon persons not permanent residents in the state, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court."

In *Welton* v. *Missouri*, 91 U. S. 275, 279, 281 [23: 347, 349, 350], the question was as to the validity of a statute of Missouri declaring that whoever should deal in the selling of patent and other medicines, goods, wares and merchandise, except books, charts, maps, and stationery, which were "not the growth, produce, or manufacture of this state," by going from place to place to sell the same, should be deemed a peddler, and prohibiting him, under a penalty, from dealing as such without first obtaining a license, no license being required for selling, "by going from place to place," the produce or manufacture of the state. The constitutionality of that statute was sought to be maintained upon the ground that it was only a tax upon a calling. The state court took that view of the statute, and observed that it was a calling limited to*the sale of mer- [671]
chandise not the growth or product of Missouri. But this court, after referring to *Brown* v. *Maryland*, 12 Wheat. 419, 444 [6: 678, 687], as holding an act of Maryland to be in conflict with the Constitution of the United States because it imposed a license tax upon the importer of foreign goods, said: "So, in like manner, the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the state, before they can be sold from place to place within the state, must be regarded *as a tax upon such goods themselves;* and the question presented is, whether legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States." The question thus presented was solved by the judgment of this court declaring the legislation of Missouri to be unconstitutional. It was further said: "If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product, or manufacture of other states or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion. The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states."

The case of *Guy* v. *Baltimore*, 100 U. S. 434, 439-443 [25: 743, 745, 746], is much in

point. That case involved the validity of certain ordinances of the mayor and council of Baltimore based upon an act of the general assembly of Maryland authorizing the mayor and city council of Baltimore to regulate, establish, charge, and collect, to the use of the said mayor and city council, such rate of wharfage as they deemed reasonable, "of [672]and from all *vessels resorting to or lying at, landing, depositing, or transporting goods or articles *other than the productions of this state,* on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the state."

This court, after referring to the previous cases of *Woodruff* v. *Parham, Hinson* v. *Lott,* and *Ward* v. *Maryland,* said: "In view of these and other decisions of this court, it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several states could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several states be materially abridged and impaired."

In the argument of that case it was contended that the city, by virtue of its ownership of the wharves in question, had the right, in its discretion, to permit their free use to all vessels landing at them with the products of Maryland; and that those operating vessels laden with the products of other states cannot justly complain so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the city's property. The court said: "This proposition, however ingenious or plausible, is unsound both upon principle and authority. The municipal corporation of Baltimore was created by the state of Maryland to promote the public interests and the public convenience. The wharf at which appellant landed his vessel was long ago dedicated to public use. The public, for whose benefit it was acquired, or who are entitled to participate in its use, are not alone those who may engage in the transportation to the port of Baltimore of the products of Maryland. It embraces, necessarily, all engaged in trade and commerce [673]upon the public navigable *waters of the United States. Every vessel employed in such trade and commerce may traverse those waters without let or hindrance from local or state authority; and the national Constitution secures to all so employed, without reference to the residence or citizenship of the owners, the privilege of landing at the port of Baltimore with any cargo whatever, not excluded therefrom by or under the authority of some statute in Maryland enacted in the exertion of its police powers. The state, it will be admitted, could not lawfully impose upon such cargo any direct public burden or tax because it may consist, in whole or in part, of the products of other states. The concession of such a power to the states would render wholly nugatory all national control of commerce among the states, and place the trade and business of the country at the mercy of local regulations, having for their object to secure exclusive benefits to the citizens and products of particular states. But it is claimed that a state may empower one of its political agencies, a mere municipal corporation representing a portion of its civil power, to burden interstate commerce by exacting from those transporting to its wharves the products of other states wharfage fees which it does not exact from those bringing to the same wharves the products of Maryland. The city can no more do this than it or the state could discriminate against the citizens and products of other states in the use of the public streets or other public highways. . . . Municipal corporations owning wharves upon the public navigable waters of the United States, and quasi public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several states and with foreign nations. In the exercise of its police powers a state may exclude from its territory or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or would endanger the lives or property of its people. But if the state, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles of that kind that may be produced or manufactured in other *states, the courts would [674] find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

In *Howe Machine Co.* v. *Gage,* 100 U. S. 676, 679 [25: 754, 756], a statute of Tennessee imposing a license tax upon all peddlers of sewing machines was sustained, as not in violation of the Federal Constitution, because it applied "alike to sewing machines manufactured in the state and out of it." This court said: "In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Wherever there is such discrimination it is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the supreme court of the state, makes no such discrimination. It applies alike to sewing machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden. *Woodruff* v. *Parham, Hinson* v. *Lott, Ward* v. *State of Maryland, Welton* v. *State of Missouri, supra.*"

Webber v. *Virginia,* 103 U. S. 344, 350

[26: 565, 567], is also very much in point. That case involved the validity of a statute of Virginia providing that "any person who shall sell or offer for sale the manufactured articles or machines of other states or territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other states and territories, and should not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such article through the agency of another, but a separate license shall be required from an agent or employee who may sell or offer to sell such articles for another. For any violation of this section, the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense. The specific license tax upon an agent for the sale of any manufactured ar-
[675] ticle or machine of other states or *territories shall be twenty-five dollars; and this tax shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license; and if he shall sell or offer to sell the same in any other of the counties or corporations of this state, he shall pay an additional tax of ten dollars in each of the counties or corporations where he may sell or offer to sell the same. All persons *other than resident manufacturers or their agents, selling articles manufactured in this state,* shall pay the specific license tax imposed by this section." §§ 45, 46.

This court said: "By these sections, read together, we have this result: The agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is therefore a tax upon them, *and if this is made to depend upon the foreign character of the articles,*—that is, upon their having been manufactured without the state,—it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. *She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product.* It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states."

In *Walling* v. *Michigan,* 116 U. S. 446, 459–461 [29: 691, 695, 696], the principal *question was as to the validity of certain [676]
legislation in Michigan, which, it was contended, discriminated against the manufactured products of other states. This court held the Michigan statute to be invalid, saying: "It is suggested by the learned judge who delivered the opinion of the supreme court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police power of the state for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act, if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby. *New Orleans Gaslight Co.* v. *Louisiana Light, H. P. & Mfg. Co.* 115 U. S. 650 [29: 516]. . . . Another argument used by the supreme court of Michigan in favor of the validity of the tax is, that it is merely a tax on an occupation, which, it is averred, the state has an undoubted right to impose, and reference is made to *Brown* v. *Maryland,* 12 Wheat. 419, 444 [6: 678, 687]; *Nathan* v. *Louisiana,* 8 How. 73, 80 [12: 993, 995]; *Peirce* v. *New Hampshire,* 5 How. 593 [12: 296]; *Hinson* v. *Lott,* 8 Wall. 148 [19: 387]; *Howe Machine Co.* v. *Gage,* 100 U. S. 676 [25: 754]. *None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state,* or against the citizens of another state."

In *Brimmer* v. *Rebman,* 138 U. S. 78, 81–83 [34: 862, 863, 864, 3 Inters. Com. Rep. 485], the question was as to the validity of a statute relating to the sale of meats in Virginia. This court said: "The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot exclude the question of the conformity of the act to the Constitution. . . . Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The statute is, in effect, a prohibition upon the sale in Virginia *of [677]
beef, veal, or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats of like kind, from animals slaughtered within less than one hundred miles from the place

of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, *is thus made to depend entirely upon the place where the animals from which the beef, veal, or mutton is taken, were slaughtered.* Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, *make discriminations against the products and industries of some of the states in favor of the products and industries of its own or other states.* The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a state is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore void. *Welton* v. *Missouri,* 91 U. S. 275, 281 [23: 347, 350]; *Hannibal & St. J. Railroad Co.* v. *Husen,* 95 U. S. 465 [24: 527]; *Minnesota* v. *Barber,* above cited. The fees exacted, under the Virginia statute, for the inspection of beef, veal, and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are in reality a tax; and 'a discriminating tax imposed by a state,
[678] *operating to the disadvantage of the product of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States.' *Walling* v. *Michigan,* 116 U. S. 446, 455 [29: 691, 694]. Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia; for 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.' *Minnesota* v. *Barber,* above cited; *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, 497 [30: 694, 697, 1 Inetrs. Com. Rep. 45]. If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal, and mutton, however wholesome, from animals slaughtered in distant states, that object will be accomplished if the statute before us be enforced."

In *Emert* v. *Missouri,* 156 U. S. 296, 311 [39: 430, 434, 5 Inters. Com. Rep. 68], a Missouri statute requiring the payment of a license tax by peddlers was held to apply to the sale by peddlers in Missouri of sewing machines made in other states, and not to be a regulation of interstate commerce. The decision was placed upon the ground that the statute made no discrimination against the goods of other states as compared with domestic goods.

I am unable to reconcile the opinion and judgment in the present case with the principles announced in the above cases. A tax upon the capital employed by the manufacturing corporation or company is *pro tanto* a tax upon the goods manufactured by it. If this be not so, there are many expressions in the former opinions of this court which should be withdrawn or modified. A corporation or company wholly engaged in manufacture in New York has an advantage, in the sale of its goods in the markets of that state, over a corporation or company manufacturing like goods in other states, if the former is altogether exempted from taxation in respect of its franchise or business, and the latter subjected to taxation of its *fran- [679]
chise or business measured by the amount of its capital employed in New York. That state may undoubtedly tax capital employed within its limits by corporations or companies of other states, but it cannot impose restrictions that will necessarily prevent such corporations or companies from selling their goods in New York upon terms of equality with corporations or companies wholly engaged there in manufacturing goods of like kind. By this statute New York says to the manufacturing corporations and companies of other states: "Remove your plant to New York, and the capital employed by you in this state shall be exempt from taxation. But if you persist in keeping your plant where it is already established, your franchise or business shall be taxed upon the basis of the capital employed by you in New York, while the capital of similar corporations or companies wholly engaged in manufacturing in New York, shall be exempt from taxation." Observe, that the statute of New York does not apply exclusively to corporations. It applies equally to companies.

In my judgment, this statute cannot be sustained in its application to the plaintiff in error without recognizing the power of New York, so far as the Federal Constitution is concerned, to enact such statutes as will, by their necessary operation, amount to a tariff protecting goods manufactured in that state against competition in the markets there with goods manufactured in other states. And if such legislation as is embodied in the statute in question is held to be consistent with the Federal Constitution, why may not New York, while exempting from taxation the franchises or business of corporations or companies wholly engaged in carrying on their manufacturing in that state, put such taxation upon the franchise or business of corporations or companies doing business in that state, but not wholly engaged in manufacture there, as will amount to an absolute prohibition upon the sale in New York of the goods manufactured in other states? If each state in the Union

should enact a statute exempting from taxation the franchise and business of corporations or companies wholly engaged in carrying on manufacture within its limits, but taxing the franchise or business of corpora-
[680]tions or companies *whose manufacturing is carried on in other states, it is easy to see that commerce among the states would be as much at the mercy of discriminating state legislation as it was under the Articles of Confederation, when, as Mr. Justice Story well said, the government established to conserve the interests of the people of all the states was competent to declare everything, but was without power to do anything. While the authority of the National government to lay duties upon goods brought from foreign countries into this country so as to build up and protect American industries has been recognized, I had not supposed it was competent for any state of the Union to exert its power of taxation so as to build up and protect its local industries by means of injurious discriminations against the industries of other states. I had supposed that the Constitution of the United States had established absolute free trade among the states of the Union, and that freedom from injurious discrimination in the markets of any state, against goods manufactured in this country, was a vital principle of constitutional law.

The opinion of the court in this case says: "If the *object* of the law in question was to impose a tax upon products of other states, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that obviously such is not the *purpose* of this legislation. 'Every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized, or formed under, by, or pursuant to, law in this state or in any other state or country and doing business in this state, . . . shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows.' It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such exemption is not restricted to New York corporations,
[681]but includes corporations *of other states as well, when wholly engaged in manufacture within the state."

I submit that the validity of state legislation as affected by the Constitution of the United States is not to be determined altogether by what is supposed to be the "object" or "purpose" of such legislation, if by object or purpose is meant the motive which controlled members of the state legislature when they enacted such legislation. In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268 [23: 543, 548]. This has often been adjudged by this court. "There may be no purpose," this court has said, "upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." *Minnesota* v. *Barber*, 136 U. S. 313, 319 [34: 455, 457, 3 Inters. Com. Rep. 185], and authorities there cited. Can it be doubted that, whatever may have been the ostensible object for which the New York statute was passed, the natural and reasonable effect of the statute is to withhold from goods not manufactured in New York—*and because they were not there manufactured*—that equality in the markets of New York which, we have often said, is secured by the national Constitution to the like products of other states? If the plaintiff corporation can be taxed on its capital employed in New York in the business of selling its goods, manufactured in Michigan, while capital employed in New York by a like manufacturing corporation is exempted from taxation *because, and only because, it is wholly engaged in manufacture in that state*, is it possible to deny that such legislation injuriously discriminates against the manufactures of Michigan in favor of the like manufactures of New York?

My brethren refer to the general rule that it is competent for a state to prescribe the conditions upon which coporations of other states may do business within its limits. But I submit *that that rule, however broadly [682]
stated, has no application here. The New York statute has not assumed to prescribe any rule applicable alike to all manufacturing corporations or companies of other states. It exempts from taxation all corporations or companies, whether of New York or of other states, that wholly carry on their manufacturing business in New York, Thus a distinction is made between manufacturing corporations and companies by exempting from taxation on their capital employed in New York those, and those only, that wholly carry on their manufacturing in that state. Besides, this court has never, in any case, adjudged that the power of a state to prescribe the conditions upon which the corporations of other states may do business within its limits can be exerted by legislation that directly, or by its necessary operation, discriminates injuriously against the products of other states in favor of the products of such state. On the contrary, in the cases above cited, it has directly adjudged that such legislation was unconstitutional. It is not necessary for me now to question the soundness of the general proposition that a state may prescribe the conditions upon which corporations of other states may come within its limits for purposes of business. A good deal may depend upon the nature of the business in which the foreign corporation

is engaged. But I do question the power of any state to exact a tax from corporations or companies not wholly engaged in manufacturing within its limits, if it exempts from such taxation corporations and companies wholly engaged, and only because they are wholly engaged, in manufacturing in such state. If this be not a sound view of the Constitution, it follows that local tax laws may be so framed as to destroy the principle, frequently announced and often recognized by this court, that the products of the respective states may go into the markets of the country without being discriminated against because of the place of their origin.

The only case which seems to give any support whatever to the opposite view is *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305 [36: 164, 4 Inters. Com. Rep. 57]. But a careful examination of the report of that case and of the opinion shows that
[683] counsel did not present, nor did *the court consider or determine, the precise point here presented, as to the authority of the state to exercise the power of taxation so as to place burdens upon goods, the manufacture of other states, solely because they were not produced in the state imposing the taxation.

Some stress seems to be laid upon the fact that the exemption given by the statute to corporations or companies wholly engaged in carrying on manufactures or in mining ores within the state of New York is not limited to corporations or companies of that state; but that the exemption is allowed to such corporations or companies of other states as may carry on their manufacturing or mining business wholly in New York. This view falls far short of meeting the difficulty presented, namely, that the statute, by its necessary operation, injuriously discriminates against goods manufactured in other states, in that such goods are not permitted to go into the markets of New York and compete there upon equal terms with like goods wholly manufactured in that state. This court has often said that the objection that a local statute was invalid, as restraining or binding commerce among the states, was not met by the suggestion that it operated equally upon citizens of the state which enacted it.

I am of opinion that the statute of New York in its application to the plaintiff in error is inconsistent with the power of Congress to regulate commerce among the states, and with that clause of the Fourteenth Amendment, which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws. It is well settled that corporations are persons within the meaning of that clause of the Constitution. *Smyth* v. *Ames,* 169 U. S. 466, 522 [42: 819, 840].

For the reasons stated, I dissent from the opinion and judgment of the court.

Mr. Justice **Brown** authorizes me to say that he concurs in this dissent.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1898.

Vol. 172.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1898.

AND REPORTED HEREIN,

VOLUME 172,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 172 U. S.	Title.	Here in.
1	Walla Walla v. Walla Walla Water Co.	341
2–5	" "	342
5–6	" "	343
6–7	" "	344
7–10	" "	345
10–12	" "	346
12–15	" "	347
15–18	" "	348
18–20	" "	349
20–23	" "	350
23	" "	351
24–25	Andersen v. Treat	351
25–28	" "	352
28–31	" "	353
31	" "	354
32–34	Pittsburgh, etc. Railway v. Board of Public Works of W. Va. ("Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works of W. Va.")	354
34–36	" "	355
36–39	" "	356
39–41	" "	357
41–44	" "	358
44–47	" "	359
47–48	" "	360
48–49	United States v. Wardwell	360
49–52	" "	361
52–54	" "	362
54–57	" "	363
57–58	" "	364
58–59	Green Bay & M. Canal Co. v. Patten Paper Co.	364
59–62	" "	365
62–65	" "	366
65	" "	367
66–68	" "	368
68–70	" "	369
70–73	" "	370
73–76	" "	371
76–78	" "	372
78–81	" "	373
81–82	" "	374
82–84	Meyer v. Richmond	374
84–87	" "	375
88	" "	376
87–92	" "	377
92–93	" "	378
93–96	" "	379
96–99	" "	380
99–101	" "	381
101	" "	382
102–104	McCullough v. Virginia	382
104–107	" "	383
107–109	" "	384
109–112	" "	385
112–115	" "	386
115–117	" "	387
117–120	" "	388
120–123	" "	389
123–126	" "	390
126–128	" "	391
128–131	" "	392
131–133	" "	393
133	United States v. Ranlett	393
134–137	" "	394
137–140	" "	395
140–142	" "	396
142–145	" "	397
145–148	" "	398
148–150	Harkrader v. Wadley	399
150–153	" "	400
153–156	" "	401
156–158	" "	402
158–161	" "	403
161–164	" "	404
164–167	" "	405
167–170	" "	406
170	" "	407
171–172	New Mexico v. United States Trust Co.	407
172–175	" "	408
175–178	" "	409
178–181	" "	410
181–183	" "	411
183–186	" "	412
186	" "	413

Off. Rep. 172 U. S.	Title.	Here in.
186	New Mexico v. United States Trust Co.	413
186–188	The Elfrida	413
188–191	"	414
191–194	"	415
194–197	"	416
197–199	"	417
199–202	"	418
202–205	"	419
205–206	"	420
206–207	United States v. Loughrey	420
207–210	" "	421
210–213	" "	422
213–216	" "	423
216–218	" "	424
218–221	" "	425
221–224	" "	426
224–227	" "	427
227–229	" "	428
229–232	" "	429
232–235	Grant v. Buckner	430
235–238	" "	431
238–239	" "	432
239	Blake v. McClung	432
240–243	" "	433
243–246	" "	434
246–248	" "	435
248–251	" "	436
251–254	" "	437
254–256	" "	438
256–259	" "	439
259–262	" "	440
262–264	" "	441
264–267	" "	442
267–269	" "	443
269	Norwood v. Baker	443
270–273	" "	444
273–275	" "	445
275–277	" "	446
277–280	" "	447
280–282	" "	448
282–285	" "	449
285–288	" "	450
288–291	" "	451
291–293	" "	452
293–296	" "	453
296–299	" "	454
299–302	" "	455
302–303	" "	456
303–304	Winston v. United States Strather v. United States Smith v. United States	456
304–307	" "	457
307–309	" "	458
310–312	" "	459
312–314	" "	460
314–315	Bellingham Bay & B. C. R. Co. v. New Whatcom	460
315–318	" "	461
318–320	" "	462
320	Bellingham Bay Improv. Co. v. New Whatcom	463
321–323	United States v. Bliss	463
323–326	" "	464
326	" "	465
327–328	United States v. Ingram	465
328–331	" "	466
331–334	" "	467
334	Clark v. Kansas City	467
334–337	" "	468
337–338	" "	469
339	United States v. Buffalo Natural Gas Fuel Co.	469
339–342	" "	470
342–343	" "	471
343–345	Scott v. United States	471
345–347	" "	472
347–350	" "	473
350–351	" "	474
351–353	Missouri, K. & T. Trust Co. v. Krumseig	474
353–355	" "	475
355–358	" "	476
358–361	" "	477
361	" "	478
361–364	Washington Market Co. v. District of Columbia	478
364–365	" "	479
365–368	" "	480
368–371	" "	481
371	" "	482
372–374	Simpson v. United States	482
374–377	" "	483
377–379	" "	484
379–382	" "	485
382–383	" "	486
383–384	Home for Incurables v. Noble Colville v. American Security & T. Co.	486
385–387	" "	487
387–390	" "	488
390–393	" "	489
393–396	" "	490
396–398	" "	491
398–400	" "	492
401	Sonnentheil v. Christian Moerlein Brew. Co.	492
401–403	" "	493
403–406	" "	494
406–409	" "	495
409–411	" "	496
411–414	" "	497
414–416	" "	498
416–417	Utter v. Franklin	498
417–419	" "	499
419–423	" "	500
423–425	" "	501
425	" "	502
425–428	Capital Nat. Bank v. First Nat. Bank	502
428–430	" "	503
430–433	" "	504
433–434	" "	505
434	Capital Nat. Bank v. Coldwater Nat. Bank McDonald v. Samuel Cupples Wooden Ware Co. McDonald v. Genesee Fruit Co.	505
434	Keck v. United States	505
436–439	" "	507
439–441	" "	508
441–444	" "	509
444–447	" "	510
447–450	" "	511
450–452	" "	512
452–455	" "	513
455–458	" "	514
458–461	" "	515
461–464	" "	516
464–465	" "	517

Off. Rep. 172 U. S.	Title.	Here in.
465–466	Chappell Chemical & F. Co. v. Sulphur Mines Co. (No. 1)	517
466–469	“ “	518
469–471	“ “	519
472–473	Chappell Chemical & F. Co. v. Sulphur Mines Co. (No. 2)	520
474	Chappell Chemical & F. Co. v. Sulphur Mines Co. (No. 3)	520
474–475	“ “	521
475–477	Columbia Water Power Co. v. Columbia Electric Street R. L. & P. Co. - -	521
477–479	“ “	522
479–482	“ “	523
482–485	“ “	524
485–488	“ “	525
488–490	“ “	526
490–493	“ “	527
493–496	Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. - - - -	528
496–499	“ “	529
499–502	“ “	530
502–505	“ “	531
505–507	“ “	532
507–510	“ “	533
510–513	“ “	534
513–515	“ “	535
516	Fitts v. McGhee - -	535
516–518	“ “ -	536
518–521	“ “ -	537
521–523	“ “ -	538
523–524	“ “ -	539
524–527	“ “ -	540
527–530	“ “ -	541
530–532	“ “ -	542
532–533	“ “ -	543
534	Washington Gas Light Co. v. Lansden - - -	543
535	“ “	544
535–538	“ “	545
538–541	“ “	546
541–544	“ “	547
544–546	“ “	548
546–549	“ “	549
549–552	“ “	550
552–555	Washington Gas Light Co. v. Lansden - - -	551
555–557	“ “	552
557	Orient Ins. Co. v. Daggs	552
558–560	“ “	553
560–563	“ “	554
563–566	“ “	555
566–567	“ “	556
567–568	United States v. Harsha -	556
568–571	“ “ -	557
571–573	“ “ -	558
573–574	First Nat. Bank v. Anderson	558
574–576	“ “	559
576	United States v. Duell (“United States, Bernardin, v. Duell”) - - -	559
577–579	“ “	560
579–582	“ “	561
582–585	“ “	562
585–588	“ “	563
588–589	“ “	564
589–591	Northern P. R. Co. v. Myers	564
591–594	“ “	565
594–597	“ “	566
597–599	“ “	567
599–602	“ “	568
602	“ “	569
602–605	Connecticut Mut. L. Ins. Co. v. Spratley - - - -	569
605–608	“ “	570
608–610	“ “	571
610–613	“ “	572
613–615	“ “	573
615–618	“ “	574
618–621	“ “	575
621–622	“ “	576
622–623	Hoeninghaus v. United States	576
623–626	“ “	577
626–629	“ “	578
629–630	“ “	579
630–631	Marshall v. Burtis - -	579
631–634	“ “ - -	580
634–635	“ “ - -	581
636–637	McQuade v. Trenton - -	581
637–640	“ “ - -	582
641–650	Memorandum Cases - -	1177
	“ “ - -	1188

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1898.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

---

[1] CITY OF WALLA WALLA *et al.*, *Appts.*,
v.
WALLA WALLA WATER COMPANY.

(See S. C. Reporter's ed. 1–23.)

Impairment of municipal contract—grant of right to supply water to a city—power to make—sufficiency of complaint—injunction, when granted—monopoly—police power of city—city erecting waterworks of its own—limitation of its indebtedness—provision of city charter.

1. The impairment of a municipal contract for a water supply by establishing its own system of waterworks is not excluded from the constitutional provision against impairing the obligation of contracts, on the ground that the city makes the contract and takes the action which impairs it in its proprietary capacity, and not as an agency of the state.
2. The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Federal Constitution against state legislation to impair it.
3. Such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters.
4. An averment that the establishment by a city of competing waterworks would injure the value of the property of a water company, and deprive it of rentals which the city had agreed to pay, need not specifically state how such damage would be done.
5. An injunction against the building of waterworks by a city in violation of a contract with a water company will not be denied on the ground of a complete and adequate remedy at law, as the damage by the breach would be great, and perhaps irreparable, and exceedingly difficult of ascertainment.
6. An ordinance granting the right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water does not create a monopoly, or prevent the granting of a similar franchise to another company,—especially when there is an express stipulation that the city shall not erect waterworks of its own, but no stipulation against granting another franchise.
7. A municipal contract for a water supply for a term of years is not void as an attempt to barter away the police power of the city council, so as to justify its abrogation or impairment, when the water supply is innocuous and the contract is carried out with due regard to the good order of the city and the health of the inhabitants.
8. The inadequacy of the supply of water, which renders a contract by a city with a water company voidable, does not justify the city in erecting waterworks of its own in violation of the express terms of the contract, without first having the contract annulled.
9. A limitation of municipal indebtedness is not violated by a contract for a supply of water or gas at an annual rental, merely because the aggregate of the rentals during the life of the contract may exceed the limit of indebtedness.
10. A city charter authorizing a contract for a water supply, without providing for an election to ratify it, although it does provide for such an election as a condition of the erection of waterworks by the city, supersedes a general statute which requires such an election to ratify a contract for a water supply.

[No. 28.]

Argued October 12, 13, 1898. Decided November 14, 1898.

APPEAL from the Circuit Court of the United States for the District of Washington to review a decree in a suit in equity brought by the Walla Walla Water Company against the city of Walla Walla *et al.*, perpetually enjoining said city and its officers from erecting waterworks in pursuance of an ordinance of the city, and from expending moneys of the city or selling its bonds to erect such waterworks. *Affirmed.*

See same case below, 60 Fed. Rep. 957.

Statement by Mr. Justice **Brown:**

[2] *This was a bill in equity filed by the water company to enjoin the city of Walla Walla and its officers from erecting waterworks in pursuance of an ordinance of the city to that effect, or from acquiring any property for the purpose of carrying out such enterprise,
[3] or from expending the moneys *of the city or selling its bonds or other securities for the purpose of enabling the city to erect such waterworks.

The facts are substantially as follows: By an act of the territory of Washington (November 28, 1883), incorporating the city of Walla Walla, it was enacted (section 11) that the city should have "power . . . to provide . . . a sufficient supply of water;" and by section 10 "*to grant the right to use the streets of said city* for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons, *for a term not exceeding twenty-five years*, . . . provided always, that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the same rights to others." Other sections are as follows:

"Sec. 11. The city of Walla Walla shall have power to erect and maintain waterworks within or without the city limits, *or to authorize the erection of the same*, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, . . . and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; but no waterworks shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein on not less than five hundred dollars' worth of property, shall at a general or special election vote for the same.

"Sec. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such waterworks, and shall have power to purchase or condemn waterworks already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof."

. . . .

"Sec. 22. The city of Walla Walla shall have power to adopt proper ordinances for the government of the city, and to carry into effect the powers given by this act."

. . . .

*"Sec. 23. The city of Walla Walla shall have power to establish and regulate the fees and compensation of all its officers, except when otherwise provided, and have such other power and privileges not here specifically enumerated as are incident to municipal corporations." [4]

. . . .

"Sec. 24. The power and authority hereby given to the city of Walla Walla by this act shall be vested in a mayor and council, together with such other officers as are in this act mentioned, or may be created under its authority."

. . . .

"Sec. 43. The city council shall possess all the legislative power granted by this act."

. . . .

"Sec. 103. The rights, powers, and duties and liabilities of the city of Walla Walla and of its several officers shall be those prescribed in this act, and none others, and this is hereby declared a public act."

. . . .

"Sec. 105. The limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars."

Pursuant to these sections of the charter, the city council, on March 15, 1887, passed "An Ordinance to Secure a Supply of Water for the City of Walla Walla," by which it granted under certain restrictions to the water company, for the period of twenty-five years from the date of the ordinance, "the right to lay, place, and maintain all necessary water mains, pipes, connections, and fittings in all the highways, streets, and alleys of said city, for the purpose of furnishing the inhabitants thereof with water."

By section 4 the city reserved the right to erect and maintain as many fire hydrants as it should see fit, and, in case of fire, that the city should have all reasonable and necessary control of the water for the extinguishment thereof.

The ordinance also contained the following further provisions:

"Sec. 5. The city of Walla Walla shall pay to said Walla *Walla Water Company [5]
for the matters and things above enumerated, quarter-yearly, on the first days of July, October, January, and April of each year, at the rate of fifteen hundred dollars ($1,500) per annum, for the period of twenty-five (25) years from and after the date of the passage of this ordinance, the first quarterly payment to be made on the first day of October next (October 1, 1887).

"Sec. 6. The city of Walla Walla shall during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week.

"Sec. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good wholesome water, at reasonable rates, to con-

sumers, at all times during the said period of twenty-five (25) years; and this contract shall be voidable by the city of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided the city of Walla Walla shall not erect, maintain, or become interested in any waterworks except the ones herein referred to, save as hereinafter specified.

"Sec. 8. Neither the existence of said contract nor the passage of this ordinance shall be construed to be or be a waiver of or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time; and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said waterworks of the said Walla Walla Water Company."

[6] *The water company accepted this ordinance, entered into a formal contract with the city, and substantially complied with the terms and conditions of such contract,—which has never been avoided by the city or by the courts, and was still in force at the time the bill was filed.

After this contract had been in force and the stipulated rentals paid for about six years, on June 20, 1893, an ordinance was passed "to provide for the construction of a system of waterworks" for the purpose of supplying the city and its inhabitants with water; to authorize the purchase and condemnation of land for that purpose, and the issue of bonds to the amount of $160,000 to provide the necessary funds. Pursuant to the provisions of such ordinance an election was held whereby the proposition submitted by the ordinance was carried by a sufficient majority of the legal voters.

The answer of the defendants insisted that the contract of the city with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain or become interested in any system of waterworks other than that of the plaintiff.

A demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to § 5 of the circuit court of appeals act allowing such appeal in any case that involves the construction or application of the Constitution of the United States.

Messrs. **A. H. Garland**, *J. Hamilton Lewis*, and *R. Garland*, for appellants:

The city of Walla Walla cannot be regarded as an agent of the state; the state cannot be regarded as its principal; therefore the state cannot be charged as being the actor in the proceeding, whether it be the making of the contract or the impairing of the obligation of one.

Western College of Homeopathic Medicine v. *Cleveland*, 12 Ohio St. 377; *New Orleans* v. *Abbagnato*, 23 U. S. App. 533, 62 Fed. Rep. 240, 10 C. C. A. 361, 26 L. R. A. 329; *Maxmilian* v. *New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Safety Insulated Wire & Cable Co.* v. *Baltimore*, 25 U. S. App. 166, 66 Fed. Rep. 140, 13 C. C. A. 377; *Illinois Trust & Sav. Bank* v. *Arkansas City*, 40 U. S. App. 257, 76 Fed. Rep. 271, 22 C. C. A. 181, 34 L. R. A. 518.

A municipal ordinance not passed under supposed legislative authority cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.

Murray v. *Charleston*, 96 U. S. 432, 24 L. ed. 760; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 30 L. ed. 1059; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607.

The general reservation of the power to alter, revoke, or repeal a grant of special privileges necessarily implies that the power may be exercised at the pleasure of the legislature.

Close v. *Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550; *Tomlinson* v. *Jessup*, 15 Wall. 454, 21 L. ed. 204.

The plaintiff had an apparent, full, and adequate remedy at law.

Smyth v. *New Orleans Canal & Bkg. Co.* 141 U. S. 656, 35 L. ed. 891.

The governmental power of self-protection cannot be contracted away.

New York & N. E. R. Co. v. *Bristol*, 151 U. S. 556, 38 L. ed. 269; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Budd* v. *New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45.

A municipal corporation may make or authorize contracts, but it has no power to make contracts or pass by-laws which shall cede away, control, or embarrass its legislative or governmental powers, or which shall disable it from performing its public duties.

Garrison v. *Chicago*, 7 Biss. 480; *Logan* v. *Pyne*, 43 Iowa, 524, 22 Am. Rep. 261; *State, Atty. Gen.*, v. *Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Minturn* v. *Larue*, 23 How. 435, 16 L. ed. 574; *Norwich Gaslight Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Richmond County Gaslight Co.* v. *Middletown*, 59 N. Y. 231; *New Orleans City R. Co.* v. *Crescent City R. Co.* 12 Fed. Rep. 308.

The contract is void as an attempt to barter away a part of the governmental power of the city council.

Grant v. *Davenport*, 36 Iowa, 402; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Law-*

ton v. *Steele*, 152 U. S. 133, 38 L. ed. 385; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *State* v. *Wheeler*, 44 N. J. L. 88; *Safety Insulated Wire & Cable Co.* v. *Baltimore*, 25 U. S. App. 166, 66 Fed. Rep. 140, 13 C. C. A. 378; *Illinois Trust & Sav. Bank* v. *Arkansas City*, 40 U. S. App. 257, 76 Fed. Rep. 271, 22 C. C. A. 179, 34 L. R. A. 518; *Gale* v. *Kalamazoo*, 23 Mich. 345, 9 Am. Rep. 80; *National Waterworks Co.* v. *Kansas City*, 28 Fed. Rep. 921; *Illinois & St. L. R. & Canal Co.* v. *St. Louis*, 2 Dill. 77; *Jackson County Horse R. Co.* v. *Interstate Rapid Transit Co.* 24 Fed. Rep. 307; *Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585.

The contract is void as creating an indebtedness in excess of the charter limit.

Burlington Water Co. v. *Woodward*, 49 Iowa, 61; *Salem Water Co.* v. *Salem*, 5 Or. 29; *Fuller* v. *Chicago*, 89 Ill. 282; *Murphy* v. *East Portland*, 42 Fed. Rep. 309.

Mr. **John H. Mitchell**, for appellee:

The city of Walla Walla had full power to authorize respondent to construct and maintain waterworks.

New Orleans Gaslight Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Atlantic City Waterworks Co.* v. *Atlantic City*, 39 N. J. Eq. 367.

A contract with a municipal corporation is within the protection of section 10, article 1, of the Constitution.

New Jersey v. *Wilson*, 7 Cranch, 166, 3 L. ed. 303; *Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162.

There was a good and sufficient consideration for the contract.

Home of the Friendless v. *Rouse*, 8 Wall. 437, 19 L. ed. 498.

The ordinance of the city of Walla Walla approved June 20, 1893, and proceedings thereunder, constitute a law within the meaning of section 10, article 1, of the Constitution.

Saginaw Gaslight Co. v. *Saginaw*, 28 Fed. Rep. 529; *Citizens' Street R. Co.* v. *City R. Co.* 56 Fed. Rep. 746; *Citizens' Street R. Co.* v. *Memphis*, 53 Fed. Rep. 715; *Santa Ana Water Co.* v. *San Buenaventura*, 56 Fed. Rep. 339; *Capital City Gas Co.* v. *Des Moines*, 72 Fed. Rep. 818; *Baltimore Trust & Guarantee Co.* v. *Baltimore*, 64 Fed. Rep. 153; *Wright* v. *Nagle*, 101 U. S. 791, 25 L. ed. 921; *Hamilton Gaslight Co.* v. *Hamilton*, 146 U. S. 258, 25 L. ed. 921; *Bacon* v. *Texas*, 163 U. S. 207, 41 L. ed. 132; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 41 L. ed. 518; *Williams* v. *Bruffy*, 96 U. S. 176, 24 L. ed. 716; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607.

The circuit court had jurisdiction, and an injunction was the proper and appropriate remedy.

Osborn v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union L. S. L. & S. H. Co.* 9 Fed. Rep. 743; *New Orleans Waterworks Co.* v. *St. Tammany Waterworks Co.* 14 Fed. Rep. 194; *Baltimore & O. R. Co.* v. *Allen*, 17 Fed. Rep. 171; *Parsons* v. *Marye*, 23 Fed. Rep. 113; *Barnes* v. *Kornegay*, 62 Fed. Rep. 671.

There was no reservation in the charter to alter, amend, or repeal; and none, except a qualified one, in the ordinance and agreement.

New Jersey v. *Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 17 L. ed. 173; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Wilmington R. Co.* v. *Reid*, 13 Wall. 264, 20 L. ed. 568.

When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts.

East St. Louis v. *East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Crowder* v. *Sullivan*, 128 Ind. 486, 13 L. R. A. 647; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 417; *Smith* v. *Dedham*, 144 Mass. 177; *Grant* v. *Davenport*, 36 Iowa, 396; *East St. Louis Gaslight & Coke Co.* v. *East St. Louis*, 45 Ill. App. 591; *Lott* v. *Waycross*, 84 Ga. 681; *Merrill R. & Lighting Co.* v. *Merrill*, 80 Wis. 358.

No obligation imposed by a contract to pay money becomes a debt until the money is payable.

Weston v. *Syracuse*, 17 N. Y. 110; *Garrison* v. *Howe*, 17 N. Y. 458; *Willington* v. *West Boylston*, 4 Pick. 101; *Badger* v. *Titcomb*, 15 Pick. 409, 26 Am. Dec. 611; *Knight* v. *New England Worsted Co.* 2 Cush. 271; *Oviatt* v. *Hughes*, 41 Barb. 541; *People* v. *Arguello*, 37 Cal. 524; *Wood* v. *Partridge*, 11 Mass. 488; *Wentworth* v. *Whittemore*, 1 Mass. 471; *Thorndike* v. *De Wolf*, 6 Pick. 120; *Meacham* v. *McCorbitt*, 2 Met. 352; *Davis* v. *Ham*, 3 Mass. 33; *Child* v. *Boston & F. Iron Works*, 137 Mass. 516; *Bent* v. *Hubbardston*, 138 Mass. 99; *Deane* v. *Caldwell*, 127 Mass. 242.

*Mr. Justice **Brown** delivered the opinion [6]
of the court:

The demurrer to the plaintiff's bill rested principally upon a *want of jurisdiction of [7]
the court in certain particulars hereinafter specified. There was confessedly no diversity of citizenship, and the case was treated by the court below as one arising under the Constitution and laws of the United States.

1. The jurisdiction depends specifically upon the allegation in the bill that defendants insist that the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain, or become interested in any system of waterworks other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by the plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water; that

the plaintiff is the owner of property in the city of the value of $125,000, and pays taxes to the city on the same; that if the city is permitted to borrow money and apply the same to the erection of waterworks the indebtedness will become a cloud and burden upon all taxable property in the city, and that such loan is inequitable and imposes upon the taxpayers a large and unnecessary burden; that the value of plaintiff's property is largely dependent upon the fact of its having no competition, and that the threatened action of the city has greatly diminished the value of such property and the credit of the company, and that it finds itself without the ability to borrow money to make the necessary additions and repairs to its property; and, in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States.

These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893. The argument of the defendant in this connection is that the action of the city in contracting with the water company, and in passing the ordinance of 1893 provid-
[8] ing for the erection *of waterworks, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the state, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens, and nowise as the agent of the state; and therefore that neither the state nor the city as its agent can be charged either with the making or the impairing of the original contract; that for these reasons the Constitution of the United States has no application to the case, the Federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy.

It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step farther, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the state or its authorized agent, but one of an ordinary breach of contract by a private party, and hence the case does not arise under the Constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the *court or the application [9]
of the contract clause may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650, 660 [29: 516, 520]; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 [29: 525]; *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64 [30: 563]; *Crescent City Gaslight Co.* v. *New Orleans Gaslight Co.* 27 La. Ann. 138, 147.

It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in *State* [*Atty. Gen.*] v. *Cincinnati Gaslight and Coke Co.* 18 Ohio St. 262, 293: "And, assuming that such a power" (granting franchises to establish gas works) "may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with the necessary authority." This case is directly in line with those above cited. See also *Wright* v. *Nagle*, 101 U. S. 791 [25: 921]; *Hamilton Gaslight & Coke Co.* v. *Hamilton City*, 146 U. S. 258, 266 [36: 963, 967]; *Bacon* v. *Texas*, 163 U. S. 207, 216 [41: 132, 136]; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471 [41: 518].

The cases relied upon by the appellant are no authority for the position assumed, that the Federal court has no jurisdiction *of a [10]
case wherein the charter of a water company is alleged to have been impaired by subsequent legislation. In several of these cases the actions were for negligence in the performance of certain duties which the court held to be public or private, as the case might be. *New Orleans* v. *Abbaganto*, 23 U. S.

App. 533, 545 [26 L. R. A. 329]; *Maxmilian* v. *Mayor* [*of New York*] 62 N. Y. 160; *Western College of Homeopathic Medicine* v. *Cleveland*, 12 Ohio St. 375. In *Safety Insulated Wire Co.* v. *Baltimore*, 25 U. S. App. 166, a contract to put electric wires under ground was held to be for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the state at large, and that with reference to such contracts the city must be regarded as a private corporation. The contract was held to be one into which the city could lawfully enter, but no question of jurisdiction was made. In *Illinois Trust & Sav. Bank* v. *Arkansas City*, 40 U. S. App. 257 [34 L. R. A. 518], the power to contract for waterworks was held to be for the private benefit of the inhabitants of the city, and that in the exercise of these powers a municipality was governed by the same rules as a private corporation; but the jurisdiction of the case was apparently dependent upon citizenship.

We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the Constitution and laws of the United States. Granting that, in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company has been treated
[11] as falling within the constitutional *provision are altogether too numerous to be now questioned, or even to justify citation.

2. The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction goes rather to the sufficiency of the pleading than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing waterworks, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a private corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contract should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain, or become interested in any waterworks except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing waterworks would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge and within the common observation of men. That which is patent to anyone of average understanding need not be particularly averred.

3. The objection that a court of equity has no jurisdiction because the plaintiff has a complete and adequate remedy at law is equally untenable. Obviously it has no present remedy at law, since the city has done
nothing in violation of its *covenant not to [12]
erect competing waterworks, and the water company has as yet suffered no damage. It is true that after the city shall have gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff company, the latter would doubtless have a remedy at law for breach of the covenant. In the meantime great, perhaps irreparable, damage would have been done to the plaintiff. What the measure of such damage was would be exceedingly difficult of ascertainment, and would depend largely upon the question whether the value of the plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the plaintiff.

This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 215 [7: 655, 657]; *Phœnix Mut. L. Ins. Co.* v. *Bailey*, 13 Wall. 616, 621 [20: 501, 503]; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514 [32: 1005, 1009]; *Tyler* v. *Savage*, 143 U. S. 79, 95 [36: 82, 89].

Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss,—to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works; to the plaintiff, if it be adjudged that the city has a right to do so.

But it is further insisted in this connection that, under section 8 of the contract, the city had the right at any time to take and condemn the waterworks of the company, and that, *in case of such condemnation*, the contract should not be taken into consideration in estimating the value of the waterworks;
[13] *and hence, that if the city elected to establish waterworks of its own, without condemning those of the plaintiff company, the value of such waterworks would furnish the proper measure of damages in such action. This argument necessarily assumes, however, that the damages in such action would be the same as in a proceeding for condemnation. Perhaps if the plaintiff company were forced to abandon its works entirely by the competition of the city, the value of such works might furnish the measure of its compensation; but it could not be forced to do this, and if the company elected not to abandon, but to enter into competition with the city, the damages would have to be estimated by the probable injury done to the company by such competition. This, as above indicated, would furnish a most uncertain basis.

4. The case upon the merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract, which purports to have been passed in pursuance of this charter, declared that until such contract should be avoided by a court of competent jurisdiction the city should not erect, maintain, or become interested in any waterworks except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of waterworks by the city for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict,—the latter clearly impaired the obligation of the former.

The argument of the city is that the council exceeded its powers in authorizing the contract with the water company for a continuous supply of water and the payment of rentals for twenty-five years, and that such contract was specially obnoxious in its stipulation that the city should not construct waterworks of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

a. The contract creates a monopoly which, in the absence of an express grant from the legislature of power so to do or such power necessarily implied, is void as in contravention of public policy;

[14] **b*. The contract is void as an attempt to contract away a part of the governmental power of the city council;

c. The contract is void as creating an indebtedness in excess of the charter limits;

d. The contract is in violation of the express provision of a general statute of the territory of Washington.

By section 10 of the city charter, the city is authorized "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons, for a term not exceeding twenty-five years, . . . provided always, that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the said rights to others;" and by section 11 "the city of Walla Walla shall have power to erect and maintain waterworks within or without the city limits, or *to authorize the erection of the same* for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water."

As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the water company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Waterworks* v. *Atlantic City*, 48 N. J. L. 378.

Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. It is true that in *City of Brenham* v. *Brenham Water Co.* 67 Tex. 542, a city ordinance granting to the water company the right and privilege for the term of twenty-five years of supplying the city with water, for which the city agreed to pay an annual rental for each hydrant, the supreme court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have been rested largely upon the use of the words "privilege" and "supplying,"—words which are not found in the contract in this case. Without expressing an opinion upon the point involved in that case, we are content to say *that an ordinance granting a [15]
right to a water company, for twenty-five years, to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect waterworks of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise.

5. The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exer-

cise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. Thus, in *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659 [24: 1036], an act of the general assembly of Illinois authorized the fertilizing company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might buy or own. Subsequently the charter of the vil-
[16] lage of Hyde Park was revised, and *power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals or offensive matter through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the state, citing *Coates* v. *Mayor, etc. of New York,* 7 Cow. 585.

Substantially the same ruling was made in *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 [28: 585], wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughterhouses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughterhouses.

The same principle has been applied to charters for the maintenance of lotteries, which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government (*Boyd* v. *Alabama,* 94 U. S. 645 [24: 302]; *Stone* v. *Mississippi,* 101 U. S. 814 [25: 1079]; *Douglas* v. *Kentucky,* 168 U. S. 488 [42: 553]), as well as to laws regulating the liquor traffic (*Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25 [24: 989]; *Metropolitan Board of Excise* v. *Barrie,* 34 N. Y. 57), and even laws regulating the inspection of coal oil (*United States* v. *De Witt,* 9 Wall. 41 [19: 593]; *Patterson* v. *Kentucky,* 97 U. S. 501 [24: 1115]). In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York* [*New York Electric Lines*] v. *Squire,* 145 U. S. 175 [36: 666]; **St. Louis* v. *Western Union Teleg. Co.* [17]
148 U. S. 92 [37: 380]; [*Missouri*] *Laclede Gaslight Co.,* v. *Murphy,* 170 U. S. 78 [42: 955]. But where a contract for a supply of water is innocuous in itself, and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

6. Nor do we think the contract objectionable in its stipulation that the city would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn, and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish waterworks of its own it would do so by condemning the property of the company, and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes, to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is
not *to be supposed that the company would [18]
have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it undoubtedly would have become the master,—and practically extinguish the rights it had already granted

to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.

Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party. The more prominent of these cases are *Minturn* v. *Larue*, 23 How. 435 [16: 574]; *Wright* v. *Nagle*, 101 U. S. 791 [25: 921]; *State* [*Atty. Gen.*] v. *Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262; *Logan* v. *Pyne*, 43 Iowa, 524 [22 Am. Rep. 261]; *Jackson County Horse R. R. Co.* v. *Interstate Rapid Transit Co.* 24 Fed. Rep. 306; *Norwich Gaslight Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Saginaw Gaslight Co.* v. *Saginaw*, 28 Fed. Rep. 529; *Grand Rapids Electric Light and Power Co.* v. *Grand Rapids Edison Electric Light & Fuel Gas Co.* 33 Fed. Rep. 659; *Gale* v. *Kalamazoo*, 23 Mich. 344 [9 Am. Rep. 80]. These cases furnish little or no support to the proposition for which they are cited.

If, as alleged in the answer, the water company failed to carry out its contract, and the supply furnished was inadequate for domestic, sanitary, or fire purposes, and the pressure so far insufficient that in many parts of the city water could not be carried above the first story of the buildings, the 7th section of the contract furnished an ade-
[19] quate and *complete remedy by an application to the courts to declare the contract void.

7. The objection that the indebtedness created by this contract exceeds the amount authorized by the charter raises a serious, though by no means a novel, question. The objection is founded upon section 105 of the charter, which enacts "that the limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars," and upon the allegation in the bill, that the city, at the date of the contract, was indebted in a sum exceeding $16,000. The city, by section 5 of its ordinance and contract with the water company, agreed to pay a rental of $1,500 per annum for twenty-five years, or an aggregate amount of $37,500, which, added to the existing indebtedness of $16,000, would create a debt exceeding the limited amount of $50,000.

There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposed to purchase outright, or establish a system of waterworks of its own, the section would apply though bonds were issued therefor made payable in the future. *Buchanan* v. *Litchfield*, 102 U. S. 278 [26: 138]; *Culbertson* v. *Fulton*, 127 Ill. 30; *Coulson* v. *Portland*, Deady, 481; *State* [*Read*], v. *Atlantic City*, 49 N. J. L. 558; *Spilman* v. *Parkersburg*, 35 W. Va. 605; *Beard* v. *Hopkinsville*, 95 Ky. 239 [23 L. R. A. 402]. There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. *Niles Waterworks* v. *Niles*, 59 Mich. 311; [*State*], *Humphreys*, v. *Bayonne*, 55 N. J. L. 241; *Salem Water Co.* v. *Salem*, 5 Or. 29.

But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. *There [20]
is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as, by the issue of railway bonds or for the erection of a public improvement,—though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. *Wood* v. *Partridge*, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals. *Smith* v. *Dedham*, 144 Mass. 177; *Crowder* v. *Sullivan*, 128 Ind. 486 [3 L. R. A. 647]; *Saleno* v. *Neosho*, 127 Mo. 627 [27 L. R. A. 769]; *Valparaiso* v. *Gardner*, 97 Ind. 1 [49 Am. Rep. 416]: *New Orleans Gaslight Co.* v. *New Orleans*, 42 La. Ann. 188; *Merrill R. & Lighting Co.* v. *Merrill*, 80 Wis. 358; *Weston* v. *Syracuse*, 17 N. Y. 110; *East St. Louis* v. *East St. Louis Gaslight & Coke Co.* 98 Ill. 415 [38 Am. Rep. 97]; *Grant* v. *Davenport*, 36 Iowa, 396; *Lott* v. *Waycross*, 84 Ga. 681;

Burlington Water Co. v. *Woodward,* 49 Iowa, 58.

The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school-teachers, or other salaried
[21] employees to whom *the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor.

It is true that in the case of *Lake County* v. *Rollins,* 130 U. S. 662 [32: 1060], it was held by this court that a similar provision in the Constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses, such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurer's commissions, etc.; but the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defense being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but as it appears that the limit of indebtedness was $50,000 and the amount of the city debt but $16,000, it is clear that the payment of an annual rental of but $1,500 would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness a different question would be presented.

8. Further objection is made to this contract upon the ground that it is violative of a general statute of the territory of Washington, enacted December 1, 1881, authorizing cities, etc., to provide for a supply of water. By the first section of this act all cities are authorized to contract, for a term not exceeding twenty-five years, with corporations for a supply of water; but section 2 states
[22] that, before any such contract *shall be entered into, the terms of the proposed contract shall be submitted to a vote of the taxpayers at a special election to be called by the council after a notice of three weeks. As no such election was held to ratify the contract in this case, it is insisted that the city council was never authorized to enter into it.

We are of opinion, however, that the general act of 1881 was, so far as it applied to the city of Walla Walla, superseded by the charter of November 28, 1883, which provided that the city might enter into contracts for the purpose of supplying its inhabitants with water without any further requirement that an election should be held to ratify such contract. That no such ratification by the electors was intended is also evident from section 11 of the charter, which enacts that no waterworks shall be *erected* by the city without a vote of a majority of its freeholders. The fact that such ratification was required where waterworks were to be erected, and that no mention was made of a vote where the city contracted with a corporation for such purpose, clearly evinces an intent on the part of the legislature to permit the city to make a contract for a limited term without appealing to the people for their assent. While the special act is silent with reference to the ratification of contracts to supply water, we think the maxim, *Expressio unius est exclusio alterius,* is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular, leaving the general law to stand where it is proposed that the city shall erect and maintain waterworks of its own.

9. Finally, it is argued that upon the facts of this case it clearly appears that the plaintiff company has failed to comply with its contract to furnish an ample supply of good and wholesome water; that the pressure in the mains was not sufficient for fire protection or for domestic purposes and irrigation of lawns; that the pressure was not a sufficient supply for satisfactory use in the second stories of buildings; that several of the city additions are higher than the reservoir, and cannot be supplied from them, etc.

We are of opinion, however, that these facts cannot be set up *in defense to this bill. [23]
By the express provision of section 7 of the contract ordinance, it was made *voidable* by the city of Walla Walla so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of supply, or a failure on the part of the company to keep or perform any agreement on its part specified in the contract, and until "so avoided" the city would not erect waterworks of its own. Had the city failed to pay its quarterly rentals we should have no doubt that in an action to recover the same it might set up the failure of the company to perform its contract. Perhaps it might itself institute an action for that purpose, but we do not think it within the power of the city to constitute itself the judge, and to proceed to erect waterworks of its own upon the theory that the company had failed to carry out its contract, without, in the language of section 7, obtaining the judgment of a court of competent jurisdiction to that effect. As the section provides the manner in which the failure of the company shall be legally established, we think the city was bound to pursue this course before taking steps to erect

waterworks of its own. We have already held that so long as the contract remained in force the city had no right to establish waterworks, but under section 7 of the ordinance and contract the failure of the company to furnish a sufficient supply did not of itself avoid the contract. It rendered the contract voidable, not void. The city was bound to procure its nullity before the courts before it could treat it as void. Whether if a sudden emergency arose, requiring immediate action on the part of the city to procure a further supply or to preserve the health of its inhabitants, a preliminary avoidance of the contract would be necessary, is a question not involved in this case, and upon which we express no opinion. There was no pretense that the water was impure, and the evidence was conflicting upon the sufficiency of the supply.

Upon the whole case, we are of opinion that *the decree of the Circuit Court must be affirmed.*

---

[24] JOHN ANDERSEN, *Appt.*,

v.

MORGAN TREAT, United States Marshal for the Eastern District of Virginia.

(See S. C. Reporter's ed. 24–31.)

Refusing prisoner a consultation with his counsel.

The refusal to permit counsel engaged by a prisoner to have a consultation with him before the district attorney had seen and examined him is not ground for attacking a conviction by habeas corpus, when the prisoner waived examination before a commissioner, and was represented on the trial by counsel assigned to him at his own request, and the statement made by him to the district attorney was voluntary and was not put in evidence, and no objections were raised to questions asked him on the stand as to what he said on that occasion, and no witnesses were called to contradict his answers.

[No. 415.]

Argued November 8, 1898. Decided November 14, 1898.

APPEAL from an order of the District Court of the United States for the Eastern District of Virginia denying a writ of habeas corpus for which a petition was filed by John Andersen, who was held in custody by Morgan Treat, United States marshal, for execution, in pursuance of a judgment convicting him of murder, rendered by the Circuit Court of the United States for the Eastern District of Virginia. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

John Andersen was indicted in the circuit court of the United States for the eastern district of Virginia, at the November term thereof, A. D. 1897, and, December 23, 1897, convicted of the murder, on August 6, 1897, on the high seas, of William Wallace Saunders, mate of the American vessel Olive Pecker, and sentenced to death. The case was brought to this court on error and the judgment was affirmed May 9, 1898. 170 U. S. 481 [42: 1116]. The mandate having gone down, execution of the sentence was fixed for August 26, 1898. On that day (H. G. Miller and P. J. Morris assuming to act as his counsel), Andersen filed a petition in the district court of the United States for the eastern district of Virginia, praying for a writ of habeas corpus, on the ground that he was held in custody for execution "in violation of the laws and the Constitution of the United States of America," in that he had been deprived "of the free exercise of his rights to be represented by counsel, in accordance with article 6 of the Amendment of the Constitution of the United States."

*The petition stated: [25]

"Your petitioner represents that on the 7th day of November, 1897, he was delivered to the United States marshal for the eastern district of Virginia, charged with having committed the crime of murder within the maritime jurisdiction of the United States of America; that as a prisoner of the said United States marshal he was confined on the day of his delivery in the city jail in the city of Norfolk to await his examination, as provided by law, before the United States commissioner for the eastern district of Virginia; that on that day, *viz.*, the 7th day of November, 1897, while thus detained in the city jail of the city of Norfolk, he employed as counsel to represent him one P. J. Morris, an attorney at law, residing in the city of Norfolk, Virginia.

"Your petitioner further represents that after securing the services of the said Morris, on the same day the said Morris called at the city jail (the place of the detention of your petitioner), and asked permission to see your petitioner to consult with him as attorney and client. Your petitioner represents that admission was refused my said attorney, for the reason that the district attorney of the United States for the eastern district of Virginia had instructed the jailer and others in charge of your petitioner to allow no one, without exception, to see your petitioner; whereupon your petitioner represents that on the 7th day of November, 1897, my said attorney asked permission, by phone, of the district attorney for the eastern district of Virginia, to permit him to visit the said jail and consult with your petitioner; that said application was refused, and that, on account of the order of the district attorney lodged with the jailers and keepers of the prison in which your petitioner was detained, your petitioner was denied the right of the assistance of counsel to represent your petitioner.

"Your petitioner further represents that the district attorney for the eastern district of Virginia informed your petitioner's counsel on the night of the 7th of November, 1897, that he would let him know on the following day whether or not permission would be granted your petitioner's counsel

[26] to consult *with your petitioner. Your petitioner represents that, instead of informing my said attorney and giving my said attorney full notice as to the time when your petitioner's preliminary hearing would be held, and before the United States district attorney for the eastern district of Virginia had given my said attorney permission to consult with me, I was taken in irons, handcuffed, to the office of the United States commissioner and examined, without aid or presence of my attorney. Your petitioner further represents that, before the time the said examination was completed and statements made by me were finished, my said attorney discovered that said examination was going on without his presence and before any consultation could be held between your petitioner and his said attorney, and my said attorney thereupon applied to the said district attorney of the United States and to the Honorable Robert W. Hughes, late judge for the eastern district of Virginia, and was told by them that, as the defense of your petitioner was inconsistent with the defense of others charged at the same time with complicity in the destruction of the vessel, Olive Pecker, that any attorney representing both prisoners was objectionable, and that the court would not permit the same attorney to represent both your petitioner and the other prisoners, and therefore the court would assign him an attorney to represent him. Your petitioner therefore represents that he was deprived of the free exercise of his rights to be represented by counsel, in accordance with article 6 of the Amendment of the Constitution of the United States, and that therefore the action of the court in depriving him of the right to select his own counsel the court exceeded its power and jurisdiction, and that therefore the trial and proceedings therein are null and void, and that the judgment and the sentence of the court are void and in violation of his constitutional rights, as he will show."

The matter came on for hearing on the petition, together with an order and certain papers, which were made part of the proceedings by consent of parties, and were as follows:

1. The order was entered by District Judge Hughes on December 14, 1897, *nunc*
[27] *pro tunc* as of November 8, and read: *"The court having, on the 8th day of November, 1897, upon its own motion, as well as upon the request of the accused, John Andersen, assigned George McIntosh, Esq., as counsel for the said John Andersen, under and by notice of section 1034 of the Revised Statutes of the United States, and it appearing to the court that he has since then performed the duties of such counsel and has been recognized as such by this court in all proceedings had herein.

"And it further appearing that no entry of said assignment was made in the minutes of this court for the said 8th day of November, A. D. 1897, it is hereby ordered that the said assignment be now entered by the clerk of this court as of the said 8th day of November, A. D. 1897."

No indictment had been found November 8, but the *nunc pro tunc* order of December 14 referred in its title to five indictments against Andersen, numbered 234, 235, 236, 239, and 240, two of said indictments being for arson on the high seas; two of them for the murder of Saunders; and one for the murder of John W. Whitman.

2. A statement dated at Norfolk, Virginia, November 9, 1897, and signed by P. J. Morris, as counsel for Horsburgh, Lind, Barrial, Barstad, and March, which, referring to the United States district attorney, declared:

"Mr. White, in this case, as in all others, has shown me the utmost consideration. Yesterday morning, when I went up to the office of Mr. White, I found he was about to examine the prisoners, and told him that I expected to be employed by them. Mr. White informed me that he had not himself talked with the men, and that it was imperatively necessary that he should do so in order to judge which would be indicted and which might be needed only as witnesses; that as soon as he had completed that and the men had employed me, they would be at my disposal. I acquiesced in the propriety of this position. The men were in custody of the United States marshal and in the United States marshal's room after this preliminary examination, which I understand was voluntary on the part of the prisoners, and before it was finished I applied to Judge Hughes to give me permission to *see the men, who were [28]
then in the United States marshal's custody and in his office. This was done, and five of the men then in writing employed me, and I then gave this writing to Mr. White.

"I desire distinctly to say that in this matter Mr. White has done nothing which justifies any criticism on my part, and I have to thank him in this, as in other matters, for courtesies of a very considerate character."

3. The writing referred to was dated November 8, addressed to the judge of the United States court at Norfolk, and signed by Horsburgh, Barstad, March, Barrial, and Lind, who thereby authorized "P. J. Morris to represent us in all the courts of the United States in any and all cases pending against us and to be presented against us connected with the charges against us growing out of the burning of the vessel 'O. H. Pecker.'"

4. A letter addressed to P. J. Morris, attorney at law, dated at Norfolk, November 7, 1897, signed by Horsburgh, March, Barstad, Lind, and Barrial, stating: "We desire counsel and request an interview with you, in order to arrange for our defense of charge now pending in the court of the United States." This note was indorsed by Judge Hughes, November 8, 1897, as follows: "The prisoners mentioned in this paper are entitled to be seen at any time and at all times by their counsel. Mr. P. J. Morris is hereby authorized to see and confer with these prisoners whenever he or they think fit."

The district court denied the writ of habeas corpus prayed for, and ordered the petition to be dismissed, whereupon an appeal was allowed petitioner to this court, and a transcript of the petition, the final order, and all other proceedings in the cause were directed to be forwarded to its clerk. The final order concluded in these words: "And the court further certifies as a part of this order that although indictment No. 241, under which the petitioner, John Andersen, was tried and convicted of murder, was not one of the number embraced in the order of the 14th of December, 1897, assigning said McIntosh as counsel, that still said McIntosh, under said order and pursuant to the
[29] assignment of the court, *continued to represent the said Andersen upon his trial in the circuit court of the United States, and upon his appeal in the Supreme Court of the United States, on trial of said indictment No. 241."

Messrs. **Hugh G. Miller, P. J. Morris,** and *J. G. Bigelow* for appellant.

Mr. **William H. White,** United States Attorney for the Eastern District of Virginia, for appellee.

[29] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The rule that the writ of habeas corpus cannot be made use of as a writ of error being firmly established, the contention of appellant's counsel is that the judgment of the circuit court, the judgment of this court, and the action of the circuit court in pursuance of our mandate, are wholly void because he was denied "the assistance of counsel for his defense," that is, the assistance of counsel of his own selection.

The petition was insufficient in not setting forth the proceedings, or the essential parts thereof, prior to August 26, 1898, on which day it was presented, and it was very properly conceded on the hearing of this appeal that the record of Andersen's trial and conviction and the proceedings on error was to be treated as part of the record, and it was referred to by counsel on both sides accordingly. *Craemer* v. *Washington,* 168 U. S. 124, 128 [42: 407, 409].

The record disclosed that on Monday, the 8th of November, 1897, the day after Andersen had been delivered into the custody of the marshal, George McIntosh, Esq., was assigned to him as counsel upon his own request and in accordance with section 1034 of the Revised Statutes; and that Mr. McIntosh actually represented him from thence onward contesting every step of the way, until, after having obtained a writ of error from this court, and argued the cause here, his petition for a rehearing was denied.

But the petition averred that on Novem-
[30] ber 7 petitioner had *"employed as counsel to represent him one P. J. Morris;" that on the same day Morris called at the place of detention and asked permission to see petitioner for consultation, which was refused; that petitioner's preliminary examination was had without the aid or presence of his attorney; and that the district judge and the district attorney told his said attorney that, as petitioner's defense was "inconsistent with the defense of others charged at the same time with complicity in the destruction of the vessel "Olive Pecker," the court would not permit the same attorney to represent them all.

The contention seems to be that petitioner was denied, at any rate in the first instance, the assistance of the attorney he had selected, and that he did not have his attorney with him when he told his story November 8; and that, as he was thereby deprived of fundamental constitutional rights, all subsequent proceedings were void for want of jurisdiction.

The papers introduced before the district court, by consent, tended to show that Morris had not been employed by Andersen prior to November 8; that the five members of the crew other than Andersen authorized Morris on that day to represent them; that the district attorney had had no interview with any of the prisoners up to the morning of November 8, which he informed the attorney it was imperatively necessary in view of future action that he should have, and then if the prisoners employed him they would be at his disposal.

Apart from that evidence, however, the record of the trial showed that examination before the United States commissioner was waived by the accused; that the trial lasted several days, during which no other counsel applied to the court for leave to act for Andersen, nor did Andersen request the court to permit any other counsel to conduct or assist in conducting his defense; that Andersen admitted that the statement he made on November 8 was a voluntary one, that no such statement was put in evidence; nor was any objection raised to questions propounded to Andersen when on the stand as to what he had said on that occasion; nor were witnesses called to contradict his answers.

*The record did not show nor was there [31]
any pretense that the court was requested to assign Morris as counsel for Andersen, and denied the request; and if it were true that the district judge or district attorney suggested that it would be objectionable to do so in view of his employment by the other five members of the crew, even though coupled with the intimation that the court would decline on that ground to make such assignment, the fact was not material on this application.

In *Commonwealth* v. *Knapp,* 9 Pick. 496 [20 Am. Dec. 491], the supreme judicial court of Massachusetts refused to make a desired assignment because the person designated was not a member of the bar of that court, and also because "a person of more legal experience ought to be assigned, who might render aid to the court as well as to the prisoner;" but the question under what circumstances a court may in a given case decline to assign particular counsel on the

request of the accused was not discussed. In the case of *Re Shibuya Jugiro*, 140 U. S. 291, 296 [35: 510,513], the alleged assignment at Jugiro's trial "of one as his counsel who (although he may have been an attorney at law) had not been admitted or qualified to practice as an attorney or counselor at law in the courts of New York" was held to be matter of error, and not affecting the jurisdiction of the trial court.

The general rule is that the judgment of a court having jurisdiction of the offense charged and of the party charged with its commission is not open to collateral attack. The exceptions to this rule when some essential right has been denied need not be considered, for whether this application was tested on the petition alone, treating the record as part thereof, or heard, without objection, as on rule to show cause, the district court could not have done otherwise than deny the writ. *Re Boardman*, 169 U. S. 39 [42: 653].

Order affirmed. Mandate to issue at once.

---

[32] PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, *Appt.*,
v.
BOARD OF PUBLIC WORKS OF THE STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 32-48.)

Injunction against a tax—adequate remedy for error—opportunity to be heard.

1. The collection of taxes assessed under the authority of a state is not to be restrained by injunction from a Federal court, unless it clearly appears, not only that the tax is illegal, but also that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction.
2. Provision for a review and correction by the circuit court of a county, of an assessment for taxes made by the board of public works, affords such a convenient and adequate remedy for any error in the taxation as will preclude an injunction against collecting the tax.
3. Previous notice of a hearing before officers who make an assessment for taxes is not necessary if there is notice of the decision with a right to appeal to a court and be heard and offer evidence before the valuation of the property for taxation is finally fixed.

[No. 8.]

Submitted January 25, 1898. Decided November 28, 1898.

APPEAL from a decree of the Circuit Court of the United States for the District of West Virginia sustaining a demurrer and dismissing a suit in equity brought by the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company against the board of public works of West Virginia *et al.*, to restrain the assessment and collection of taxes upon a bridge over the Ohio river. *Affirmed.*

Statement by Mr. Justice **Gray:**

The Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, a corporation of the state of Ohio, owning and operating a railway running through the states of West Virginia, Ohio, Pennsylvania, Indiana, and Illinois, under the laws of those states, and crossing the Ohio river, a navigable stream, forming the boundary between the states of West Virginia *and Ohio, by means of a [33]
bridge built, owned, and controlled by the plaintiff, filed in the circuit court of the United States for the district of West Virginia a bill in equity against the Board of Public Works of the state of West Virginia, a public corporation, against its members individually (being the Governor, the auditor, the treasurer, the superintendent of free schools, and the attorney general of the state), and against one Cowan, sheriff of Brooke county, all of them citizens of that state, to restrain the assessment and collection of taxes upon the bridge under section 67 of chapter 29 of the Code of West Virginia of 1891.

The bill alleged that, under and by virtue of that section of the Code, the plaintiff was required, through its principal officers, to make return in writing, under oath, to the auditor of the state, on or before the 1st of April in each year, and in the manner prescribed by that section, of its property subject to taxation in the state; the auditor was required to bring the return, as soon as practicable, before the board of public works; that board was authorized either to approve the return, or to proceed to assess and fix the fair cash value of all the property of railroad companies which they were so required to return for taxation; and it was further provided that, as soon as possible after the value of any railroad property was fixed for purposes of taxation by one of the several methods designated by that section, the auditor should assess and charge such property with the taxes properly chargeable thereon.

The bill also alleged that the plaintiff's main line of railway ran through the state of West Virginia for a distance of 7.11 miles, of which 6.53 miles were in the county of Brooke and 0.58 miles in the county of Hancock; that its bridge across the Ohio river was part of its railway; that the total length of the bridge, including its abutments, was 2,044 feet, of which 1,518 feet were in West Virginia and 526 feet in Ohio; and that the plaintiff, before April 1, 1894, as required by section 67 of chapter 29 of the Code, made to the auditor of the state of West Virginia a return of its property subject to taxation in the state for the year 1894 (a copy of which was *annexed to and made part of the bill, [34]

and is set out in the margin †), and, in making that return, included, in the 7.11 miles of its main track, so much of the bridge as lay within the state, amounting to 1,518 feet.

The bill further alleged that some time in September, 1894, the board of public works, meeting at Charleston in that state, as provided by that section of the Code, to assess
[35] and fix the *valuation of railroad property for the purposes of taxation, refused to approve the plaintiff's return, and proceeded, among other things, to assess the plaintiff with 6.53 miles of main track and 6.53 miles of second track in the county of Brooke, which assessment and valuation covered the entire length of its railroad in the state of West Virginia, including so much of the bridge as lay within the state; and, in addition thereto, valued and assessed the bridge as a separate structure, at the sum of $200,000, placing the tax upon the bridge at $3,060, and the auditor proceeded to assess the plaintiff with this sum of $3,060; thereby assessing it with the entire length of the bridge in West Virginia as a part of its railway in the state, and also assessing it with the bridge as a separate structure, thus taxing the plaintiff a second time for that part of its bridge which lay in West Virginia; whereas the bridge should only have been assessed as so many feet of the railway.

The bill further alleged that neither the board of public works, nor any member thereof, nor the auditor, informed the plaintiff of the valuation which had been placed upon its property by the board of taxation, nor of the taxes which had been assessed thereon by the auditor; that on September 28, 1894, the plaintiff, not having been informed of the action of the board or of the auditor, addressed through its chief engineer a letter to the auditor, inquiring what action had been taken by the board of public works and the auditor with regard to the assessment of taxes on its property for 1894; that the letter was not answered, nor was any information in regard to the taxes given to the plaintiff until January 19, 1895, when it received from the auditor a statement showing that the board of public works had placed a separate and additional valuation of $200,000 upon the bridge for the purposes of taxation, and that the auditor had proceeded to assess and charge the plaintiff with the sum of $3,060 as a tax for 1894 upon that valuation; and that on January 19, 1895, the auditor demanded of the plaintiff payment of that sum, and the plaintiff refused to pay it, but paid to the auditor the rest of the taxes assessed, amounting to the sum of $4,187, upon a valuation *of $310,830, which [36]
included the plaintiff's railroad in the county of Hancock.

The bill further alleged that "on the — day of ——, 1895," the auditor added ten per cent to the sum of $3,060, to pay the expense of collection, and certified that sum, with the ten per cent added, to the sheriff of Brooke county for collection; and that the sheriff "since said date" had demanded payment of the sum of $3,060 and the ten per cent additional, and was threatening to collect them by legal process, and would thus inflict irreparable injury upon the plaintiff, unless prevented by the interposition of a court of competent jurisdiction.

†Valuation of P., C., C. & St. L. R'y Main Line in the State of West Virginia as Returned for Taxation for the Year 1894.

Brooke County. Cross Creek district:

Main track	6.53	miles at $13,000 00 =	$84,890 00	
Second track	6.53	" " 4,000 00 =	26,120 00	
Side track	12.62	" " 2,500 00 =	31,550 00	
Rolling stock	6.53	" " 3,567 78 =	23,298 00	
Telegraph line	6.53	" " 100 00 =	653 00	
Supplies and tools			1,306 00	
Station house at Colliers			1,300 00	
Water tank " "			400 00	
Sand house " "			50 00	
Car house " "			100 00	
Trainmen's house "			950 00	
Scale house at "			100 00	
Tower west of "			450 00	
Tower at New Cumberland Junction			800 00	
Station at Hollidays Cove			180 00	
Station at Wheeling Junction			400 00	
Total listed value for Brooke County				$172,547 00

Hancock County. Butler district:

Main track	0.58	miles at $13,000 00 =	$7,540 00	
Second track	0.58	" " 4,000 00 =	2,320 00	
Side track	0.95	" " 2,500 00 =	2,375 00	
Rolling stock	0.58	" " 3,567 00 =	2,069 00	
Telegraph line	0.58	" " 100 00 =	58 00	
Supplies and tools			116 00	
Total listed value for Hancock County				14,478 00
Total listed value of main line				$187,025 00

Summary of Mileage.

Main track	7.11 miles.
Second track	7.11 "
Side tracks	13.57 "
Rolling stock	7.11 "
Telegraph line	7.11 "

The plaintiff further alleged that the bridge constituted a part of its line of railway, and had no separate earning capacity, and no greater earning capacity than any other equal number of feet of its line of railway, and was used exclusively by it in transporting freight and passengers across the Ohio river to and from the states of West Virginia and Ohio; and that it was advised and believed that the bridge was an instrument of interstate commerce, and was not, as a separate structure from its line of railway, a proper subject for taxation by the state of West Virginia in the manner above set forth.

The bill then charged that the tax upon the bridge was illegal and unjust, and constituted a cloud upon the title to the bridge, and that by reason of that clause of the Constitution of the United States, which gives Congress control over interstate commerce, the circuit court of the United States for the district of West Virginia was clothed with authority and jurisdiction to restrain and to prevent the assessment and collection of this illegal and unjust tax; and prayed for an injunction against its assessment and collection, and for further relief.

The bill was sworn to March 18, 1895; and was filed March 25, 1895, together with an affidavit to the effect that, since the bill was sworn to, the sheriff had levied upon one of the plaintiff's freight engines for the purpose of enforcing the collection of the tax upon the bridge. Upon the filing of the bill, a temporary injunction was granted as prayed for.

A general demurrer to the bill was after-
[37] wards filed and *sustained, the injunction dissolved, and the bill dismissed. The plaintiff appealed to this court, under the act of March 3, 1891, chap. 517, § 5. 26 Stat. at L. 828.

Messrs. **J. Dunbar** and **J. B. Sommerville,** for appellant.

Messrs. **T. S. Riley, Thayer Melvin,** and **Edgar P. Rucker,** Attorney General of West Virginia, for appellee.

[37] **In Union Pacific Railway Co.* v. *Cheyenne,* delivered the opinion of the court:

The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction. *Dows* v. *Chicago,* 11 Wall. 108 [20: 65]; *Hannewinkle* v. *Georgetown,* 15 Wall. 547 [21: 231]; *State Railroad Tax Cases,* 92 U. S. 575 [23: 663]; *Union Pacific Railway Co.* v. *Cheyenne,* 113 U. S. 516 [28: 1098]; *Milwaukee* v. *Koeffler,* 116 U. S. 219 [29: 612]; *Shelton* v. *Platt,* 139 U. S. 591 [34: 273].

In *Dows* v. *Chicago* a citizen of the state of New York, owning shares in a national bank organized and doing business in the city of Chicago, filed a bill in equity, in the circuit court of the United States for the northern district of Illinois, to restrain the collection of a tax assessed by the city of Chicago upon his shares in the bank, alleging, among other things, that the tax was illegal and void, because the tax was not uniform and equal with taxes on other property as required by the Constitution of the state, and because the shares were taxable only at the domicil of the owner and therefore were not property within the jurisdiction of the state of Illinois. This court, speaking by Mr. Justice Field, without considering the validity of the objections to the tax, held that the bill could not be maintained, saying: "Assuming the tax to *be illegal and void, we do not think [38]
any ground is presented by the bill, justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law," 11 Wall. 109, 110 [20: 66]. "The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." 11 Wall. 112 [20: 67].

In the *State Railroad Tax Cases* this court, in a careful and thorough opinion delivered by Mr. Justice Miller, stated that "it has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a *court of equi- [39]
ty;" referred to section 3224 of the Revised Statutes, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court;" and said that "though this was

intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." The court then quoted from *Dows* v. *Chicago*, and *Hannewinkle* v. *Georgetown*, above cited, and proceeded as follows: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes. But we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction; and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitutions of all the states, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner, it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." 92 U. S. 613–615 [23: 673, 674].

[40] *In *Union Pacific Railway Co.* v. *Cheyenne*, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of "would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale; and would cloud the title to all its real estate." 113 U. S. 526, 527 [28: 1102].

In *Shelton* v. *Platt*, 139 U. S. 591 [35: 273], the president in behalf of himself and other members of an express company, a joint-stock company of the state of New York, filed a bill in equity in a circuit court of the United States in Tennessee to restrain the collection of a license tax upon the company under a statute of the state of Tennessee, alleged to be contrary to the Constitution of the United States. The bill averred that the comptroller had issued a warrant of distress to a sheriff to collect such taxes for two years, the sheriff had levied or was about to levy the warrant on the property of the company, and the comptroller was about to issue a like warrant to collect the tax for a third year; that the property of the company in Tennessee was employed in interstate commerce in the express business, and was necessary to the conduct of it; and that the seizure by the sheriff would greatly embarrass the company in the conduct of that business and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience. This court held that, even if the statute was unconstitutional and the tax void, the bill could not be maintained, and, speaking by the Chief Justice, said: "The trespass involved in the levy of the distress warrant was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages *in an ac- [41]
tion at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averment showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage, and inconvenience which would be in their nature irremediable." The court went on to say that another statute of the state (which had been adjudged by this court in *Tennessee* v. *Sneed*, 96 U. S. 69 [24: 610], to afford a simple and effective remedy) provided that where an officer charged by law with the collection of a tax took any steps to collect it, a party conceiving it to be unjust or illegal might pay it under protest and sue the officer to recover it back, and should have no other remedy by injunction or otherwise. The court observed that "legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the court of chancery ought not to be interposed in that direction, except where resort to that court is grounded upon the settled principles which govern its jurisdiction;" and that the jurisdiction exercised by the courts of the United States to restrain by injunction the collection of a tax wholly illegal and void had always been rested on other grounds than merely the unconstitutionality of the tax. 139 U. S. 596–598 [35: 276, 277].

In the light of these decisions we proceed to an examination of the provisions of the Code of West Virginia of 1891, chap. 29, § 67, under which the tax upon the plaintiffs' bridge was assessed.

That section requires every corporation, owning or operating a railroad wholly or partly within the state, to make, through

its principal officers, to the auditor of the state, on or before the 1st of April in each year, a return in writing, under oath, showing, among other things, the following: 1st. The whole number of its miles of railroad within the state. 2d. If the railroad is partly within and partly without the state, the whole number of miles within, and of those without the state, including all its branches. 3d. "Its railroad track in each county in this state through which it runs, giving the whole number of miles of road in the county,
[42] including the *track and its branches and side and second tracks, switches, and turnouts therein; and the fair cash value per mile of such railroad in each county, including in such valuation such main track, branches, side and second tracks, switches, and turnouts." 4th. All its rolling stock, and the fair cash value thereof, distinguishing between what is used wholly within the state, and what is used partly within and partly without the state, and the proportionate value of the latter, according to the time used and the number of miles run thereby in and out of the state; "and the proportional cash value thereof to each county in this state through which such railroad runs." 5th. "Its depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, structures, and appendages connected thereto or used therewith, together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad, and not otherwise taxed, including telegraph lines owned or used by it; and the fair cash value of all buildings and structures, and all machinery and appendages, and of each parcel of such real estate, including such telegraph line, and the cash value thereof in each county in this state in which it is located."

The return made by the railroad company to the auditor is to be laid by him, as soon as practicable, before the board of public works. If the return is satisfactory to the board, the board shall approve it, and, by an order entered upon its records, direct the auditor to assess the property of the company with taxes, and he shall assess it as afterwards provided. But if the return is not satisfactory, the board is authorized to proceed, in such manner as it may deem best, to obtain the information required to be furnished by the return; and may compel the attendance of witnesses and the production of papers; and is directed, as soon as possible after having procured the necessary information, to assess and fix the fair cash value of all the property required to be returned, in each county through which the railroad runs; and, in ascertaining such value, to consider the return, and all the evidence and information that it has been able to procure, and all such as may be offered by the railroad company.

[43] *The legislature evidently intended that the annual return should include all the real estate owned or used by the railroad company in connection with its railroad within the state. The plaintiff's bridge across the Ohio river between the states of West Virginia and Ohio was real estate. It was a "building or structure," within the proper meaning of the words. *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 147 [17: 571, 577]; [*State*], *Whitall*, v. *Gloucester County Freeholders*, 40 N. J. L. 302, 305. And it had been declared by Congress to be "a lawful structure." Act of July 14, 1862; 12 Stat. at L. 569, chap. 167. The fact that the bridge was an instrument of interstate commerce did not exempt so much of it as was within West Virginia from taxation by the state. *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679 [35: 900].

According to the facts alleged in the bill and admitted by the demurrer, the plaintiff has been assessed by the board of public works one sum upon the whole length of its railroad track within the state, and another sum upon that part of the bridge within the state, as a separate structure.

The plaintiff alleged in the bill that its return included, in the number of miles of its main track, so much of the bridge as lay within the state; and contended that the bridge was included in "its railroad track," within the meaning of the third subdivision of the section of the code above quoted, and therefore should have been assessed only as so many feet of the railroad. But the return does not mention the bridge; and, if it was included in the term "railroad track" in that subdivision, the increased value of the track by reason of the bridge might properly be taken into consideration in estimating the value of the railroad track, and the assessment of the track and the bridge separately would seem to be a difference of form rather than of substance. *Pittsburgh, C. C. & St. L. Railway Co.* v. *Backus*, 154 U. S. 421, 429 [38: 1031, 1037]; *Robertson* v. *Anderson*, 57 Iowa, 165.

If the bridge was not covered by the third subdivision, it was certainly included in the fifth. This subdivision begins by designating "depots, station houses, freight houses, machine and repair shops and machinery therein, and all other buildings, *structures, [44]
and appendages connected thereto or used therewith." It was argued that the words "thereto" and "therewith," in this sentence, referred to the same antecedent as the previous word "therein;" and that "therein" referred to depots, station houses, freight houses, machine and repair shops, and therefore "thereto" and "therewith" must be equally restricted. But if a strictly grammatical construction should be adopted, it may well be doubted whether "machinery therein" related to anything but machine and repair shops; and it can hardly have been the intention of the legislature to limit the words "buildings, structures, and appendages connected thereto or used therewith" to those connected or used with such shops only. If the bridge is not a "building or structure," within the meaning of those words, as here used, it certainly (if not part of the "railroad track," under the third subdivision) comes within the words next following, "together with all other real estate, other than its railroad track, owned or used by it in connection with its railroad." By

a clause near the end of the same section, it is provided that "all buildings and real estate owned by such company, and used or occupied for any purpose not immediately connected with its railroad," are to be taxed like similar property of individuals.

The same section further provides that the decision made by the board of public works shall be final, unless the railroad company, within thirty days after such decision comes to its knowledge, appeals (which it is expressly authorized by the statute to do) from the decision, as to the assessment and valuation made in each county through which the railroad runs, to the circuit court of that county. The appeal is to have precedence over all other cases, and is to be tried as soon as possible after it is entered. That court, on such appeal, is to hear all legal evidence offered by the appellant, or by the state, county, district, or municipal corporation, and, if satisfied that the valuation is fixed by the board of public works is correct, to confirm the same; but, if satisfied that such valuation is too high or too low, to correct it, and to ascertain and fix the true value of
[45] the property *according to the facts proved, and certify such value to the auditor.

This provision for a review and correction, by the circuit court of the county, of the assessment made by the board of public works, affords a convenient and adequate remedy for any error in the taxation, and has been held by the highest court of the state to be in accordance with its Constitution. *Wheeling Bridge & T. Railway Co.* v. *Paull*, 39 W. Va. 142.

That court has often had occasion to inquire how far the action of the circuit court of the county, in this respect, is administrative only, and how far it may be considered as judicial in its nature. *Pittsburg, C. & St. L. Railway Co.* v. *Board of Public Works*, 28 W. Va. 264; *Charleston & Southside Bridge Co.* v. *Kanawha County Court*, 41 W. Va. 658; *State* v. *South Penn Oil Co.* 42 W. Va. 80. See also *Upshur County* v. *Rich*, 135 U. S. 467 [34: 196].

But it is not important, in this case, to pursue that course of inquiry; since, in matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Kelly* v. *Pittsburgh*, 104 U. S. 78, [26: 658]; *Pittsburgh, C. C. & St. L. Railway Co.* v. *Backus*, 154 U. S. 421, [38: 1031].

Even if, therefore, no previous notice of the hearing before the board of public works was required by the statute, or was in fact given to this plaintiff (which is by no means clear), yet the notice of its decision, with the right to appeal therefrom to the circuit court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation was finally fixed, afforded the plaintiff all the notice to which it was entitled.

The railroad bridge in question being liable to assessment under section 67, it is unnecessary, for the purposes of this case, to determine whether it should be treated as "railroad track," or as a building or structure," or as "other real estate, owned or used in connection with the railroad." In any view, its assessment and valuation by the board of public works, of which the plaintiff complains, was subject to review by the *cir- [46]
cuit court of the county upon an appeal seasonably taken by the railroad company.

The section, indeed, also provides that, when the return made to the auditor is satisfactory to the board of public works, or when an assessment is made by that board, the auditor shall immediately certify, to the county court of each county through which the railroad runs, the value of the property of the railroad company therein, as valued and assessed as aforesaid; that that court shall apportion that value among the districts, school districts, and municipal corporations through which the railroad runs; and that the clerk of that court, within thirty days after it has laid the county and district levies, shall certify to the auditor the apportionment so made; that the recording officer of each district or municipal corporation through which the road runs shall, within thirty days after a levy is laid therein, certify to the auditor the amount levied; and that, if any such officer fails to do so, the auditor may obtain the rate of taxation from the land books in his office or from any other source.

But the provision directing the auditor to immediately certify the assessment made by the board of public works to the county court of each county must be construed as subordinate to and controlled by the next preceding provision giving the right of appeal from the board of public works to the circuit court of the county—as clearly appears from the next succeeding provision, by which it is after the value of the property of the railroad company has been "fixed by the board of public works, or by the circuit court on appeal as aforesaid" that the auditor is directed to assess and charge the property of the company "with the taxes properly chargeable thereon," in a book to be kept by him for that purpose.

The statute also contains a provision that "no injunction shall be awarded by any court or judge to restrain the collection of the taxes, or any part of them, so assessed, except upon the ground that the assessment thereof was in violation of the Constitution of the United States, or of this state, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable *on [47]
the property of said corporation or company; and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill." While this provision cannot, of course, bind the courts of the United States, it is nearly in accord with the rule governing the exercise of the jurisdiction in equity of those courts, as established by the decisions cited at the beginning of this opinion.

The statute further makes it the duty of the auditor, "as soon as possible after he completes the said assessments," to make out and transmit to the railroad company "a statement of all taxes and levies so charged;" and the duty of the railroad company "so assessed and charged" to pay "the whole amount of such taxes and levies upon its property" by the 20th of January "next after the assessment thereof;" and if the company does not pay "such taxes and levies" by that day, the auditor is directed to add ten per cent to the amount thereof to pay the expenses of collecting them, and to certify to the sheriff of each county "the amount of such taxes and levies assessed within his county."

In the present case, the bill does not allege that there was any fraud in the assessment; or that the defendants made any attempt to interfere with the plaintiff's ownership or control of its real estate; or that the plaintiff either made any application to the auditor to correct any supposed mistake in the assessment, or took any appeal from the decision of the board of public works to the circuit court of the county; or that, within the thirty days allowed for such an appeal, any attempt was made by the defendants, either to charge the plaintiff with the penalty of ten per cent for delay in payment of the taxes, or to levy upon its property for nonpayment of them.

On the contrary, the bill would appear to have been studiously framed to avoid making any such allegation. The bill, which was sworn to on March 18, 1895, alleged that on January 19, 1895 (sixty days before), the plaintiff received notice from the auditor of the decision of the board of public works; that "on the—— day of ——, 1895" (which
[48] might be any day *before the bill was sworn to), the auditor added the ten per cent and certified to the sheriff the amount of the tax assessed with that addition; and that the sheriff "since said date" had demanded payment of both sums from the plaintiff; and the affidavit filed with the bill on March 25, 1895, shows that the sheriff's levy on one of the plaintiff's engines was made after the bill was sworn to.

The only reasonable inference from these vague allegations of the bill is that the auditor waited for more than thirty days, after giving the plaintiff notice of the decision of the board of public works, in order to afford full opportunity for an appeal from that decision; and that no penalty was imposed for delay in payment of the taxes, nor any active measure taken to enforce them, until it had become clear that the plaintiff did not intend to take such an appeal.

The plaintiff, upon its own showing, having made no attempt to avail itself of the adequate remedies provided by the statute of the state for the review of the assessment complained of, is not entitled to maintain this bill.

Decree affirmed.

UNITED STATES, *Appt.*,
v.
MARY A. WARDWELL, Admrx., of William V. B. Wardwell, Deceased.

(See S. C. Reporter's ed. 48-58.)

U. S. Rev. Stat. § 1069—§§ 306, 308—*statute of limitations as to a claim against the United States.*

1. U. S. Rev. Stat. § 1069, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the court of claims can take cognizance.
2. U. S. Rev. Stat. §§ 306-308, contain a promise by the government to hold the money covered into the Treasury under said sections, for the benefit of the owner until such time as he shall call for it. This is a continuing promise.
3. A claim against the United States for moneys carried to the credit of the payee of a check drawn by a disbursing officer in pursuance of U. S. Rev. Stat. § 306, for which, by § 308, the proper officer of the Treasury is required to give a warrant, does not accrue at the time the check is issued or at the time when it may be lost or destroyed, so that the statute of limitations (U. S. Rev. Stat. § 1069) will begin to run, but it will accrue only when the promise made by § 308 is broken,—as, by refusal of an application for a warrant.

[No. 53.]

Argued October 20, 1898. Decided November 28, 1898.

APPEAL from a judgment of the Court of Claims in favor of Mary A. Wardwell, administratrix, etc., against the United States for the amount of three checks drawn on the Assistant Treasurer of the United States in payment of claims against it, and which were subsequently lost and destroyed and the amounts thereof covered into the Treasury. *Affirmed.*

See same case below, 32 Ct. Cl. 30.

Statement by Mr. Justice **Brewer:**

*This is an appeal from the court of claims. [49]
The facts as found by that court are that in June, 1869, three checks were drawn in favor of William V. B. Wardwell, one by Major W. B. Rochester, paymaster, United States Army, and two by Major M. I. Ludington, quartermaster, United States Army, all drawn on the Assistant Treasurer of the United States in New York, and in payment of lawful claims of Wardwell against the United States. Subsequently to the issue of the checks and while still in the possession and ownership of Wardwell they were lost or destroyed, probably in a depredation committed on his house by Indians in the year 1872. None of the checks having been presented for payment the amounts thereof were covered into the Treasury of the United States and carried to the account of "outstanding liabilities" in pursuance of the act

of May 2, 1866, now sections 306 and following, Revised Statutes, the entry on the books of the Treasury (as shown by a report made by the Secretary of the Treasury to the House of Representatives) being as follows:

Name.	Period.	Balance due United States.	Balance due from United States.
W. V. B. Wardwell........	1872	....	$461 87
William V. B. Wardwell ...	1872	....	500 00
Do.	1872	....	1,017 30

No part of the same has ever been paid. Wardwell is dead and the claimant is his duly appointed and acting administratrix. As such she in 1890 applied to the Treasury Department for payment of the checks by the issue of Treasury warrants, and at the same time filed a bond of indemnity, with sufficient sureties, for double the amounts thereof, to secure the United States against a possible second demand for payment. The First Comptroller of the Treasury declined to per-
[50] mit *the settlement of a new account or the issue of warrants in favor of the claimant. Thereafter, and on April 10, 1896, she commenced this suit. As a conclusion of law the court found that the statute of limitations did not begin to run until the 14th day of April, 1890, the time when the accounting officers of the Treasury refused to recognize the claimant's demand, and that she was entitled to recover the amount of the three checks, and on the 11th day of January, 1897, entered judgment for that amount. From such judgment the United States appealed to this court.

Section 1069, Revised Statutes, provides:

"Every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the Senate or the clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

The act of May 2, 1866, is entitled "An Act to Facilitate the Settlement of the Accounts of the Treasurer of the United States, and to Secure Certain Moneys to the People of the United States, or to Persons to Whom They are Due, and Who are Entitled to Receive the Same." (14 Stat. at L. 41, chap. 70.)

This was carried into the Revised Statutes as sections 306 and following. Sections 306, 307, and 308 read:

"Sec. 306. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any department of the government, upon the Treasurer or any Assistant Treasurer or designated depositary of the United *States, or upon any national bank designated [51] as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated 'outstanding liabilities.'

"Sec. 307. The certificate of the Register of the Treasury, stating that the amount of any draft issued by the Treasurer to facilitate the payment of a warrant directed to him for payment has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly indorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts, and checks.

"Sec. 308. The payee or the *bona fide* holder of any draft or check, the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States."

Messrs. **George Hines Gorman** and *Louis A. Pradt*, Assistant Attorney General, for appellant.

Messrs. **George A. King** and *Edward E. Holman* for appellee.

*Mr. Justice **Brewer** delivered the opin- [52] ion of the court:

Section 1069, Revised Statutes, is not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the court of claims can take

cognizance. *Finn* v. *United States*, 123 U. S. 227 [31: 128].

Counsel for the government contend that the claim against the United States first accrued in 1869, when the checks were issued, or, if not then, at least in 1872, when they were lost or destroyed, and therefore, this being twenty-four years before the commencement of this suit, that the claim was barred. If there were nothing to be considered but the single section referred to, it would be difficult to escape this conclusion of counsel.

It is further contended that sections 306, 307, and 308 relate to what is simply a matter of bookkeeping, and do not in any manner change tbe scope of the liability of the government. But we are of the opinion that they mean something more. While it may be that they do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a promise by the government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given. If bookkeeping was the only matter sought to be provided for, there were no need of section 308. That prescribes payment, and payment in a particular way. The payee does not simply surrender his check and receive money. But "on presenting the same to the proper officer" he is "entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor." This may be mere machinery for payment, but it is machinery not used or required until after the money
[53] has been "covered into the *Treasury by warrant" and "carried to the credit" of the payee. The right given is the right to surrender the cbeck and receive a warrant on the Treasury. It will also be noticed that the purpose of the act of 1866 was, as expressed in its title, not merely to "facilitate the settlement of the accounts of the Treasurer of the United States," not merely to perfect a system of bookkeeping, but also "to secure certain moneys . . . to persons to whom they are due, and who are entitled to receive the same." And the deposit by the Treasurer is not of a gross amount to be applied to any claims that may arise, but of the amount due for certain specified checks and drafts. In other words, the purpose of the government by this statute is to secure to each party who holds government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the government. The ordinary rules for the maturity of negotiable paper do not control. Congress has directed that the money already once appropriated and checked against shall be placed in the Treasury and held subject to the call of the party for whose benefit it has been so appropriated and checked. There is no occasion for suit until after his application for a warrant is refused. When the contract created by the promise made in section 308 is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by section 1069 begins to run. There is thus no conflict with that section. Its full force is not impaired.

In this connection it may be not amiss to notice those authorities in which it is held that upon the ordinary deposit of money with a bank no action will lie until a demand has been made, by check or otherwise, and that hence the statute of limitations will not begin to run until after a refusal to pay on such demand. In *Downes* v. *Phœnix Bank of Charlestown*, 6 Hill, 297, 300, Bronson, J., delivered the opinion of the court, and, after referring to the ordinary rule that where there is a promise to pay on demand the bringing of an action is a sufficient demand, and criticising it as illogical, added:

*"The rule ought not to be extended to [54]
cases which do not fall precisely within it. Here the contract to be implied from the usual course of the business is that the banker shall keep the money until it is called for. Although it is not strictly a bailment, it partakes in some degree of that character."

See also *Johnson* v. *Farmers' Bank*, 1 Harr. (Del.) 117; *Watson* v. *Phœnix Bank*, 8 Met. 217-221 [41 Am. Dec. 500].

In *Dickinson* v. *Leominster Savings Bank*, 152 Mass. 49, 55, it was held that the statute of limitations would not begin to run in favor of the bank and against a depositor until there had been something equivalent to a refusal on the part of the bank to pay, or a denial of liability.

In *Girard Bank* v. *Bank of Penn Township*, 39 Pa. 92, 98, 99 [80 Am. Dec. 507], the holder of a certified check was the plaintiff, and, the check having been outstanding more than six years, the statute of limitations was pleaded; but the plea was not sustained, the court, by Strong, J., saying, in respect to the case of an ordinary deposit:

"Were this a suit against the Bank of Penn Township by the original depositor the statute of limitations would be interposed in vain, not so much because a bank is a technical trustee for its depositors, as for the reason that the liability assumed by receiving a deposit is to pay when actual demand shall be made. The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows that no right of action exists, and the statute of limitations does not begin to run until the demand stipulated for in the contract has been duly made."

And the rule thus announced in respect to

ordinary deposits was held to apply in case of a certified check:

[55] *"When a check payable to bearer, or order, is presented with a view of its being marked 'good,' and is so certified, the sum mentioned in it must necessarily cease to stand to the credit of the depositor. It thenceforth passes to the credit of the holder of the check, and is specifically appropriated to pay it when presented, and as the purpose of having it so certified is not to obtain payment, but to continue with the bank the custody of the money, the holder can have no greater rights than those of any other depositor. Certainly he has no right of action until payment has been actually demanded and refused."

In Morse on Banks and Banking, page 40, the author says:

"We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking, it may be said, even of the debt itself. In short, the agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, is only to pay upon demand; accordingly, until there has been such demand, and a refusal thereto, or until some act of the depositor, or some act of the bank made known to the depositor, has dispensed with such demand and refusal, the statute ought not to begin to run, nor should any presumption of payment be allowed to arise."

It is not meant to be asserted that the authorities are unanimous on this question; on the contrary, there is a diversity of opinion. It is sufficient for the purposes of this case to notice that the rule finds support in the decisions of many courts of the highest standing. It is not inconsistent with the proposition laid down by this court in *Marine Bank* v. *Fulton County Bank*, 2 Wall. 252 [17: 785], and often reaffirmed, *Phœnix Bank* v. *Risley*, 111 U. S. 125 [28: 374], and cases cited in opinion, to the effect that the relation between a bank and its depositor is that of debtor and creditor and nothing
[56] more, for that proposition throws *no light upon the question when the debt of the debtor becomes due, and when the statute of limitations begins to run. Neither is it pretended that the relation of the United States to this petitioner was that of bank and depositor, but the reasoning of the authorities cited strengthens the conclusion that when Congress declared that this money should be covered into the Treasury to the credit of the plaintiff, and that she should, on presentation of the checks to the proper officer of the Treasury, be entitled to a settlement of an account and the issue of a warrant, it was the intention to recognize a continuing obligation—one which was available to the plaintiff at any time she saw fit, that it was a promise which was not broken until after demand and refusal.

But authority more in point is not wanting to sustain these views. The direct tax act of August 5, 1861 (12 Stat. at L. 292, chap. 45), provided, in the thirty-sixth section, that, in case of a sale of real estate, and a surplus remaining after satisfying the tax, costs, etc., such surplus should be paid to the owner, or if he be not found, "then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner, or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant." In *United States* v. *Taylor*, 104 U. S. 216 [26: 721], the owner did not apply for the surplus until more than six years had elapsed from the closing up of the sale and the deposit of the money in the Treasury, and it was held that section 1069 did not bar his action, the court observing (p. 221):

"This section limits no time within which application must be made for the proceeds of the sale. The Secretary of the Treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the
Treasury for an indefinite *period without [57]
losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time.

"A construction consistent with good faith on the part of the United States should be given to these statutes. It would certainly not be fair dealing for the government to say to the owner that the surplus proceeds should be held in the Treasury for an indefinite period for his use or that of his legal representatives, and then, upon suit brought to recover them, to plead in bar that the demand therefor had not been made within six years.

"The general rule is that when a trustee unequivocally repudiates the trust, and claims to hold the estate as his own, and such repudiation and claim are brought to the knowledge of the *cestui que trust* in such manner that he is called upon to assert his rights, the statute of limitations will begin to run against him from the time such knowledge is brought home to him, and not before.

. . . .

"In analogy to this rule the right of the owner of the land to recover the money which the government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the court of claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued."

This was reaffirmed in *United States* v. *Cooper*, 120 U. S. 124 [30: 606]. Counsel distinguish those cases from this in that there the money came into the Treasury subject to an express trust created by the act of Congress, which directed that it be there held for the benefit of the owner, while here in

the first instance there was a written promise by the government, a promise for which an appropriation had been made and upon which a cause of action existed. But while there is a difference, we do not think it sufficient to create a different rule or measure of liability. There is no new deposit when a check is certified, but as shown by the opinion in *Girard Bank* v. *Bank of Penn Township, supra,* this fact works no change in the
[58] *rule. Whether the money to satisfy this liability was paid in by some third party or already held by the Treasurer; whether there was or not any prior liability on the part of the government, in each case there was a declaration by Congress that the money thus received or covered into the Treasury should there be held for the benefit of and subject to the call of the owner, and no time was specified within which such call must be made. This was a distinct and separate promise, creating a new liability, and the claim accrued when this new liability matured. It matured when the claimant presented her checks and, calling for warrants, was refused them.

The judgment is affirmed.

GREEN BAY & MISSISSIPPI CANAL COMPANY, *Plff. in Err.,*
v.
PATTEN PAPER COMPANY *et al.*

(See S. C. Reporter's ed. 58–82.)

Federal question—when sufficiently alleged—water power, when subject to appropriation by the United States.

1. An explicit allegation that a claim is founded on certain acts of Congress and a contract with the United States is sufficient to present a Federal question for review by the Supreme Court of the United States, if the alleged right is denied by the state court.
2. No particular form of words or phrases is required for the assertion of a claim of Federal rights to present a question for writ of error from this court to a state court, but it is sufficient if such rights were specially set up or claimed in the state court, in such manner as to bring them to the attention of that court.
3. Water power incidentally created by the erection and maintenance of a dam and canal for the purposes of navigation in Fox river, Wisconsin, which by legislation, both state and Federal, was dedicated to raising a fund to aid the enterprise, is subject to control and appropriation by the United States, which owns and operates the public works, and not by the state of Wisconsin, within whose limits the river lies.
4. A riparian owner on a stream on which works of public improvement have been constructed by state and Federal authority to improve navigation, whereby an incidental water power is created, is not entitled to have all the water flow past his land, so as to prevent the diversion of the surplus water power by grantees of the government, where he was given reasonable opportunity to obtain compensation for damages sustained by the construction of the improvement.

[No. 14.]

Argued January 13, 14, 1898. Decided November 28, 1898.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment of that court reversing a judgment of the Superior Court of Milwaukee County in an action brought by the Patten Paper Company *et al.* against the Green Bay & Mississippi Canal Company *et al.* to determine rights in the waters of Fox river, etc. There was also a motion to dismiss. *Reversed,* and case remanded for further proceedings.

See same case below, 93 Wis. 283.

Statement by Mr. Justice **Shiras:**

This was a suit brought, in 1886, in the circuit court of Outagamie county, Wisconsin, by the Patten Paper Company and others, against the Kaukauna Water Company; the Green Bay & Mississippi Canal Company, and others. The object *of the pro- [59]
ceeding, as set forth in the complaint, was to have determined what share or proportion of the flow of Fox river, where the same passes Islands Nos. 3 and 4 in township No. 21, north of range No. 18 east, is appurtenant and of right should be permitted to flow in the south, middle, and north channels of said river respectively, and to have the defendants restrained from drawing from said Fox river above the head of Island No. 4, and so that the same shall not come into the middle channel of said river and into the mill pond of the plaintiffs, more water flow of said river than the one-sixth part thereof, or more than the amount which by nature was appurtenant to and flowed in the south channel of said river.

The scope of the investigation was widened by reason of the answer of the Green Bay & Mississippi Canal Company, which it was agreed and stipulated should have the effect of a cross bill in the action, and which asserted that any decree to be entered in the suit determining or adjudicating what share or proportion of the flow of the river should be permitted to flow in its several channels, should be made subject to the right of the canal company, by reason of the facts stated, to use all of the water power created by the government dam and improvements on the river.

The principal facts disclosed in the case were the following:

The Fox river is a navigable stream, and flows through township 21, north of range 18 east, in the county of Outagamie, Wisconsin, and in said river, below Lake Winnebago, there are and always have been rapids and abrupt falls. To permit navigation through or by said rapids and falls necessarily requires the building of dams, locks, and canals at great expense. By an act approved August 8, 1846, Congress granted to the state of Wisconsin, on its admission into the Union, a large amount of public lands for the express purpose of and in trust for improving the navigation of the Fox and Wisconsin

rivers. The state accepted said grant of land for said purposes, and by an act of its legislature, approved August 8, 1848, undertook the improvement of said rivers, and enacted, among other things, that "*whenever a water power shall be created by reason of any dam*
[60] *erected *or other improvements made on any of said rivers, such water power shall belong to the state, subject to the future action of the legislature.*"

One of the rapids in Fox river, around which it was necessary to secure slack water navigation by means of dams, locks, and canals, was commonly known as the Kaukauna rapids. The state adopted a plan and system for the construction of a dam and canal at said Kaukauna rapids, whereby there was to be built a low dam beginning on the south side near the head of the rapids, extending down stream, on or near the south bank of the river, across lots 8, 7, 6, and on to lot 5 of section 22, and thence extending at about a right angle with the south bank across the river, leaving an opening at the north end through which the water of the river could pass, and be conducted by a conduit or canal to a certain point at which should be placed a lock.

The sales of lands granted by Congress not proving sufficient to carry on the work, the board of public works were authorized by the legislature to issue certificates of indebtedness, which were declared to be a charge upon the proceeds of the lands granted by Congress and upon the revenues to be derived from the works of improvement.

In July, 1853, the state legislature created a corporation under the name of "The Fox & Wisconsin Improvement Company," to which, by the second section thereof, were granted and transferred the uncompleted works of improvement, together with all and singular the rights of way, dams, locks, canals, water power, and other appurtenances of said works. The company agreed to pay the outstanding certificates, and forthwith undertook the work. Additional lands were granted by Congress in 1854 and 1855, to aid the state in the improvement of the Fox and Wisconsin rivers. The company subsequently executed a deed of conveyance of the works of improvement, the incidental water powers and all of the lands, in trust to apply all revenues derived from the improvement and the proceeds of sales of the lands to the payment of the unpaid certificates and of bonds issued by the company, and to the completion of the works.

[61] *In 1864 the company failed, the deed of trust was foreclosed, and, in 1866, the property of the company, consisting of the works of improvement, the water powers and the lands, were sold pursuant to a decree of court entered February 4, 1864. The purchasers became incorporated under the name of the Green Bay & Mississippi Canal Company, and that company was authorized, by the third section of an act of the legislature approved April 12, 1866, to "enlarge and increase the capacity of said works and of the said rivers so as to make a uniform steamship navigation from the Mississippi river to Green Bay, or to surrender the same to the United States for such enlargement, on such terms as may be approved by the governor for the time being of the state."

July 7, 1870, Congress passed an act entitled "An Act for the Improvement of Water Communication between the Mississippi River and Lake Michigan by the Wisconsin and Fox Rivers." By this act Congress authorized the Secretary of War to ascertain the sum "which in justice ought to be paid to the Green Bay & Mississippi Canal Company as an equivalent for the transfer of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of Fox river, including its locks, dams, canals, and franchises, or so much of the same as shall, in the judgment of said Secretary, be needed," and to that end he was authorized to "join with said company in appointing a board of disinterested and impartial arbitrators"—one to be selected by the Secretary, one by the company, and the third by the two arbitrators so selected. The act provided that in making their award the arbitrators should take into consideration the amount of money realized from the sale of lands granted by Congress to aid in the construction of said water communication, which amount should be deducted from the actual value thereof as found by the arbitrators. It was further enacted that no money should be expended on the improvement of the Fox and Wisconsin rivers until the Green Bay & Mississippi Canal Company should make and file with the Secretary of War an agreement, in writing, whereby it shall agree to grant *and convey to the [62]
United States its property and franchises upon the terms awarded by the arbitrators.

By an act approved March 23, 1871, by the legislature of Wisconsin, the directors of the Green Bay & Mississippi Canal Company were authorized to sell and dispose of the rights and property of said company to the United States, and to cause to be made and executed all papers and writings necessary thereto as contemplated in the act of Congress.

Subsequently, in November, 1871, the arbitrators fixed the then value of all the property of the company at $1,048,070, and the amount realized from land sales, to be deducted therefrom, at $723,070, leaving a balance of $321,000 to be paid to the company. And, in anticipation that the Secretary might decide that the personal property and "the water powers created by the dams and by the use of the surplus waters not required for purposes of navigation," were not needed, these water powers and the water lots necessary to the enjoyment of the same, subject to all uses for navigation, were valued at the sum of $140,000, personal property $40,000, and the improvements $145,000.

The Secretary of War recommended to Congress that it should take the works of improvement and not the water powers and personal property. Congress accordingly, by act approved June 10, 1872, made the necessary appropriation, and the company, by its deed of September, 1872, conveyed and granted to the United States "all and singular its

property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of Fox river, including its locks, dams, canals and franchises, saving and excepting therefrom, and reserving to the said company, the following described property rights and portion of franchises which, in the opinion of the Secretary of War and of Congress, are not needed for public use, to wit: First. All of the personal property of the said company, and particularly of all such property described in the list or schedule attached to the report of said arbitrators, and now on file in the office of the Secretary of War, to which reference is hereto made, whether or not such
[63] property be appurtenant to *said line of water communication. Second. Also all that part of the franchise of said company, *viz.*, the water powers created by the dams and by the use of the surplus waters not required for the purpose of navigation, with the rights of protection and preservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company, a blank form of which attached to the said report of said arbitrators is now on file in the office of the Secretary of War, and to which reference is here made, and subject also to all leases, grants, and assignments made by said company, the said leases *et cet.* being also reserved therefrom."

The leases referred to, and reserved from the grant, were those granted by the company to third parties, in consideration of the payment of annual rents. The use of the surplus water began as early as 1861, and has extended until now from one quarter to one half of the flow of the river is utilized at points near the first lock. The company has caused to be erected, at this point, large and costly mills, and it was found by the trial court that the Green Bay & Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal.

The cause having been submitted to the superior court of Milwaukee county, upon the pleadings and proofs, that court sustained the allegations contained in the cross-complaint of the Green Bay & Mississippi Canal Company, and adjudged, among other things, that "the Green Bay & Mississippi Canal Company is the owner of and entitled as against all the parties to this action, and their successors, heirs, and assigns, to the full flow of the river, not necessary to navigation, and that all and singular the other parties to this action are hereby forever enjoined from interfering with the said Green Bay & Mississippi Canal Company in so withdrawing and using such water; and it is further considered and adjudged and decreed as in favor of the Patten Paper Com-
[64] pany against all other *defendants that all of the water of the river which is permitted by the Green Bay & Mississippi Canal Company to flow over the upper dam or into the river above Island No. 4, so as to pass down the river, should be, and it is hereby, divided and apportioned between the plaintiffs and their successors and assigns, the Kaukauna Water Power Company, and its successors and assigns, and the Green Bay & Mississippi Canal Company, and its successors and assigns, between and to the south, middle, and north channels of the river in the following proportions, *et cet.*"

The supreme court of Wisconsin reversed the judgment so rendered by the superior court, and remanded the case to the superior court with directions to enter judgment in accordance with its opinion. [93 Wis. 283.] That court, in obedience to the mandate of the supreme court, entered a final judgment in the case, as follows, omitting recitals:

"Upon motion of Hooper and Hooper, plaintiffs' attorneys, it is considered, adjudged, and decreed, as in favor of the Patten Paper Company, Union Pulp Company, and Fox River Pulp & Paper Company against all defendants, that all the water of the river except that required for purposes of navigation shall be and is hereby divided and apportioned between and to the south, middle, and north channels of the river, in the following proportions, that is to say: 43–200 thereof of right should flow down the south channel; 157–200 thereof should of right flow down the main channel of the river, north of Island No. 4, and that of the water so of right flowing down the main channel of the river, north of Island No. 4, and above the middle channel, 62–157 thereof should of right flow down the middle channel and south of Island No 3, and that of the water flowing down the north channel north of Island No. 4, and above Island No. 3, 95–157 part should of right flow down the north channel and north of Island No. 3; and each of the parties, to this action, their heirs, successors, and assigns, are forever enjoined from interfering with the waters of said river so as to prevent their flowing into said channels in the proportions aforesaid.

"And it is further adjudged by the court that said Green *Bay & Mississippi Canal Company, its successors and assigns, shall so use [65]
the water, if at all, created by said dam, as that all the water used for water power or hydraulic purposes shall be returned to the stream in such a manner and at such a place as not to deprive the appellants or those claiming under or through them of its use as it had been accustomed to flow past the lands of the said appellants on said river and in the several channels of said river below said dam as it was accustomed to flow, and that said appellants shall have the right to use the water of said river, except such as is or may be necessary for navigation, as it was wont to run in a state of nature without material alteration or diminution."

From this judgment the Green Bay & Mississippi Canal Company, plaintiff in the cross bill, appealed to the supreme court of the state; and on January 10, 1896, the respondents, the present defendants in error, moved to dismiss said appeal for the reason that the judgment was in exact accord with the mandate and was in effect the judgment

of the supreme court. Upon this motion the supreme court dismissed the appeal, expressing itself as follows:

"After careful consideration we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this court. Certainly it would have been improper to allow any amendment to pleadings or new litigation. The mandate was not for a new trial, nor for further proceedings according to law, but with direction to enter judgment in accordance with the opinion, and the opinion left nothing undetermined. This left nothing for the trial court to do in the case except to enter judgment therein as directed."

By that appeal and its decision the jurisdiction of the state courts in the case was exhausted, and the judgment entered in the superior court became the final judgment of the highest court in the state in which a decision in the suit could be had. And on May 18, 1896, a writ of error to said judgment by the Green Bay & Mississippi Canal Company was taken to this court and allowed by the Chief Justice of the supreme court of Wisconsin.

Messrs. **William F. Vilas, B. J. Stevens,** and *E Mariner,* for plaintiff in error:

The rights and privileges of the plaintiff are held under the statutes and authority of the United States, and the decision of the state court was against the rights and privileges so claimed and enjoyed.

The Genesee Chief, 12 How. 443, 13 L. ed. 1058; *The Daniel Ball,* 10 Wall. 557, 19 L. ed. 999; *The Eagle,* 8 Wall. 15, 19 L. ed. 365; *Ex parte Boyer,* 109 U. S. 629, 27 L. ed. 1056; *Re Garnett,* 141 U. S. 1, 35 L. ed. 631.

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation.

Wisconsin v. *Duluth,* 96 U. S. 387, 24 L. ed. 672; *Northern Transp. Co.* v. *Chicago,* 99 U. S. 635, 25 L. ed. 336; *Eldridge* v. *Trezevant,* 160 U. S. 452, 40 L. ed. 490; *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. ed. 23; *Sinnot* v. *Davenport,* 22 How. 227, 16 L. ed. 243; *Foster* v. *Davenport,* 22 How. 244, 16 L. ed. 248; *Henderson* v. *New York,* 92 U. S. 259, 23 L. ed. 543; *Chy Lung* v. *Freeman,* 92 U. S. 275, 23 L. ed. 550; *New York* v. *Compagnie Générale Transatlantique,* 107 U. S. 59, 27 L. ed. 383; *The Glide,* 167 U. S. 606, 42 L. ed. 296.

Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard.

Gibson v. *United States,* 166 U. S. 276, 41 L. ed. 1002; *Northern Transp. Co.* v. *Chicago,* 99 U. S. 635, 25 L. ed. 336; *Monongahela Nav. Co.* v. *Coons,* 6 Watts & S. 101; *Wisconsin River Improv. Co.* v. *Lyons,* 30 Wis. 65; *Arimond* v. *Green Bay & M. Canal Co.* 31 Wis. 338; *Cohn* v. *Wausau Boom Co.* 47 Wis. 322.

Messrs. **George G. Greene, Alfred L. Cary, Moses Hooper,** *John T. Fish,* and *David S. Ordway,* for defendants in error:

No right under the Federal Constitution was "specially set up or claimed" in the state court.

Maxwell v. *Newbold,* 18 How. 511, 15 L. ed. 506; *Brooks* v. *Missouri,* 124 U. S. 394, 31 L. ed. 454; *Leeper* v. *Texas,* 139 U. S. 462, 35 L. ed. 225; *Schuyler Nat. Bank* v. *Bollong,* 150 U. S. 85, 37 L. ed. 1008; *Re Buchanan,* 158 U. S. 31, 39 L. ed. 884; *Chicago & N. W. R. Co.* v. *Chicago,* 164 U. S. 454, 41 L. ed. 511; *Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 41 L. ed. 1149.

The burden is on the plaintiff in error to show that the claim was thus set up.

Marrow v. *Brinkley,* 129 U. S. 178, 32 L. ed. 654; *Kansas Endowment Asso.* v. *Kansas,* 120 U. S. 103, 30 L. ed. 593; *Church* v. *Kelsey,* 121 U. S. 282, 30 L. ed. 960.

Neither the Constitution nor any provision of it is mentioned in the printed record, save in the assignment of errors in this court.

Ansbro v. *United States,* 159 U. S. 695, 40 L. ed. 310; *Butler* v. *Gage,* 138 U. S. 52, 34 L. ed. 869.

Plaintiff in error has no right, as grantee of the state, to divert from the land or water powers of the defendants in error any of the water of the river for power.

Head v. *Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889; *Garwood* v. *New York C. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Druley* v. *Adam,* 102 Ill. 177; *Emporia* v. *Soden,* 25 Kan. 588, 37 Am. Rep. 265; *Kimberly & C. Co.* v. *Hewitt,* 79 Wis. 334; *Smith* v. *Rochester,* 92 N. Y. 463, 44 Am. Rep. 393; *Halsey* v. *Lehigh Valley R. Co.* 45 N. J. L. 26; *A. C. Conn Co.* v. *Little Suamico Lumber Mfg. Co.* 74 Wis. 652; *Grand Rapids* v. *Powers,* 89 Mich. 94, 14 L. R. A. 498; *Black River Improv. Co.* v. *La Crosse Boom Co.* 54 Wis. 659; *Brooks* v. *Cedar Brook & S. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460; *Delaplaine* v. *Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386.

The powers of eminent domain and taxation agree in that they can be exercised only for a public use.

Cole v. *La Grange,* 113 U. S. 1, 28 L. ed. 896; *Atty. Gen.* v. *Eau Claire,* 37 Wis. 400; *Re Eureka Basin Warehouse & Mfg. Co.* 93 N. Y. 42; *Weismer* v. *Douglas,* 64 N. Y. 91, 21 Am. Rep. 586; *Consolidated Channel Co.* v. *Central P. R. Co.* 51 Cal. 269; *Varick* v. *Smith,* 5 Paige, 137, 28 Am. Dec. 417; *Parkersburg* v. *Brown,* 106 U. S. 487, 27 L. ed. 238; *Central Branch Union P. R. Co.* v. *Smith,* 23 Kan. 745; *Bissell* v. *Kankakee,* 64 Ill. 249, 21 Am. Rep. 554; *English* v. *People,* 96 Ill. 566; *Sholl* v. *German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379; *Allen* v. *Jay,* 60 Me. 124, 11 Am. Rep. 185; *Newell* v. *Smith,* 15 Wis. 102; *Curtis* v. *Whipple,* 24 Wis. 350, 1 Am. Rep. 187; *Osborn* v. *Hart,* 24 Wis. 89, 1 Am. Rep. 161.

The power incidental to the right to improve streams for navigation is only the power of the surplus water not used for navigation, at the improvement which intercepts the flow of the stream to raise a head for navigation.

Varick v. *Smith,* 5 Paige, 137, 28 Am. Dec. 417; *Cooper* v. *Williams,* 5 Ohio, 392, 24

Am. Dec. 299; *Buckingham* v. *Smith*, 10 Ohio, 288; *Druley* v. *Adam*, 102 Ill. 177; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004.

Riparian property cannot be taken for any public use except navigation, until compensation is provided.

Janesville v. *Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *Halsey* v. *Lehigh Valley R. Co.* 45 N. J. L. 26; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39.

Plaintiff in error has no right as a riparian owner to divert water from complainants for power.

Webb v. *Portland Mfg. Co.* 3 Sumn. 189; *Pratt* v. *Lamson*, 2 Allen, 275; *Vandenbergh* v. *Van Bergen*, 13 Johns. 212; *Harding* v. *Stamford Water Co.* 41 Conn. 87; *Parker* v. *Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Blanchard* v. *Baker*, 8 Me. 253, 23 Am. Dec. 504; *Moulton* v. *Newburyport Water Co.* 137 Mass. 163; *Illinois & M. Canal Trustees* v. *Haven*, 11 Ill. 554; *Corning* v. *Troy Iron & Nail Factory*, 40 N. Y. 191.

Plaintiff in error has gained no right to convert the water for power, by prescription or estoppel.

Prentice v. *Geiger*, 74 N. Y. 341; *Holsman* v. *Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Norway Plains Co.* v. *Bradley*, 52 N. H. 86; *Carlisle* v. *Cooper*, 21 N. J. Eq. 576.

There can be no estoppel to assert a legal right or title, by acquiescence, if the facts on which the right or title depends were equally known to both parties; nor unless the acquiescence was fraudulent.

Brant v. *Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927; *Kingman* v. *Graham*, 51 Wis. 232; *Canning* v. *Harlan*, 50 Mich. 320; *Robbins* v. *Potter*, 98 Mass. 532; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226; *Powell* v. *Rogers*, 105 Ill. 318; *Henshaw* v. *Bissell*, 18 Wall. 255, 21 L. ed. 835; *Williams* v. *Wadsworth*, 51 Conn. 277.

[66] *Mr. Justice **Shiras** delivered the opinion of the court:

First for our consideration is the motion made by the defendants in error to dismiss the writ of error because the record does not disclose that any Federal question was involved in the controversy, and because no title, right, privilege, or immunity claimed under the Constitution of the United States, or any treaty or statute of, or commission held, or authority exercised under, the United States, was specifically set up or claimed in the trial court or in the supreme court of the state of Wisconsin by the plaintiff in error, nor was there any decision in either of said state courts against any such title, right, privilege, or immunity specially set up or claimed by the plaintiff in error.

The contention that no Federal question is disclosed in the record is sufficiently disposed of, we think, by an inspection of the cross-complaint filed by the Green Bay & Mississippi Canal Company. It was therein claimed that the water power in question was created by a dam, canal, and other improvements owned and operated by the United States, and that the right and title of the said canal company to the use of the water power so created arose under and by virtue of certain alleged and recited acts of Congress and acts of the legislature of the state of Wisconsin, relating to the improvement of Fox river as a public highway, and especially by virtue of an alleged contract between the United States and the canal company, whereby the use of the surplus water created by said dam and canal was granted and reserved to the canal company.

Assuming the truth of such allegations, it is plain that the *plaintiff in error asserted a [67] right and title and authority exercised under the United States.

It is, however, urged that, whatever may have been the right, title, privilege, or authority possessed by the canal company and derived from the United States, such right, title, privilege, or authority was not specially set up and claimed in the state courts at a time and in a manner to give this court jurisdiction.

This contention is based on the words in section 709 of the Revised Statutes, carried forward from the twenty-fifth section of the judiciary act of 1789, "specially set up or claimed;" and the effect to be given to those words has been frequently considered by this court.

There is a class of cases wherein it has been held and laid down as settled doctrine that "the revisory power of this court does not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or statutes of the United States; that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court; that this statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

The last elaborate discussion of this phase of the subject is found in the opinion of the court in *Oxley Stave Company* v. *Butler County*, 166 U. S. 648 [41: 1149], delivered by Mr. Justice Harlan, in which many of the cases are reviewed and from which the preceding quotation is taken.

But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state *court in such manner [68] as to bring it to the attention of that court.

"The true and rational rule," this court said in *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 143 [17: 576], "is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was re-

lied on by the party who brings the writ of error, and that the right thus claimed by him was denied." In *Roby* v. *Colehour*, 146 U. S. 159 [36: 922], it was said that "our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment." If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient." *Powell* v. *Brunswick County*, 150 U. S. 440 [37: 1137]; *Sayward* v. *Denny*, 158 U. S. 180 [39: 941]; *Chicago, Burlington, & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226 [41: 979].

As then, in its cross-complaint, the canal company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the canal company, under which the United States became the owner of the dam, canal, and other improvements on the Fox river, and the canal company became vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the supreme court of Wisconsin necessarily held adversely to these claims of Federal right, we hold that the motion to dimiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below.

Whether the water power, incidentally created by the erection and maintenance of the dam and canal for the purposes of navigation in Fox river, is subject to control and
[69] appropriation *by the United States, owning and operating those public works, or by the state of Wisconsin, within whose limits Fox river lies, is the decisive question in this case.

Upon the undisputed facts contained in the record we think it clear that the canal company is possessed of whatever rights to the use of this incidental water power that could be validly granted by the United States.

That Fox river is one of the navigable waters of the United States has been already decided by this court in the case of *The Montello*, 20 Wall. 430 [22: 391], upon the same facts, historical and legislative, that are now before us. That was the case of a libel filed by the Government in the circuit court of the United States for the district of Wisconsin against the steamer Montello, in admiralty, for noncompliance with acts of Congress making enrolment and license and certain provisions as to steam valves necessary for vessels like the Montello navigating the navigable waters of the United States. The court below dismissed the libel, resting its decision on the ground that before the navigation of the river was artificially improved there had been numerous obstructions to a continuous navigation, by reason of falls and rapids, and that, therefore, Fox river was not a navigable water of the United States. But this court reversed the judgment and held that Fox river is a stream of a national character, and that steamboats navigating its waters are subject to governmental regulations.

To aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal, the United States, by the act of August 8, 1846 (9 Stat. at L. 83, chap. 170), granted a quantity of land on each side of Fox river, and the lakes through which it passes, from its mouth to the point where the portage canal should enter the same, and provided that, as soon as the Territory of Wisconsin should be admitted as a state, all the lands granted by the act should become the property of said state "for the purpose contemplated by the act, and no other." It further enacted that the legislature should agree to accept said grant upon the terms specified in the act, and should have power to fix the price at which said lands should be sold, not less than one dollar and twenty-five cents *the acre; and to adopt such [70]
kind and plan of improvement on said route as the said legislature shall from time to time determine for the best interest of said state; and provided, also, that the lands granted should not be conveyed or disposed of by said state, except as said improvements should progress—that is, the said state might sell so much of said lands as should produce the sum of twenty thousand dollars, and then the sales should cease until the governor of the state should certify the fact to the President of the United States that one half of said sum had been expended upon said improvements, when the said state might sell and dispose of a quantity of said lands sufficient to reimburse the amount expended; and that thus the sales should progress as the proceeds thereof should be expended, and the fact of such expenditure certified in the manner in the act mentioned. It further enacted that the said improvements should be commenced within three years after the said state should be admitted into the Union, and completed within twenty years, or the United States should be entitled to receive the amount for which any of said lands might have been sold by the state.

In February, 1848, the state of Wisconsin was created by the adoption of a Constitution, and the legislature of the new state, by an act passed August 8, 1848, accepted the grant from Congress made by the act of August 8, 1846, and organized a board of public works, and authorized the board, in the construction of such improvements, to "enter on, to take possession of, and use all lands, waters, and materials the appropriation of which for the use of such works of improvement should in their judgment be necessary. The act contained the following section:

"Sec. 16. When any lands, waters, or materials appropriated by the board to the use of said improvements shall belong to the state, such lands, waters, or materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be absolutely reserved to the state, and whenever a water power shall be created by reason of any dam erected or other improve-
[71] ments made on any of *said rivers, such water power shall belong to the state subject to future action of the legislature."

Sections 17, 18, 19, 20, 21, and 22 provide for condemnation by the board of such lands, waters, and materials belonging to individuals, with whom the board could not agree, and for payment of damages out of the fund.

By an act approved February 9, 1850, the legislature of Wisconsin enacted as follows:

"The board of public works are hereby authorized and empowered in any future lettings of contracts for the improvement of the Fox and Wisconsin rivers to consider bids made by any person or persons for improvements which will create a water power, and when such person or persons offer to perform, or perform and maintain, the work in consideration of the granting by the state to him or them, his or their assigns, forever, the whole or a part of such water power: *Provided*, That before such bid is accepted and the contracts entered into it shall receive the approval of the governor.

"When lettings have been made for the improvement of said rivers, whereby a water power is created, the board of public works may relinquish to the person or persons who have performed the same all or a part of such power as a consideration in full or in part for such performance or maintenance of such improvement, or for both."

The eighth article of the Constitution of Wisconsin contained the following:

"Sec. 10. The state shall never contract any debt for works of internal improvement or be a party carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion."

By the act approved July 6, 1853, the legislature of Wisconsin created a corporation to supersede the board of public works in the construction and maintenance of the improvements on the Fox and Wisconsin rivers
[72] under the name of *the "Fox and Wisconsin Improvement Company," and granted and surrendered to the said company "the works of improvement contemplated by the act entitled 'An Act to Provide for the Improvement of the Fox and Wisconsin Rivers and Connecting the Same by a Canal,' approved August 8, 1848, and by several acts supplemental thereto and amendatory thereof, and known as the 'Fox and Wisconsin rivers improvement,' together with all and singular the rights of way, dams, locks, canals, water power, and other appurtenances of said works; also all the right possessed by the state of demanding and receiving tolls and rents for the same, so far as the state possesses or is authorized to grant the same, and all privileges of constructing said works and repairing the same, and all other rights and privileges belonging to the improvement to the same extent and in the same manner that the state now holds or may exercise such rights by virtue of the acts above referred to in this section."

The Fox & Wisconsin Improvement Company, thus created and empowered, agreed to fully execute the trust, and forthwith undertook the work.

By an act, approved October 3, 1856, entitled "An Act to Secure the Enlargement and Immediate Completion of the Improvement of the Navigation of the Fox and Wisconsin Rivers," etc., it was enacted, by its second section, as follows:

"Sec. 2. To enable said company to make all the dams, locks, canals, feeders, and other structures, and to do all the dredging and other work, and furnish all materials necessary to complete the improvement of the navigation of the Fox and Wisconsin rivers and the canal connecting the same, all the lands now unsold, granted by Congress in aid of said improvement, as explained by the same body (which grants are hereby accepted), are hereby granted to the Fox & Wisconsin Improvement Company, subject, however, to the terms and conditions of said grants by Congress, and to the further terms and conditions following, that is to say: That within ninety days after the passage of this act, the said company shall make a deed of trust to three trustees to be appointed *as [73]
hereinafter provided, including and conveying to said trustees and their successors all the unsold lands granted to the state of Wisconsin by the several acts and resolutions of Congress to aid in the improvement of the Fox and Wisconsin rivers, and all the works of improvements constructed or to be constructed on said rivers, and all and singular the rights of way, dams, locks, canals, water powers, and other appurtenances of said works, and all rights, privileges, and franchises belonging to said improvement, and all property of said company, of whatever name and description."

By the third section it was enacted that, for raising funds, from time to time, for the construction, enlargement, and completion of said works of improvement, and for the purchase of materials to be used therein, etc., said company might issue its bonds, to be countersigned by said trustees, in sums of not less than five hundred nor more than one thousand dollars each, at rates of interest not exceeding ten per centum per annum, payable semi-annually, the principal of said bonds payable at a period to be therein named, not exceeding twenty years from their date, etc., and that the payment of said bonds should be secured by the deed of trust afore-

said of said lands, works, water powers, property, and franchises. It was further provided, that, in case the company should fail to comply with any of the requirements of the act, or to pay the principal or interest of its bonds, to be issued as therein provided, the said trustees should sell the said lands, in tracts not exceeding six hundred and forty acres, and should apply the proceeds thereof to the purposes expressed in the act, and that if the proceeds of said sales should be insufficient to pay all the evidences of state indebtedness and interest thereon and redeem all the bonds and other obligations of said company, then the said trustees should sell the water powers created by said improvements, and thereafter all the corporate rights, privileges, franchises, and property of said company in said improvement, and all appurtenances thereto, to pay the same; and that the purchasers thereof should take, hold, and use the same as fully as they were held, used, and enjoyed by said company, etc.

[74] *By the fourth section it was enacted that the trustees might, on the requisition of said company, proceed to sell the lands granted by Congress in aid of said improvement, and might sell or lease the water powers created by said improvement in such manner and upon such terms, as to price and time and place of payment, as the company might direct; but that no sales of said lands, or sales or leases of said water powers, should be made until after the execution and delivery of said deed of trust, etc.

In 1864 the company failed, the deed of trust was foreclosed, and the property of the company, consisting of the works of improvement, lands, and water powers, were sold, in February, 1866, to purchasers, who became incorporated, under authority of law, as the Green Bay & Mississippi Canal Company. In the act of April 12, 1866, authorizing the purchasers at said sale to form "a corporation for the purpose of holding, selling, operating, or managing the lands, water powers, works of improvement, franchises, and other property purchased at said sale, or any part thereof," it was enacted that said corporation should have power to enlarge and increase the capacity of said works and of the said rivers so as to make a uniform steamship navigation from the Mississippi river to Green Bay, or to surrender the same to the United States for such enlargement on such terms as should be approved by the governor of the state.

The amount realized at the sale was just sufficient to pay the state indebtedness, outstanding on account of certificates issued to aid in the work of improvement, and the sum estimated, by a commission duly appointed, to be necessary to complete the improvement.

The Green Bay & Mississippi Canal Company, thus organized, continued to hold the works of improvements and manage the same until, in 1870, Congress passed an act providing for the purchase from the company of "all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals, and franchises, or so much of the same as should, in the judgment of the Secretary *of War, be needed," and authorizing the appointment of a board of arbitrators, to be mutually chosen, who should appraise the properties to be taken. This act provided that in making their award the arbitrators should take into consideration the amount of money realized from the sale of the lands granted to the state of Wisconsin to aid in the construction of said water communication, which amount was to be deducted from the actual value thereof as found by the arbitrators. [75]

In pursuance of this legislation, the arbitrators were appointed and acted. They fixed the value of the company's property at $1,048,070; the amount of the land sales at $723,070; leaving a balance of $325,000 to be paid the company. They valued the water power and the water lots necessary to the enjoyment of the same at the sum of $140,000; the personal property at $40,000, and the improvement at $145,000.

Subsequently Congress, by act of June 10, 1872, appropriated the amount of $145,000, and on September 18, 1872, the canal company, by its deed of that date, transferred and conveyed the works of improvement to the United States, reserving to itself the personal property and the water powers in the language following:

"All that part of the franchises of said company, *viz.:* The water powers created by the dams and by the use of the surplus waters not required for purposes of navigation, with the rights of protection and reservation appurtenant thereto, and the lots, pieces, or parcels of land necessary to the enjoyment of the same, and those acquired with reference to the same, all subject to the right to use the water for all purposes of navigation, as the same is reserved in leases heretofore made by said company; . . . and subject, also, to all leases, grants, and assignments made by said company, the said leases, etc., being also reserved herefrom."

Since that time the United States have assumed possession and exclusive control of the rivers, and have expended several millions of dollars in their improvement, in pursuance of yearly appropriations; and the canal company has continued, *until the decree complained of in the present case, in the possession and enjoyment of the water powers and water lots mentioned in the report of the arbitrators and reserved in the deed to the United States. [76]

It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition. Nor was it created by the erection of a dam by private persons for that sole purpose.

We, of course, must accept the doctrine of the supreme court of Wisconsin, that it would not be competent even for the legisla-

ture to legalize such structures for private purposes. Such a question is for the state tribunals.

But we have here the case of a water power incidental to the construction and maintenance of a public work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States.

It also appears that, through the entire history of this improvement, these incidental water powers were recognized by the legislature of the state as a source of revenue for the promotion and success of the public enterprise, and in aid of its completion. By the act of July 6, 1853, the water powers were granted with the rest of the public works to the Fox & Wisconsin Improvement Company, upon a public trust to continue and complete the partially constructed highway, and the company was thereby authorized to mortgage such water powers, as part of the plant, to secure bonds issued to raise money for that purpose; and, subsequently, upon a foreclosure the entire property became vested in the Green Bay & Mississippi Canal Company.

The case of *Kaukauna Water Power Co.* v. *Green Bay & Mississippi Canal Co.* 142 U. S. 254 [35: 1004], involved some of the questions presented in the present case. There a private riparian owner sought to withdraw water from this very dam to furnish power to its works. The canal company filed a bill against such owner, the Kaukauna Water Company, to enjoin it from interfering with the canal company in building and maintaining the dam, and from cutting said dam in order to permit a flow of water out of the
[77] pool into the works of the defendant. *The decree asked for was granted by the circuit court of Outagamie county, and that judgment was affirmed by the supreme court of Wisconsin. 70 Wis. 645. The case was brought to this court where it was contended, on behalf of the Kaukauna Water Power Company, that said company, by reason of ownership of the bank and of the bed of the stream, was the owner of the use, while passing, of all the water which might flow over the bed of the stream; in other words, was the owner of all the water power which could be utilized upon its land; and that, therefore, the act of the state of Wisconsin, of August 8, 1848, was void as an impairment of such property rights. The judgment of the court below was affirmed in an opinion by Mr. Justice Brown, some of the observations of which are so pertinent to our present purpose that we quote them at some length:

"The case of the plaintiff canal company depends primarily upon the legality of the legislative act of 1848, whereby the state assumed to reserve to itself any water power which should be created by the erection of the dam across the river at this point. No question is made of the power of the state to construct or authorize the construction of this improvement, and to devote to it the proceeds of the land grant of the United States. The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose is doubtless a proper exercise of the authority of the state under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its
right to *make such improvement. Indeed, [78]
it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to withdraw—controversies which could only be avoided by the state reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the state to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

"The value of this water power created by the dam was much greater than that of the river in its unimproved state in the hands of the riparian proprietors, who had not the means to make it available. Those proprietors lost nothing that was useful to them, except the technical right to have the water flow as it had been accustomed and the possibility of their being able some time to improve it. If the state could condemn this use of the water, with the other property of the riparian owner, it might raise a revenue from it sufficient to complete the work, which might otherwise fail. There was every reason why a water power thus created should belong to the public rather than to the riparian owners. Indeed it seems to have been the practice, not only in New York, but in Ohio, in Wisconsin, and perhaps in other states, in authorizing the erection of dams for the purpose of navigation, or rather public improvement, to reserve the surplus of water thereby created to be leased to private parties under the authority of the state; and where the surplus thus created was a mere incident to securing an adequate amount of water for the public improvement, such legislation has, it is believed, been uniformly sustained."

The learned judge then proceeds to cite decisions to that effect rendered in several of the state supreme courts.

[79] *As respected the right of the riparian owners in that case to recover compensation for their property thus taken, this court held that the act of Congress of 1875 (18 Stat. at L. 506, chap. 166), to aid in the improvement of the Fox and Wisconsin rivers, made a proper provision for such compensation, and that although the act of 1875 may have been repealed in 1888 (25 Stat. at L. 4, 21, chap. 4), yet that the lapse of thirteen years had afforded a reasonable opportunity for the Kaukauna Water Power Company to have obtained compensation for the damages sustained by the construction of the improvements.

As previously stated, the state of Wisconsin, by its act of October 3, 1856, granted and conveyed to the Fox & Wisconsin Improvement Company all the rights and interest of the state in the improvement, including the water powers created thereby, and, in case the sales of the granted lands should fail to realize a sum sufficient to complete the intended works of improvement and to pay the outstanding indebtedness of the state, and redeem the bonds issued by the company, the state authorized the sale of the water powers created by the said improvements. And, subsequently, by act of March 23, 1871, the state authorized the Green Bay & Mississippi Canal Company, which had become the owner of the entire improvement works, lands, and water powers by purchase at the foreclosure sale, to sell and dispose of the same to the United States.

The legal effect and import of the sale and conveyance by the canal company were to vest absolute ownership in the improvement and appurtenances in the United States, which proprietary rights thereby became added to the jurisdiction and control that the United States possessed over the Fox river as a navigable water. By the findings of the arbitrators the sum of three hundred and twenty-five thousand dollars was payable to the canal company, but, by agreement and under the act of Congress of June 10, 1872, the United States consented to the retention by the canal company of certain personal property and of the water powers, with the lots appurtenant thereto, in part payment

[80] of the sum at which *the entire plant had been appraised; and accordingly, in its deed of conveyance, the company reserved to itself such personal property and the water powers and appurtenances, and the United States paid the remaining sum of one hundred and forty-five thousand dollars.

The substantial meaning of the transaction was, that the United States granted to the canal company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works, and that the United States were credited with the appraised value of the water powers and appurtenances and the articles of personal property. The method by which this arrangement was effected, namely, by a reservation in the deed, was an apt one, and quite as efficacious as if the entire property had been conveyed to the United States by one deed and the reserved properties had been reconveyed to the canal company by another.

So far, therefore, as the water powers and appurtenant lots are regarded as property, it is plain that the title of the canal company thereto cannot be controverted; and we think it is equally plain that the mode and extent of the use and enjoyment of such property by the canal company fall within the sole control of the United States. At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire.

This aspect of the subject was before us in *Wisconsin v. Duluth*, 96 U. S. 379 [24: 668], where the state of Wisconsin sought, by an original bill in this court, to restrain the city of Duluth from changing the current of the St. Louis river and making other improvements in the city harbor to the detriment, as was claimed, of the harbor of Superior City within the jurisdiction of Wisconsin. It, however, was disclosed that Congress had made large appropriations for the work complained of, and that the executive department had taken *exclusive charge and [81]
control of it. The court dismissed the bill, and in its opinion, per Mr. Justice Miller, said:

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the government was organized. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the states. And while this court has maintained, in many cases, the right of the states to authorize structures in and over the navigable waters of the states, which may either impede or improve their navigation, in the absence of any action of the general government in the same manner, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under state authority."

To the same effect is *South Carolina v. Georgia*, 93 U. S. 4 [23: 782].

Several cases are cited in the briefs for the defendants in error, wherein it has been decided by state supreme courts of high authority that whatever remains of the stream, beyond what is wanted for the public improvement, and which continues to flow over the dam and down the original channel of the river, belongs to riparian owners upon the

stream, in the same manner as if the state dam had not been erected.

Our examination of the cases so cited has not enabled us to perceive that they are applicable to the present subject. In none of them have we found that, by the state legislation, was there a fund created out of the use of the surplus water, to be expended in the completion and maintenance of the public improvement. As we have seen, the entire legislation, state and Federal, in the present instance, has had in view the dedication of the water powers incidentally created by the dams and canal to raising a fund to aid in the erection, completion, and maintenance of the public works; and, as we have further seen, provision was made in the Federal act of 1875 for the ascertainment and payment of damages, in respect to which this court said, in *Kaukauna Water Power Co.* v. *Green Bay and Mississippi Canal Co.* 142 U.
[82] S. 279 [35: 1013], that "the terms of *this act are broad enough to cover, not only lands taken for flowage purposes, but all injury done to lands or other property by means of any part of the works of said improvement, which would include damages caused by the diversion of the waters."

Moreover, in the state cases cited by the defendants in error, the question of Federal jurisdiction and control did not arise and was not considered.

Other propositions, based on the alleged departure by the supreme court of the state from the case made by the pleadings, were discussed by the counsel for the plaintiff in error; but as the views heretofore stated dispose of the case, it is not necessary for us to consider them.

Our conclusion, then, is that, as by the judgment of the supreme court of Wisconsin there was drawn into question the validity of an authority exercised under the United States, to wit, the granting of the said water powers and easement, and the decision was against the validity of such authority, thereby depriving the plaintiff in error of property without due process of law, the judgment of that court must be and is hereby—

Reversed, and the case is remanded to the Supreme Court of Wisconsin for further proceedings not inconsistent with this opinion.

ENGELBERT MEYER, *Plff. in Err.*,
v.
CITY OF RICHMOND and Chesapeake & Ohio Railway Company.

(See S. C. Reporter's ed. 82–101.)

Federal right, when sufficiently set up—consequential damage to property is not a deprivation of the property.

1. A Federal right is sufficiently set up in a state court, although it is not so set up or claimed in a declaration as to be decided in passing on a demurrer, where it is presented subsequently by a motion to the court to set aside its judgment on the demurrer, and its denial assigned as error on appeal to the highest court of the state.
2. Consequential damage to property by an obstruction in a street is not a deprivation of the property within the constitutional provision against depriving a person of property without due process of law.

[No. 48.]

Submitted October 14, 1898. Decided November 28, 1898.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review an order of that court denying a writ of error to the law and equity court of the city of Richmond in that state for the review of a judgment of the latter court sustaining a demurrer to the declaration and dismissing an action brought by Engelbert Meyer, plaintiff, against the city of Richmond *et al.*, for damages to plaintiff's property by obstructions in the street. *Affirmed.*

Statement by Mr. Justice **McKenna:**

*This is a common-law action of trespass **[83]**
on the case, and was brought by plaintiff in error against the defendants in error in one of the nisi prius courts of the state of Virginia. The substance of the plaintiff's declaration is as follows:

That he was the owner in fee of a lot of land fronting on Eighth street between Cary and Canal streets, on which were *located two **[84]**
brick buildings, the first floor of which was used for store purposes and the second story as dwellings; that said property, previous to the obstruction of Eighth street, as hereinafter described, was very profitable as an investment, being continuously rented to good tenants, who promptly paid remunerative rents for the same; that on the 25th day of June, 1886, the city council of Richmond by ordinance, authorized the Richmond & Alleghany Railway Company to obstruct for the distance of sixty feet (commencing at Canal street in the direction of Cary street) Eighth street, and by virtue of which said railway company wholly obstructed and occupied said street for said distance with its tracks, sheds, fences, etc., except to pedestrians, for whom said company was required to provide by overhead bridge and stairway approaches thereto. It was averred in said declaration that by means of this obstruction so made by said company by authority of said city, travel along said street was arrested and the property rights of your petitioner, as an abutter upon said street, were not only substantially injured, but practically destroyed; that the city had no right under the Constitution and laws of the land to authorize the said railroad company to close said street or place obstructions therein without proper legal proceedings for that purpose and the making of just compensation to such abutting owners as might be injured by said action; that this unconstitutional

and illegal action rendered said defendants liable to your petitioner, as trespassers on his property, for all damages that he had sustained not common to the public; that the obstructions were in themselves nuisances which the city was charged with the duty of abating and moving, and that every day's continuation of the same was a new offense; that the rights, privileges, and obligations of said Richmond & Alleghany Railway Company had been legally transferred to and assumed by said Chesapeake & Ohio Railway Company, and that it, the said last-named company, now maintained the said obstructions and was therefore liable, jointly with said city of Richmond, for the said trespasses. A plat of the *locus in quo* and a copy of said ordinance were made parts of said declaration.

[85] *Damages were claimed in the sum of five thousand dollars.

On the 9th of September, 1895, the defendants entered a general demurrer to the whole declaration and each count thereof, in which the plaintiff joined, and on the 27th of December, 1895, the court sustained the demurrer and gave judgment for the defendants, dismissing the action.

And thereupon the plaintiff, by counsel, moved the court to set "aside the said judgment and enter judgment for him on said demurrer, and it being represented to the court that it is the intention of the plaintiff in the case of H. Wythe Davis against the city of Richmond and the Chesapeake & Ohio Railway Company to apply for a writ of error to the judgment of this court entered this day in that cause, and the questions involved in that case being the same as in this case, the court takes time to consider of said motions, and by consent of parties this case is retained on the docket of this court, and the determination of said motions to await the result of the application for a writ of error in the case of H. Wythe Davis against the city of Richmond and the Chesapeake & Ohio Railway Company."

On the 31st day of January, 1896, the following proceedings were had:

"This day came the parties again, by their attorneys, and the court, being now advised of its judgment to be rendered herein, on the motion of the plaintiff to set aside the judgment rendered on the demurrer to the plaintiff's declaration and to each count thereof, doth refuse to set aside said judgment.

"And thereupon the plaintiff again moved the court to set aside said judgment entered on the 27th day of December, 1895, sustaining defendant's demurrer to the declaration and to each count thereof, solely on the ground that the act of the general assembly of Virginia, approved May 24, 1870, providing a charter for the city of Richmond (Acts 1869-70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, as well as said ordinance, is unconstitutional and void, because in conflict with the Fourteenth Amendment of the Constitution of the United States, which prohib-
[86] its any *state from depriving any person of property without due process of law, and therefore there was no warrant of law for the closing of said street as claimed by said defendants; but the court overruled said motion and refused to grant said motion and to set aside said judgment; to which action of the court the plaintiff excepted and filed his bill of exception, which was signed, sealed, and enrolled, and made a part of the record."

The plaintiff then presented a petition to the supreme court of appeals of Virginia, the court of last resort of that state, asking for a writ of error to said judgment, but said court rejected the petition by the following order:

Virginia:

In the Supreme Court of Appeals held in the State Library Building, in the city of Richmond, on Thursday, February 20th, 1896.

The petition of Engelbert Meyer for a writ of error from a judgment rendered by the law and equity court of the city of Richmond on the 31st day of January, 1896, in a suit in which the petitioner was plaintiff and the city of Richmond and the Chesapeake & Ohio Railway Company were defendants, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that said judgment is plainly right, doth reject said petition.

The case is here on error to this order.

In his petition to the court of appeals the plaintiff set up and urged a right under the Constitution of the United States as follows:

"Your petitioner now insists that the said law and equity court erred in sustaining said demurrer to his declaration, and also in refusing to set aside its judgment so holding as set forth in his bill of exception.

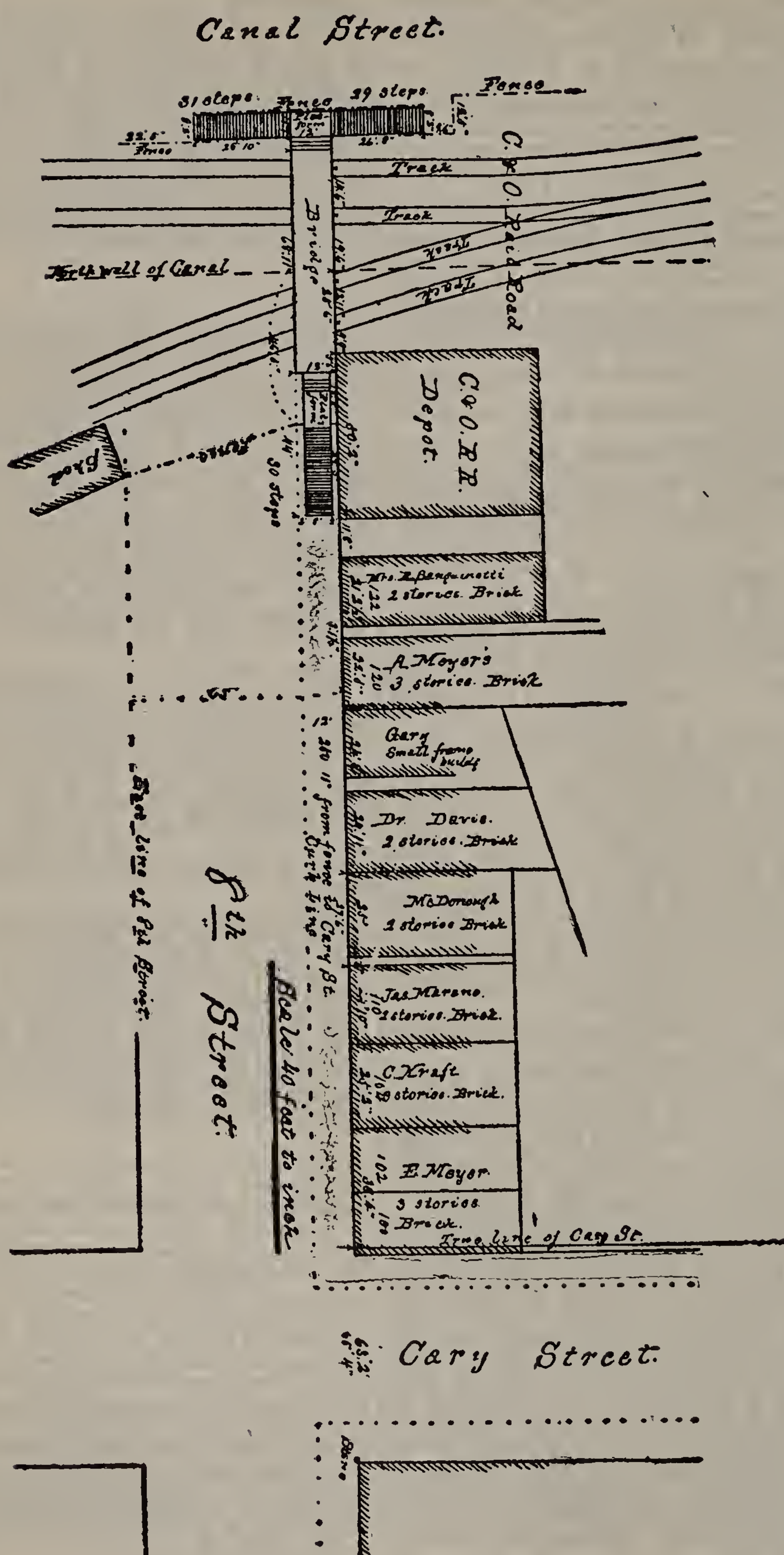
"Your petitioner therefore humbly submits—

"That under the Constitution and laws of this state the free and uninterrupted use of public highways once dedicated to and accepted by the public or acquired by right of eminent domain are for continuous public use, and that the right of *access to and use [87]
of such streets by an abutting property holder is property of which the owner cannot under the Federal Constitution be deprived without due process of law.

. . . .

"The said law and equity court in sustaining the said demurrer denied to your petitioner his constitutional rights, and specially so did it in refusing to set aside its judgment when its attention was called to the unconstitutionality of the act of the general assembly of Virginia approved May 24, 1870 (Acts 1869-70, p. 120), so far as it authorized the passage of the ordinance in the declaration mentioned, because in conflict with the Fourteenth Amendment, which prohibits any state from depriving any person of property without due process of law, there being no mode prescribed in said act of the general assembly or in said ordinance for the devesting him of his said property rights by any judicial proceedings whatsoever."

The following is a copy of the diagram showing plaintiff's property and the obstructions complained of:


Canal Street.
31 steps.
Fence
29 steps.
Fence
Track
Track
Track
Track
C. & O. Rail Road
Bridge
North wall of Canal
C. & O. R.R. Depot.
30 steps
2 stories. Brick
A. Meyers
3 stories. Brick
Cary
Small frame build'g
Dr. Davis.
2 stories. Brick
McDonough
2 stories Brick
Jas. Moreno.
2 stories. Brick.
C. Kraft
3 stories. Brick.
E. Meyer
3 stories.
Brick.
True line of Cary St.
8th Street.
Scale 40 feet to inch
East line of 8th Street
Cary Street.

The ordinance under which the defendants justified is inserted in the margin; also the sections of the Virginia Acts of Assembly, 1869–70, under which the ordinance was passed, are inserted in the margin.†

[89] *The Constitution of Virginia, so far as involved in this controversy, provides in article 5, section 14, that the general assembly shall not pass "any laws whereby private property shall be taken for public use without just compensation."

Mr. **Henry R. Pollard** for plaintiff in error.

Messrs. **H. T. Wickham** and *Henry Taylor, Jr.*, for defendants in error.

[91] *Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

The jurisdiction of this court is challenged. The defendants in error claim that "the declaration shows no point is therein raised which demanded the consideration by the court of any constitutional question," and they insist further that "if it were intended to raise the question that the charter and ordinance were unconstitutional, and in consequence thereof plaintiff was deprived of his property without due process of law, the same should have been specially set up as claimed by apt language in the declaration so as to bring the question to the attention of the court when it had to pass on the demurrer." This certainly was not done, and if it was an indispensable condition to the jurisdiction of this court it has none.

But it was done subsequently, as we have stated, and, whatever the ground of the court's ruling on the demurrer and on the first motion to reverse that ruling, the second motion was unequivocally based on the invalidity of the city ordinance because of its asserted conflict with the Fourteenth Amendment of the Constitution of the United States, and the court's ruling necessarily responded to and opposed the grounds of the motion—necessarily denied the right specially set up by him under the Constitution.

Plaintiff's motion and the special grounds of it and exceptions to the ruling of the court were embraced in a bill of exceptions, and allowed and became part of the record on his petition to the supreme court of appeals of Virginia for a review and reversal of the judgment, and the petition besides explicitly set up and urged a right under the Constitution of the United States.

*The court of appeals rejected the petition. [92]
Its order recited ". . . that, having maturely considered, and the transcript of the record of the judgment aforesaid seen and inspected, the court, being of opinion that such judgment is plainly right, doth reject said petition."

Necessarily, therefore, the supreme court of appeals did as the court of the city of Richmond did—considered the right which plaintiffs claimed under the Constitution of

†Ordinance Permitting the Richmond & Alleghany Railroad Company to Close a Certain Portion of Eighth Street, and Requiring Them to Erect a Foot Bridge. (Approved June 28, 1886.)

Be it ordained by the city council of Richmond, First. So much of Eighth street as lies between the present southern boundary line of the property of the Richmond & Alleghany Railroad Company, being also the southern boundary line of the right of way of the James River & Kanawha Company, and a line drawn across Eighth street at right angles, sixty feet north of the face of the north wall of the canal as said wall is now built, shall be, and the same is hereby, closed from the 31st day of August, 1886, until it is required to be reopened in accordance with the provisions of this ordinance: Provided, that the said Richmond & Alleghany Railroad Company shall, on or before the said 31st day of August, begin to erect an overhead foot bridge across the tracks and canal of said railroad on that portion of Eighth street above described, and shall complete the same by the 30th day of September, 1886.

Second. The said bridge and the stairways thereto shall be twelve feet wide, and shall be so located, and shall be of such material or materials, design, security, and capacity, as may be required by the city engineer; the same shall always be kept and maintained in such condition and repair as may be from time to time required by the committee on streets of the said city council, and always be open to the free use of the public.

Third. Should the said company fail for the space of ten days to put the said bridge or stairways in such condition or repairs, after having been required so to do by said committee, then the said company shall be liable to a fine of fifty dollars, to be imposed by the police justice of Richmond, and each day's failure to be a separate offense; and the city may in all such cases repair said bridge or stairways when not done by said company as herein required, and the expense thereof shall be a debt against the said company recoverable as debts are now recoverable by the city of Richmond.

Fourth. The said company, by exercising the privileges herein granted, doth hereby agree and bind themselves to indemnify and save harmless at all times the said city from any loss or damage suffered by reason of anyone being injured in any manner in using said bridge or stairways, or by reason of the building or existence of the same, and shall pay to the city any amount or amounts recovered against said city by any judgment or judgments given on account of any such injuries.

Fifth. The above-described portion of Eighth street shall remain closed until the said Richmond & Alleghany Railroad Company shall have been ordered by the ordinances of two successively elected councils to remove the said overhead bridge and restore the street to its present condition, and to the same authority and control of the city as existed prior to the passage of this ordinance. Whenever it is so ordered to be reopened, the said company shall be allowed three months from the date of the passage of the last of the said two ordinances in which to remove said bridge and stairways, and to restore said Eighth street to the same condition in which it was before the passage of this ordinance. And should the said company fail to remove said bridge and stairways and to restore said Eighth street to its former condition, before the expiration of the said three months, then the said company shall be liable to a fine of one hundred dollars, and each day's default shall be a separate offense; and the said city may remove said bridge and stairways and restore said Eighth street as above mentioned, when not done by said company as above required, and

the United States, and denied the right. *Chicago, Burlington & Q. Railroad Co.* v. *Chicago*, 166 U. S. 228 [41: 982].

So far the conditions of the power of review by this court existed. A right under the Constitution of the United States was specially set up and the right was denied. Was it set up in time? It has been repeatedly decided by this court that to suggest or set up a Federal question for the first time in a petition for a rehearing in the highest court of a state is not in time. *Texas & Pacific Railway Co.* v. *Southern Pacific Railroad Co.* 137 U. S. 48, 54 [34: 614, 617]; *Butler* v. *Gage*, 138 U. S. 52 [34: 869]; *Winona & St. Peter Railroad Co.* v. *Plainview*, 143 U. S. 371 [36: 191]; *Leeper* v. *Texas*, 139 U. S. 462 [35: 225]; *Loeber* v. *Schroeder*, 149 U. S. 580 [37: 856].

In all of these cases the Federal question was not presented in any way to the lower court nor to the higher court until after judgment. It is not, therefore, decided that a presentation to the lower court at some stage of the proceedings and in accordance with its procedure, and a presentation to the higher court before judgment, would not be sufficient.

In *Loeber* v. *Schroeder* the court of appeals of Maryland, having before it for review a judgment of one of the lower state courts, reversed such judgment, and, having denied a rehearing on April 28, 1892, issued its order for a fieri facias against Loeber for the amount of the judgment decreed returnable to the lower court. On April 29, 1892, Loeber entered a motion before that court to quash the writ because the decree on which the writ was issued and the writ were void, because said writ would deprive him of his property without due process of law, and because it was issued in violation of the Constitution of the United States and amendments thereto. The motion was denied and Loeber prosecuted an *appeal which affirmed [93]
the order of the lower court, holding that the state law upon which it had made its decision was not in conflict with the Constitution of the United States. From this judgment of the court of appeals, Loeber prosecuted a writ of error to this court assigning the unconstitutionality of the state law sustained by the court of appeals.

Mr. Justice Jackson, who delivered the opinion of the court, said: "The motion to quash the fi. fa. in this case on the grounds that the order of the court of appeals, which directed it to be issued, was void for the reasons assigned, stood on no better footing than a petition for rehearing would have done and suggested Federal questions for the first time, which, if they existed at all, should have been set up and interposed when the decree of the court of appeals was rendered on January 28, 1892." In other words, should have been urged when the case was pending and before its decision. It is an inference from the opinion that, if this had been done, the Federal question would have been claimed in time.

In *Chicago, Burlington & Q. R. Co.* v. *Chicago*, 166 U. S. 226 [41: 979], the right

---

the expense thereof shall be a debt against the said company recoverable as debts are now recoverable by the city of Richmond.

Sixth. The said company doth, by exercising the privileges herein granted, agree and bind itself and its assigns to make no claim to the land now occupied by that portion of Eighth street to be closed, on account of said closing or the privileges herein granted, and doth fully recognize and admit the right of the said city to reopen the said Eighth street at any time, according to the provisions of this ordinance.

Seventh. Nothing in this ordinance shall conflict in any way with the ordinance approved May 12, 1886, granting permission to the Richmond & Chesapeake Railroad Company to construct a tunnel under Eighth street; and should the bridge constructed under this ordinance obstruct in any manner the said tunnel or tracks leading thereto, it shall be changed by the said Richmond & Alleghany Railroad Company within sixty days after receipt of notice from the committee on streets of the said city council requiring such change to be made.

A copy. Teste:

Ben. T. August, City Clerk.

Virginia Acts of Assembly, 1869–'70, pp. 120–146.

Sec. 19. The city council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city and of all property, real and personal, belonging to the said city; and may make such ordinances, orders, and by-laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders, and regulations as they may deem desirable to carry out the following powers which are hereby vested in them:

. . . .

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in and culverts under said streets, and may prevent or remove any structure, obstruction, or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its work the streets of the city without the consent of the council. In the meantime no order shall be made and no injunction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents, or servants are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

. . . .

Sec. 22. The council shall not take or use any private property for streets or other public purpose without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the circuit or county court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law.

under the Constitution of the United States was claimed by plaintiff in error after verdict and in a motion to set aside the verdict and to grant a new trial. It is true that, in that case being a proceeding to condemn land under the eminent domain act of the state of Illinois, no provision was made for an answer, but this accounts for some, but not all, of the language of the decision. Mr. Justice Harlan, speaking for the court, said: "It is not, therefore, important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that said right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court." But he said further: "But this is not all. In the assignment of errors filed by the defendant in the supreme court of Illinois these claims of rights under the Constitution of the United States were distinctly asserted."

The similarity of that case to the case at bar is apparent. In both, the constitutional
[94] right was claimed in such manner *as to bring it to the attention of the lower court, and its decision was necessarily adverse to such right. In both it was reasserted in the assignment of errors to the higher court, and there again in both the effect of the judgment was to declare the right not infringed by the proceedings in the case. This court, therefore, has jurisdiction, and we proceed to the consideration of the merits.

The plaintiff's constitutional claim is under that provision of the Fourteenth Amendment, which prohibits a state from depriving any person of property without due process of law, and he avails himself of it by the contention (which we give in his own language):

"That under the Constitution and laws of the state of Virginia, the free and uninterrupted use of highways, once dedicated to and accepted by the public, or acquired by the right of eminent domain, are for continuous public use, and that, when relying upon that fact, important public and private property rights have been acquired, the highway cannot be permanently diverted to a private use without proper compensation being made to those injured, and as a consequence, any person or persons so diverting such highway are trespassers and liable in damages to the parties injured."

The proposition is very general. To make it available to plaintiff in error it must be held to cover and protect an owner whose property abuts on one part of a street from damage from obstruction placed in another part of the street and not opposite his property—not only a physical taking of his property, but damages to it—not only direct damages, but consequential damages. All of these aspects of the proposition seem to be rejected by the decision of the supreme court of appeals of Virginia on the plaintiff's petition for writ of error. The petition submitted for decision the power of the city of Richmond to make or authorize the obstruction complained of under its charter, and the Constitution and laws of Virginia as well as the prohibition of the Constitution of the United States. If the decision necessarily passed on and denied the latter as we hold it did, and hence entertain jurisdiction to review its judgment, it necessarily passed on
and denied the *former. If under the Consti- [95]
tution and laws of Virginia whatever detriment he suffered was *damnum absque injuria*, he cannot be said to have been deprived of any property. *Marchant* v. *Pennsylvania Railroad Co.* 153 U. S. 380 [38: 751].

The plaintiff quotes *Western Union Telegraph Co.* v. *Williams*, 86 Va. 696 [8 L. R. A. 429]; *Hodges* v. *Seaboard & R. Railroad Co.* 88 Va. 656; *Norfolk City* v. *Chamberlaine*, 29 Gratt. 534; *Bunting* v. *Danville*, 93 Va. 200. The case at bar is not within the principle of these cases. These were concerned with erections immediately in front of the abutting owner's property, and it was held that he owned to the middle of the highway, subject only to the easement of the latter; that it was for the easement only for which he was compensated, and that any other use was an additional servitude and its authorization illegal unless paid for.

In *Home Building & C. Co.* v. *Roanoke*, 91 Va. 52 [27 L. R. A. 551], the city of Roanoke authorized the erection of a bridge across a street in the city and itself constructed the approaches to it. These approaches were sixteen feet high and thirty-five wide, but did not extend to either side of the street, but left on each side about seven and one-half feet unoccupied on Randolph street, on which the complainant's lot was situated, available for its use and that of the public. It was held that the city was not liable.

The substantial thing is not that one may be damaged by an obstruction in a street,—not that one may be specially damaged beyond others,—but is such damage a deprivation of property within the meaning of the constitutional provision? According to the Virginia cases an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which makes consequential damages to property a taking within the meaning of the Constitution of that state. Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide. *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635 [25: 336]; *Chicago* v. *Taylor*, 125 U. S. 161 [31: 638];
Marchant v. *Pennsylvania *Railroad Co.* 153 [96]
U. S. 380 [38: 751]; *Gibson* v. *United States*, 166 U. S. 269 [41: 996].

In *Northern Transportation Company* v. *Chicago* it was decided "that acts done in the proper exercise of governmental power and not directly encroaching on private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." Removing any apparent antagonism of this proposition to *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166 [20: 557], and *Eaton* v. *Boston, Concord & Montreal Railroad Co.* 51 N. H. 504 [12 Am. Rep. 147],

it was further said that in those cases "the extremest qualification of the doctrine is to be found, perhaps," and they were discriminated by the fact that in them there was a permanent flooding of private property, hence a "taking"—"a physical invasion of the real estate of the owners and a practical ouster of his possession."

In *Chicago* v. *Taylor*, Taylor sued to recover damages sustained by reason of the construction by the city of a viaduct in the immediate vicinity of his lot. The construction of the viaduct was directed by special ordinances of the city council. The facts were:

"For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was also evidence
[97] tending to show that one of the *results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago river was, that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

"On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the city."

There was a verdict and judgment against the city, and this was sustained. The tenor of the decision is, that the damages were consequential, and the difference of the ruling from that in *Northern Transportation Co.* v. *Chicago* was explained and based upon a change in the Constitution of the state of Illinois, which enlarged the prohibition to the damaging as well as to the taking of private property for public use, and its interpretation by the supreme court of the state "that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the improvement is the cause of the damage, though consequential, the party may recover."

In *Marchant* v. *Pennsylvania Railroad Co.* the plaintiff owned a lot on the north side of Filbert street, Philadelphia; the railroad erected an elevated railroad on the south side of the street and opposite plaintiff's property. It was held by the supreme court of Pennsylvania, reversing the trial court, that for the damages hence resulting the plaintiff could not recover. The case was brought to this court by writ of error, the plaintiff urging that her property had been taken without due process of law. The judgment was affirmed. The court, by Justice Shiras, said:

"In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the supreme court of Pennsylvania was called upon to construe the laws and Constitution of that
state. The plaintiff pointed *to the tenth [98]
section of article 1 of the Constitution, which provided that 'private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;' and to the eighth section of article 16, which contains the following terms: 'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction.'

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the supreme court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and Constitution of the state, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and Constitution of that state, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

In *Gibson* v. *United States* a dike was constructed in the Ohio river under the authority of certain acts of Congress for the improvement of rivers and harbors. The construction of said dike by the United States
substantially destroyed the *landing of Mrs. [99]

Gibson by preventing ingress and egress to and from the landing on and in front of her farm to the main or navigable channel of the river,—Held, *damnum absque injuria*. The court by the Chief Justice said: "The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power."

Judgment is affirmed.

[99] *Mr. Chief Justice **Fuller,** with whom Mr. Justice **Gray** concurred, dissenting on the question of jurisdiction:

I am of opinion that this writ of error should be dismissed. The contention of plaintiff in error is that the validity of the act of the General Assembly of Virginia of May 24, 1870, was drawn in question in the state courts on the ground of repugnancy to the Constitution of the United States, and that the decision of the court of appeals was in favor of its validity.

The validity of a statute is drawn in question when the power to enact it is denied, and a definite issue in that regard must be distinctly deducible from the record in order for this court to hold that the state courts have adjudicated as to the validity of the enactment under the Constitution.

This case had gone to judgment, and a motion to set aside the judgment had been made and denied, before it was suggested that the act was inconsistent with the Federal Constitution. And that question was then attempted to be raised by a second motion to vacate. But the disposal of motions of this class is within the discretion of the trial court, and only revisable by the appellate tribunal, if at all, when there is a palpable abuse of discretion.

Whether the trial court, in this instance, overruled the second motion because a second motion of that sort, without special cause shown, could not be entertained, or be-
[100] cause *of unreasonable delay, it is impossible to say, and to impute to that court the decision of a Federal question when it obviously may have considered that the point was presented too late, seems to me wholly inadmissible. And although in his petition to the court of appeals, plaintiff in error recited the action he had taken, and urged that the trial court had erred in sustaining the demurrer to his declaration, and in refusing to set aside the judgment so that the constitutional question suggested might be passed on, that court, in the exercise of appellate jurisdiction only, may well have concluded that the discretion of the court below could not be interfered with.

It does not follow from the bare fact that this second motion presented in terms a single point that that point was disposed of in denying the motion, when other grounds for such denial plainly existed.

It is thoroughly settled that if the record of the state courts discloses that a Federal question has been raised and decided, and another question, not Federal, broad enough to sustain the judgment, has also been raised and decided, this court will not review the judgment; that this is so even when it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one; and also where the record shows the existence of non-Federal grounds of decision though silent as to what particular ground was pressed and proceeded on. In other words, the rule is that the record must so present a Federal question that even if the reasons for decision are not given this court can properly conclude that it was disposed of by the state courts. If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, such decision must appear on the face of the record before the judgment can be re-examined in this court.

In *Klinger* v. *Missouri*, 13 Wall. 257 [20: 635], a juror had declined to take the test oath prescribed by the sixth section of the second article of the Constitution of Missouri of 1865, and was discharged from the panel. It was insisted here that he was thus excluded for no other reason than that he refused *to take the oath, and, if this had [101]
been so, the question of the repugnancy of the section to the Constitution of the United States would have arisen. But as this court was of opinion that, inasmuch as the grounds the juror assigned for his refusal manifested a settled hostility to the government, he might "well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws:" it was held that "it certainly would have been in the discretion of the court, if not its duty, to discharge him." And Mr. Justice Bradley, delivering the opinion of the court, said: "In this case it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear *but that* he was discharged for that ground. It cannot, therefore, with certainty, be said that the supreme court of Missouri did decide in favor of the validity of the said clause of the state Constitution, which requires a juror to take the test oath." There was nothing in the record to show on what ground the trial court excluded the juror, or that the point urged in this court was taken in the supreme court of the state, and yet because the trial court might have discharged the juror as matter of discretion, or because of unfitness in the particular suggested, this court decided that its jurisdiction could not be maintained, and the writ of error was dismissed. And see *Johnson* v. *Risk,* 137 U. S. 300 [34: 683]; *Dibble* v. *Bellingham Bay Land Company,* 163 U. S. 63 [41: 72].

We have held that the question whether a party has by laches and acquiescence waived the right to insist that a state statute impaired the obligation of a contract is not a

Federal question. *Pierce* v. *Somerset Railway Company*, 171 U. S. 641 [*ante*, 316].

And, certainly, in view of the careful language of § 709 of the Revised Statutes, we ought not to take jurisdiction to revise a judgment of a state court, where a party seeks to import a Federal question into the record, after judgment, by an application so palpably open to decision on non-Federal grounds.

I am authorized to state that Mr. Justice **Gray** concurs in this dissent.

---

[102] A. A. McCULLOUGH, *Plff. in Err.*,
v.
COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 102–133.)

Virginia law that coupons of bonds shall be received for taxes, etc., is valid—decision of state court, when not binding on Federal court—special taxes—Federal question—limits of review of state judgments—costs—vested right not taken away by repeal of statute.

1. The coupon provision of Va. act March 30, 1871, providing that the coupons of refunding bonds shall be receivable for all taxes, debts, dues, and demands due the state, which shall be so expressed on their face, is valid.
2. The decision of a state court against the validity of a state statute which constitutes a contract alleged to be impaired by subsequent statutes is not binding on the Federal courts.
3. A state statute authorizing state coupons to be received for all taxes is not wholly void because certain special taxes and dues are, by the existing state Constitution, required to be paid in cash.
4. The decision of a state court denying the validity of a state statute which creates a contract, and giving effect to subsequent statutes which impair the obligation of the contract, presents a Federal question which this court may review, although the state court in its opinion considers only the statute which it holds void, and does not discuss the later statutes.
5. In reviewing the judgment of the courts of a state, this court is not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.
6. Judgment for costs cannot be rendered against the plaintiff in an action which has abated.
7. A rightful judgment against the state gives a vested right which cannot be taken away pending writ of error, by a repeal of the statute which authorized the state to be sued.

[No. 3.]

Submitted November 2, 1896. Ordered for oral argument December 14, 1896. Argued February 21, 23, 1898. Decided December 5, 1898.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment of said court in favor of the Commonwealth of Virginia, and reversing the judgment of the Circuit Court of the City of Norfolk in said State, and dismissing the petition of A. A. McCullough to establish the genuineness of certain coupons tendered in payment of taxes. *Reversed*, and case remanded for further proceedings.

See same case below, 90 Va. 597.

Statement by Mr. Justice **Brewer:**

*On March 30, 1871, the general assembly [103] of the state of Virginia passed an act for the refunding of the public debt. (Va. Acts Assembly, 1870–71, p. 378. See also act of March 28, 1879; Va. Acts Assembly, 1878–79, p. 264.) This act, which authorized the issue of new coupon bonds for two thirds of the old bonds, leaving the other third as the basis of an equitable claim upon the state of West Virginia, contained this provision: "The coupons shall be payable semiannually, and be receivable at and after maturity for all taxes, debts, dues, and demands due the state, which shall be so expressed on their face." Under this act a large amount of the outstanding debt of the state was refunded. This provision gave value to the bonds as affording an easy method of securing payment of the interest. This refunding scheme, however, did not prove satisfactory to the people of the state, and since then there has been repeated legislation tending to destroy or impair the right granted by this provision. Among other statutes may be noticed the following: The act of March 7, 1872 (Acts of Assembly, 1871–72, p. 141), providing that it should not be "lawful for the officers charged with the collection of taxes or other demands of the state, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." That of March 25, 1873 (Acts of Assembly, 1872–73, p. 207), imposing a tax of fifty cents on the hundred dollars market value of bonds, and directing that such amount be deducted from coupons tendered in payment of taxes or dues.

At the time the act of 1871 was passed and the new bonds and coupons were issued, the court of appeals of the state had jurisdiction to grant a mandamus in any action where the writ would lie according to the principles of the common law, and *in *Antoni* v. *Wright*, [104] 22 Gratt. 883, it was held by that court that mandamus was the proper remedy to compel the collector to accept coupons offered in payment of taxes. On January 14, 1882, the assembly passed an act (Acts 1881–82, p. 10), which, in effect, provided that a taxpayer seeking to use coupons in payment of his taxes should pay the taxes in money at the time of tendering the coupons, and thereafter bring a suit to establish the genuineness of the coupons, which, if decided in his favor, enabled him to obtain from the treasurer a return of the money paid. The various features of this act are specifically pointed out in *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468]. At the same session, and on January

26, 1882 (Acts 1881-82, p. 37), the assembly passed a further act declaring that the tax collectors should receive in payment of taxes and other dues "gold, silver, United States Treasury notes, national bank currency, and nothing else," with a provision for suit by one claiming that such exaction was illegal. The act contained this proviso: "There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers, under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition, or any other writ or process whatever; but in all cases if for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner."

At the same session, on February 14, 1882, a new funding bill was passed containing a proposition to the bondholders (Acts 1881-82, p. 88); and again at the same session, on April 7, 1882, an act was passed amending the Code of Virginia in respect to mandamus, which provided "that no writ of mandamus, prohibition, or any other summary process whatever, shall issue in any
[105] case of the collection, *or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, acts of assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just." (Acts 1881-82, p. 342.)

On March 15, 1884, the general assembly passed a general act in reference to the assessment of taxes on persons, property, and incomes (Acts 1883-84, p. 561), the one hundred and thirteenth section (p. 603) of which required that all school taxes should be paid "only in lawful money of the United States."

On January 26, 1886 (Acts 1885-86, p. 37), an act was passed providing that in a suit in respect to coupons tendered in payment of taxes, no expert testimony should be receivable, and that the bonds from which the coupons were cut should be produced, if demanded, as a condition precedent to the right of recovery.

Section 399 of "the Code of Virginia," which was a revision and re-enactment of the general statutes of the state, adopted May 16, 1887, reads: "It shall not be lawful for any officer charged with the collection of taxes, debts, or other demands of the state to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or national bank notes."

On May 29, 1892, the plaintiff in error filed his petition in the circuit court of the city of Norfolk to establish the genuineness of certain coupons tendered in payment of taxes. The proceeding was had under the act of 1882, and no question is made of a full compliance with the terms of that statute. Judgment was rendered in his favor by the circuit court of the city of Norfolk, which judgment was, on March 23, 1894, reversed by the supreme court of appeals of the state, 90 Va. 597, and a judgment entered in favor of the commonwealth, dismissing the petition of the plaintiff and awarding *to the commonwealth costs. On [106]
June 13, 1894, a writ of error was allowed, and the case brought to this court.

Mr. **Richard L. Maury** for plaintiff in error on submission of case.

Mr. **R. Taylor Scott,** Attorney General of Virginia, for defendant in error on submission of case.

Messrs. **Richard L. Maury, William A. Maury,** and *M. F. Maury* for plaintiff in error on oral argument.

Messrs. **A. J. Montague, Henry R. Pollard,** and *R. Taylor Scott*, Attorney General of Virginia, for defendant in error on oral argument.

*Mr. Justice **Brewer** delivered the opin- [106]
ion of the court:

Perhaps no litigation has been more severely contested, or has presented more intricate and troublesome questions, than that which has arisen under the coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and Federal courts, not a few of which finally came to this court. *Hartman* v. *Greenhow*, 102 U. S. 672 [26: 271]; *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468]; *Virginia Coupon Cases*, 114 U. S. 269 [29: 185]; *Poindexter* v. *Greenhow*, 114 U. S. 270 [29: 185]; *Carter* v. *Greenhow*, 114 U. S. 322 [29: 204]; *Moore* v. *Greenhow*, 114 U. S. 340 [29: 240]; *Marye* v. *Parsons*, 114 U. S. 325 [29: 205]; *Barry* v. *Edmunds*, 116 U. S. 550 [29: 729]; *Chaffin* v. *Taylor*, 116 U. S. 571 [29: 728[; *Royall* v. *Virginia*, 116 U. S. 572 [29: 735]; *Royall* v. *Virginia*, 121 U. S. 102 [30: 883]; *Sands* v. *Edmunds*, 116 U. S. 585 [29: 739]; *Stewart* v. *Virginia*, 117 U. S. 612 [29: 1006]; *Re Ayers*, 123 U. S. 443 [31: 216]; *McGahey* v. *Virginia*, 135 U. S. 662 [34: 304].

For the first time in the history of this litigation has any appellate court, either state or Federal, distinctly ruled that the coupon provision of the act of 1871 was void. After the passage of the act of March 7, 1872, which in terms required all taxes to be paid in cash, the case of *Antoni* v. *Wright* came before the court of appeals of Virginia (22 Gratt. 833), and on December 13, 1872, was decided. Elaborate opinions were filed, and the court held the act of 1871 valid and the act of 1872 void, as violating the contract embraced in the coupon provision of the act of 1871. This decision was re-
affirmed in **Wise Bros.* v. *Rogers*, 24 Gratt. [107]
169, decided December 17, 1873; *Clarke* v.

Tyler, 30 Gratt. 135, decided April 4, 1878, and again in *Williamson* v. *Massey*, 33 Gratt. 237, decided April 29, 1880. In *Greenhow* v. *Vashon*, 81 Va. 336, decided January 14, 1886, the act requiring school taxes to be paid in cash was sustained, and such taxes excepted from the coupon contract on the ground of a specific command in the state Constitution in force at the time of the passage of the funding act. There was no direct decision that the coupon provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court.

In this court the decisions have been uniform and positive in favor of the validity of the act of 1871. There has been no dissonance in the declarations, from the first case, *Hartman* v. *Greenhow*, 102 U. S. 672, 679 [26: 271, 275], decided at the October term, 1880, in which, referring to this act, the court said, by Mr. Justice Field: "A contract was thus consummated between the state and the holders of the new bonds, and the holders of the coupons, from the obligations of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the state. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two thirds of their amount,"—to *McGahey* v. *Virginia*, 135 U. S. 662, 668 [34: 304, 306], decided at the October term, 1889, in which Mr. Justice Bradley, delivering the unanimous opinion of the court, observed: "We have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract betweeen the state and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the state, to use them in payment of state taxes and public
[108]dues. *This was determined in *Hartman* v. *Greenhow*, 102 U. S. 672 [26: 271], decided in January, 1881; in *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468], decided in March, 1883; in the *Virginia Coupon Cases*, 114 U. S. 269 [29: 185], decided in April, 1885, and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues, and demands due from him to the state."

Since the decision of the court of appeals of Virginia, in *Antoni* v. *Wright*, 22 Gratt. 833, that the act of 1872, providing for the payment of taxes in cash only was unconstitutional, the general assembly of Virginia has from time to time passed acts tending to embarrass the coupon holder in the exercise of the right granted by the funding act. Some of these acts appear in the statement preceding this opinion, but for a more full review of the legislation and the course of decision reference may be had to the opinion of Mr. Justice Bradley in the several cases reported under the title of *McGahey* v. *Virginia, supra.*

We are advised by the opinion of the court of appeals of Virginia, in 22 Gratt. 833, that the debt—two thirds of which was proposed to be refunded and most of which was, in fact, refunded—amounted to $40,000,000 of principal. These refunding bonds, amounting to many millions of dollars, have passed into the markets of the world, and have so passed accredited, not merely by the action of the general assembly of the state of Virginia, but by the repeated decisions of her highest court, as well as of this court, for substantially a quarter of a century, to the effect that such coupon provision was constitutional and binding. Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guaranty of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing. Such a result *is so startling [109]
that it at least compels more than ordinary consideration.

We pass, therefore, to a consideration of the specific questions presented in this record. First. It is insisted that the decision of the court of appeals was right, and that the coupon provision was void. It were a waste of time to repeat all the arguments which have been heretofore presented, and we content ourselves with reiterating that which was said by Mr. Justice Bradley speaking for the entire court, in *McGahey* v. *Virginia*, 135 U. S. 662, 668 [34: 304, 306]: "This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues, and demands due from him to the state."

Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the court of appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443 [17: 173, 177], in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: "It has never

been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not
[110]the *phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion." The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 145 [17: 571, 576]; *Wright* v. *Nagle*, 101 U. S. 791, 793 [25: 921, 922]; *McGahey* v. *Virginia*, 135 U. S. 665, 667 [34: 305, 306]; in which, in reference to this very contract, it was said: "In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto." See also *Douglas* v. *Kentucky*, 168 U. S. 488, 501 [42: 553, 557], and cases cited therein.

Thirdly. It is urged that our last decision, that in *McGahey* v. *Virginia, supra*, logically leads to the conclusion that the whole coupon contract was void, and that the court of appeals of Virginia rightly interpreted the scope of that decision when it so held. The argument of that court is that because the Constitution of Virginia compels the payment of certain taxes in cash, and that therefore the coupon contract cannot be enforced as against those taxes, the whole contract must fail, the partial failure being a vice which enters into and destroys the entire contract. But the court overlooks that which was in fact decided in the eight cases reported under the title of *McGahey* v. *Virginia*, for while in two of those cases it was held that the coupon contract could not
[111]be enforced against *certain specific taxes and dues, it was in others as distinctly held that it could be enforced in respect to general taxes.

It may be well to here quote the language with which Mr. Justice Bradley concludes his general review of the prior litigation, and which in its last paragraph shows that this very matter was considered and determined, pages 684, 685 [34: 312.]:

"Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established:

"First, that the provisions of the act of 1871 constitute a contract between the state of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

"Second, that the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the state, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

"Third, that no proceedings can be instituted by any holder of said bonds or coupons against the commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the state;

"Fourth, that any lawful holder of the tax-receivable coupons of the state issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues, and demands due from him to the state, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues, or demands, and may vindicate such right in all lawful modes of redress—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to *prevent such tak-[112]
ing where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the *Coupon Cases* and disregarding many of the rulings in other cases, which we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

"There may be exceptional cases of taxes, debts, dues, and demands due to the state which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the acts of 1871 and 1879. When such cases occur

they will have to be disposed of according to their own circumstances and conditions."

Neither is the argument a sound one. It ignores the difference between the statute and the contract, and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the state Constitution could not be affected by
[113]legislative *action, the statute is to be read as though it in terms excluded them from its operation.

Indeed, the court of appeals does not follow what it calls the logic of the decision in *McGahey* v. *Virginia* to its necessary result. The scope of its argument is that if a part of the consideration be illegal, the whole contract fails. But the promise on the part of the state, written into these coupons and authorized by the act of 1871, was a promise to pay so much money and to receive such promise in satisfaction of taxes. In reference to this, the court of appeals, in its opinion in this case, uses this language:

"We do not assail that act as unconstitutional as an entirety. We simply hold that the coupon feature of the act, the coupon contract, which is readily separable from the rest of the act, is repugnant to sections 7 and 8 of the Constitution of Virginia, and is therefore an illegal contract. The validity of the bonds issued under and by authority of said acts of March 30, 1871, and March 28, 1879, is not denied; nor is it denied that the bondholders are entitled to the interest on the bonds, to be collected in the ordinary way; but we do deny that it can be collected through the medium of the illegal coupon, which has been most aptly designated the 'cut worm of the treasury.'" 90 Va. 597-606.

Further, the authorities to which it refers make against the conclusion which it reaches. Thus, at the end of its argument, it quotes as a principal authority the following:

"The concurrent doctrine of the text-books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts part of which are unlawful, *because the [114]
whole consideration is the basis of the whole promise. The parts are inseparable. *Widoe* v. *Webb*, 20 Ohio St. 431 [5 Am. Rep. 664], citing Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, section 190; Byles on Bills, 111; Chitty on Bills, 94.

"And in the same case it is said: 'Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound;' citing Story on Prom. Notes, and Byles on Bills, *supra*, and then adds: 'And, in general, it makes no difference as to the effect whether the illegality be at common law or by statute.'"

This decision declares that when the consideration is illegal, the promise fails; and to like effect are the other authorities cited. But in the case at bar there is no illegality in the consideration. That was furnished by the bondholder in the old bond, and that bond was the sole consideration. It is nowhere suggested that there was any vice or illegality in it; that it was not a valid obligation of the state. When the bondholder surrendered that he furnished the entire consideration for the contract, and for that he received from the state a promise. And as the supreme court of Ohio said in the case above cited: "When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue." The court of appeals concedes that the promise made by the state to pay the interest is valid, because made upon a good and lawful consideration. Does it not logically follow that the promise of the state is also good as to all other matters contained within it in respect *to which it might lawfully make a [115]
promise? It promised to receive the coupons "for all taxes, debts, dues, and demands due the state." That promise was necessarily for each tax and debt, as well as for all taxes and debts. If it should so happen that any single tax or debt cannot, under the Constitution of the state, be lawfully discharged

by the receipt of the coupon, there is no difficulty in separating that part of the contract from the balance. And as said by the supreme court of Ohio: "Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established."

To like effect are the decisions of this court. In *United States* v. *Bradley*, 10 Pet. 343 [9: 448], suit was brought on a paymaster's bond, and it was claimed that as some of the stipulations were in excess of those required by the statute, and illegally inserted, the whole bond was void. But the court overruled the contention, saying (p. 360 [456]):

"That bonds and other deeds may, in many cases, be good in part and void for the residue, where the residue is founded in illegality but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in *Pigot's Case*, 11 Coke, 27*b*, it was said that it was unanimously agreed in 14 Hen. VIII., 25, 26, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio* and the others stand good."

So in *Gelpcke* v. *City of Dubuque*, 1 Wall. 221 [17: 531], this court said, in reference to a similar contention in a suit on a contract made by the officials of the city of Dubuque (p. 222 [17: 520]):

"We have not, therefore, considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se*, is that the bad parts do not affect the good. The valid may be enforced."

[116] *We see no reason to change the views heretofore and often expressd by this court, and reiterate, as said in 135 U. S. 668 [34: 306], "this question, therefore, must be considered as foreclosed and no longer open for consideration."

Fourthly. It is urged that this court has no jurisdiction of this case for the reason that the court of appeals in its opinion does not consider the subsequent legislation passed by the state with the view of impairing the contract created by the act of 1871, but limits itself to a consideration of that act, and adjudges it void. In support of this proposition the rule laid down in *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 38 [31: 607,615], reaffirmed in *Huntington* v. *Attrill*, 146 U. S. 657, 684 [36: 1123,1134], and *Bacon* v. *Texas*, 163 U. S. 207, 216 [41: 132, 136], is cited.

In this last case the doctrine is summed up in the following statement:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 [30: 1059]; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.* 125 U. S. 18 [31: 607]; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109 [40: 91, 94]. . . . If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court, upon any ground of the impairment of a contract. The above cited cases announce this principle."

It is true the court of appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly *held by this court that in re- [117]
viewing the judgment of the courts of a state we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a state legislature should pass an act exempting the property of a particular corporation from all taxation, and that a subsequent legislature should pass an act subjecting that corporation to the taxes imposed by the city in which its property was located. and that, on the first presentation to the highest court of the state of the question of the validity of taxes levied under and by virtue of this last act, that court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the state court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdic-

tion of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would [118]seem to set at naught the purpose of the *Federal Constitution to prevent a state from nullifying by its legislation a contract which it has made, or authorized to be made. In *Hickie* v. *Starke*, 1 Pet. 94-98 [7: 67-69], Chief Justice Marshall, delivering the opinion of the court, said:

"In the construction of that section (the twenty-fifth) the court has never required that the treaty or act of Congress under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty or act."

And in *Wilson* v. *The Blackbird Creek Marsh Company,* 2 Pet. 245, 250 [7: 412, 414], the same Chief Justice also said:

"But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. . . . This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 [4: 97]; *Miller* v. *Nicholls*, 4 Wheat. 311 [4: 578]; and *Williams* v. *Norris*, 12 Wheat. 117 [6: 571], are expressly in point. They establish as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the judicial act, if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law."

In *Satterlee* v. *Matthewson*, 2 Pet. 380, 410 [7: 458, 468], Mr. Justice Washington observed:

". . . If it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the Constitution of the United [119]States was drawn into question, or that *that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question."

In *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 143 [17: 571, 576], an act passed by the state in 1860 was claimed to be in violation of a contract created by an act of 1790, and it was said:

"Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party, who brings the writ of error, and that the right thus claimed by him was denied. . . . It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiff's contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

There are also some cases involving alleged contract exemptions from taxation which are worthy of notice. In *Given* v. *Wright*, 117 U. S. 648, 655 [29: 1021, 1024], the plaintiff in error claimed to hold real estate exempt from taxation by virtue of a contract alleged to have been contained in a law of the New Jersey colonial legislature passed August 12, 1758. The validity of this exemption had been sustained in *New Jersey* v. *Wilson*, 7 Cranch, 164 [3: 303], notwithstanding which, for about sixty years before the assessment in question was laid, taxes had been regularly assessed upon the land and paid without objection. *The highest court [120] of New Jersey upheld the tax, on the ground that the long acquiescence of the landowners raised a presumption that the exemption which had once existed had been surrendered. The jurisdiction of this court to review such judgment was sustained, the court saying:

"Where it is charged that the obligation of a contract has been impaired by a state law, as in this case by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

In *Yazoo & M. Valley Railroad Co.* v. *Thomas*, 132 U. S. 174, 184 [33: 302, 306], the plaintiff in error was given by its charter, which became a law on February 17, 1882, a certain exemption from taxation. In 1888 the legislature passed an act for the collection of taxes for past years, which by its terms was not applicable to railroad companies exempt by law or charter from taxation. The supreme court of the state held that the plaintiff was not entitled to the benefit of the exemption named in the acts of 1888. The jurisdiction of this court to review that judgment was challenged. But the court, by the Chief Justice, said:

"Although by the terms of the act of 1888

the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the supreme court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the supreme court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

[121] *In *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S. 279, 293 [36: 972, 978], the state court, conceding the validity of a contract of exemption from taxation, held that certain property was not within its terms, and on this ground a motion to dismiss the writ of error was made by the defendant. In respect to that the Chief Justice said:

"The jurisdiction of this court is questioned, upon the ground that the decision of the supreme court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.

"In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

In *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 486, 492, 493 [38: 793, 796], Mr. Justice Jackson, reviewing prior decisions, said:

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or nonexistence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In the case before us, after the act of 1871 and in 1872, the general assembly passed an act requiring that all taxes should be paid in "gold or silver coin, United States Treasury notes, or notes of the national banks of
[122] the United States;" and *again, in 1882, a further statute commanding tax collectors to receive in payment of taxes "gold, silver, United States Treasury notes, national bank currency, and nothing else." This command was re-enacted in the Code of 1887. Under these statutes the state demanded payment of its taxes in money and repudiated its promise to receive coupons in lieu thereof. True, in its opinion, the court of appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the state. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a state has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision.

It must also be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the state it takes no notice of the subsequent acts, but inquires simply as to the validity of the alleged contract. Here it appears that the state courts had repeatedly held the act claimed to create a contract valid, and had passed upon the validity of subsequent acts designed and calculated to destroy and impair the rights given by such contract, sustaining some and annulling others. Some of those judgments had beeen brought to this court, and by it the validity of the original act had been uniformly and repeatedly sustained, and the invalidity of subsequent and conflicting acts adjudged, and now, at the end of many years of litigation, with these subsequent statutes still standing on the statute books unrepealed by any legislative action, the state court, with only a casual reference to those later statutes, goes back to the original act, and, reversing its prior rulings, adjudges it void, thus in effect putting at naught the repeated *decisions of this court as well as its [123]
own. Under such circumstances it seems to us that it would be a clear evasion of the duty cast upon us by the Constitution of the United States to treat all this past litigation and prior decisions as mere nullities and to consider the question as a matter *de novo*. It would be shutting our eyes to palpable facts to say that the court of appeals of Virginia has not by this decision given effect to these subsequent statutes.

Finally, it is urged that since the judgment in the trial court and prior to the decision in the court of appeals the general assembly of the state of Virginia passed an act (Acts Gen. Assembly, 1893-94, p. 381) in terms repealing the statute authorizing this particular form of suit; that no state can be sued without its own consent; that such consent has thus been withdrawn, and therefore the whole proceeding abates and this suit must be dismissed. It is true that such an

act was passed, and that in *Maury* v. *Commonwealth*, 92 Va. 310, its validity was sustained by the court of appeals, but the judgment in this case did not go upon the effect of that repealing statute. It was not noticed in the opinion, and the decision was not that the suit abate by reason of the repeal of the statute authorizing it, but that the judgment of the trial court be reversed, and a new judgment be entered against the petitioner for costs. If the action had abated it was error to render judgment against him for costs.

But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the circuit court of the city of Norfolk the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the court of appeals of the state brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation
[124] may act on *subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. So, properly, the court of appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at that time, but whether such a repeal devested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute.

Even if the repeal had preceded the judgment in the trial court, or if in a proceeding like this, equitable in its nature, the mere taking of the case to the court of appeals operated to vacate the decree, there would still remain a serious question. When the act of 1871 was passed the coupon holder had a remedy by writ of mandamus to compel the acceptance of his coupons in payment of taxes. The form and mode of proceeding were prescribed by statute. (Code Va. 1873, p. 1023.) On January 14, 1882, the general assembly passed the act providing a new remedy for the coupon holder. This act came before this court in *Antoni* v. *Greenhow*, 107 U. S. 769, 774 [27: 468,471], and was sustained, the court holding that while it is true that, "as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge, and enforcement' (*Walker* v. *Whitehead*, 16 Wall. 314, 317 [21: 357, 358]), but it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." Upon this ground it was held that the new remedy being adequate and efficacious, the taking away of the old right of proceeding by mandamus was valid, and the coupon holder must be content with the new remedy. Now the statute *creating this [125]
new remedy was, as we have seen, repealed by the act of 1894. That act does not in terms revive the former remedy. Indeed, the right to use the writ of mandamus in tax cases was specifically taken away, after the act of January 14, 1882, by the act of January 26, 1882. It was said, however, in the argument of counsel that the former remedy was one arising under the common law, and that the settled law of Virginia is that when an act is passed repealing an act creating a statutory remedy it operates to revive the former common-law remedy. *Insurance Company of Valley of Virginia* v. *Barley's Adm'r*, 16 Gratt. 363; *Booth* v. *The Commonwealth*, 16 Gratt. 519, and *Moseley, Trustee*, v. *Brown et al.*, 76 Va. 419. If this be still the law of Virginia and applicable to the case at bar, so that the repeal of the act of 1882 revives the former remedy by mandamus, then it is undoubtedly true that new suits can no longer be maintained under the act of 1882 and a party must proceed by mandamus. But that is a question yet to be settled by the court of appeals of Virginia. It is not decided in the case of *Maury* v. *Commonwealth*, and, so far as we have been advised, has not yet been determined by that court. If it shall finally be held by that court that the remedy by mandamus does not exist, then it will become a question for further consideration whether the act repealing the act of 1882 can be sustained. But it is not necessary now to determine that question, inasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act, and the right acquired by the judgment creditor was not and could not constitutionally be taken away.

The judgment of the Court of Appeals will be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Peckham** dissenting:

I dissent from the opinion and judgment of the court in this case because I think that the ground upon which the state court has based its decision deprives this court of any jurisdiction. The case having originated in a state court, we *have no jurisdiction to re- [126]
examine its judgment unless there is some Federal question involved therein, the decision of which by the court below was unfavorable to the claim set up, and its decision was necessary to the determination of the case, or the judgment as rendered could not have been given without deciding it. *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111].

Jurisdiction is said to exist herein because of the alleged violation of the constitutional

provision denying to any state the right to pass any law impairing the obligation of a contract.

In all the litigation arising in the state courts, by reason of the subsequent legislation by Virginia upon the subject, the claim was made, on a review of the judgments in this court, that the judgments of the state courts had given effect to statutes which were passed subsequently to the original coupon statutes, and that the original contract made by those statutes had been impaired by reason of those subsequent statutes to which effect was given by the judgments of the state courts. It was the giving effect by the judgment of the court to the subsequent statutes, which it was alleged impaired the contract, that gave jurisdiction to this court to decide for itself whether there was a contract, and, if so, what the contract was, as a preliminary to the decision of the question whether the subsequent statutes impaired the contract as construed by this court. The cases in which this court decides for itself, without reference to the decision of the state court, what the contract was, are cases where there has been, not only subsequent legislation which is alleged to impair the contract, but also legislation which has been given some effect to by the judgment of the state court. Such is the case of *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443 [17:173, 177], and such are all the other cases decided in this court upon that subject.

If by the judgment of the state court in this case no effect has been given to any statute passed subsequently to either of the coupon acts, this court is without jurisdiction to review that judgment. *Lehigh Water Company* v. *Easton*, 121 U. S. 388 [30: 1059]; *New Orleans Waterworks Company* v. *Louisiana Sugar Ref. Company*, 125 U. S. 18 [31: 607]; *St. Paul, M. & M. Railway Co.* v. *Todd County*, 142 U. S. 282 [35: 1014]; *Central Land Company* v. *Laidley*, 159 U. S. 103 [40: 91]; *Bacon* v. *Texas*, 163 U. S. 207 [41: 132].

[127] *If there had never been any subsequent legislation regarding these coupon acts, and the highest court of the state had adjudged that they were void as being in violation of the Constitution of the state existing at the time of their passage, of course there would be no jurisdiction in this court to review that judgment. And the state court might have decided the case in different ways, at one time holding the acts valid and subsequently holding them void, and still this court would have no jurisdiction to re-examine the judgments of that court. This would be true even if millions of dollars had been invested in the bonds upon the strength of the judgment of the state court first given holding the acts valid.

The cases above cited show that even if there has been subsequent legislation, if the judgment of the state court does not give that legislation any effect, and decides the case without reference thereto, this court is also without jurisdiction to review that judgment.

I do not say that in order to give this court jurisdiction, the state court must in words allude to the subsequent legislation and in terms give effect to it. It may be assumed that if the real substance and necessary effect of the judgment of the state court was the determination of a Federal question or the giving effect to subsequent legislation, this court would have jurisdiction to review that judgment, notwithstanding the particular language used in the opinion. But when the case before the state court could have been decided upon two distinct grounds, one only of which embraced a Federal question, the sole way of determining upon which of those grounds the judgment was rested would be to examine the language used in the opinion of the state court. If that language showed the judgment was founded wholly upon a non-Federal question, this court would be without power to review it. Whether the state court has decided this case wholly without reference to subsequent legislation can only be learned from its opinion. To this extent it has always been within the power of the state court to determine the jurisdiction *of this court. If [128] the former court chooses to decide a case upon a non-Federal question, when it might have decided it upon one which was Federal in its nature, the effect of such choice is to deprive this court of jurisdiction, no matter how erroneous we may regard the decision of the state tribunal. The power is with the state court in such cases to deprive us of jurisdiction to review its determination, and we are wholly without any power to control its action in that respect. This is what has been done, and all that has been done in this case. The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation. That is the material question in this case upon which the jurisdiction of this court hangs. Prior decisions of this court in other cases holding the contract valid, where we had jurisdiction to determine such cases, can have no effect upon the question of our jurisdiction to review the judgment in the case at bar. Prior decisions in such event constitute no ground of jurisdiction.

I concede, plainly and fully, the power of this court to review a judgment of the state court when effect has been given by that judgment to subsequent legislation claimed to impair the validity of a contract. But that vital fact must appear in order to support the jurisdiction, and without it the jurisdiction does not exist, no matter how important the question may be or how many times it may have been heretofore decided.

To say that the duty is cast upon this court to inquire whether a state has passed a law impairing the obligations of a prior contract is but to half state the case. The inquiry must be further prosecuted to the extent of learning whether the state court has, by its judgment, given effect to such subsequent legislation, and, if it has not, then no duty or right rests upon this court to review the judgment.

However true it may be that in many prior cases this court has held there was a valid contract created by the coupon statutes, so called, which could not be impaired by any
[129]subsequent *legislation, the fact remains that unless such subsequent legislation has been given effect to by the judgment in this case, there is not the slightest shadow of a claim for jurisdiction in this court to review that judgment. Millions or hundreds of millions of dollars may have been invested in reliance upon a judgment of this court declaring the law to be that there was a valid contract, and yet a state court might in a subsequent action adjudge that there never was a valid contract, because the statute which it was claimed created it was in violation of the state Constitution. If that judgment did not, in effect, put in operation any subsequent legislation, the solemn adjudications of this court in some former cases that the contract was valid, could not affect the judgment in question nor furnish ground for the jurisdiction of this court to review that judgment. This court is not intrusted with the duty of supervising all decisions of state courts to the end that we may see to it that such decisions are never inconsistent, contradictory, or conflicting. We supervise those decisions only when a Federal question arises. It is said this court is not bound to follow the last decision of a state court reversing its prior rulings upon a question of the validity of a contract, when bonds have been issued and taken in reliance upon the decision of the state court adjudging the validity of the law under which the bonds were issued. I do not dispute the proposition, but it has nothing to do with this case. Where an action has been brought under such circumstances in a Federal court, it has been frequently held that such court was not bound to follow the latest decision of the state court which invalidated the law under which bonds had been issued, at a time when the state court had held the law valid. In such case the Federal court would follow the prior decision of the state court and apply it to all the securities which had been issued prior to the time when the state court changed its decision. But such a case raises no question of jurisdiction in this court to review the judgment of a state court. When that question of jurisdiction does arise, the right of review cannot rest upon the fact that the state court has refused to follow its former decision, and, on the contrary, has directly
[130]*overruled it. The jurisdiction of this court to review the state court in this class of cases is confined in the first instance to an inquiry as to the existence of subsequent legislation upon the subject, and if none has been enacted to which any effect has been given by the state court, this court cannot review the decision of the state tribunal, even though that decision makes worthless a contract which it had prior thereto held valid.

The cases of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175 [17: 520], and *Ohio & M. Railroad Company* v. *McClure*, 10 Wall. 511 [19: 997], illustrate this difference between the powers of this court when reviewing a judgment of a lower Federal court and its powers when reviewing a judgment of a state court.

In this class of cases the absolutely unbending and essential fact which must exist, in order to give jurisdiction to review a judgment of a state court, is subsequent legislation to which effect has been given by the judgment of the state court. This court is not the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals. Nor is it confided to this court to supervise the judgments of a state court in all cases where we may think that court has by its later decision invalidated a contract which it had once held to be lawful, and the judgment in which this court had upheld. The right of the state court in another case to reverse its former ruling is wholly unaffected by the fact that its former judgment had been affirmed here. Unless the Federal question exists in this case there is no ground of jurisdiction founded upon any prior decisions.

Now, has this judgment of the state court given effect to any subsequent legislation? At the time of the passage of the coupon acts there was no prior statute in Virginia permitting taxes to be paid in coupons of any kind whatever. The sole authority for such attempted payment of taxes rested in the coupon statutes under consideration. If they gave no such authority, then none existed, and no payment of taxes by means of coupons was valid. This is wholly irrespective of the subsequent acts. The state court has held the coupon *acts to be entirely void, because [131]
in violation of the state Constitution in existence when they were passed. Under that decision those acts are to all intents and purposes as if they never had been passed. They therefore furnished not the slightest form of legality to a payment of taxes in coupons. It was not a statute to forbid paying taxes in coupons that was necessary in order to deprive such payments of legality. A statute, a valid statute authorizing such payment, was necessary in the first instance, and if there were no such statute there was no authority existing to receive coupons in payment of taxes. The supreme court of appeals of Virginia, in a case in which it had jurisdiction, decided there was no such statute, and consequently no such authority, because the statute purporting to confer that authority was void, as in violation of the Constitution of the state. This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes, because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual. Thus the whole groundwork upon which to base our jurisdiction in this case falls to the ground, and we are left to maintain it upon the insufficient claim of prior decisions of this court.

In truth, the particular question decided

in this case has never been before this court. In some of the former cases this court decided the general proposition that the coupon legislation was valid and created a contract. After it had thus decided, a case came before it where a subsequent statute provided that, in the case of the school tax, coupons should not be received in payment thereof. The state court had decided that the coupon statute was invalid so far as it related to the school tax, because the Constitution in existence when the coupon acts were passed required in substance that such tax must be paid in lawful money, and consequently the coupon act was unconstitutional as to such
[132]tax. This court *affirmed that judgment. *Vashon* v. *Greenhow*, 135 U. S. 662, 713 [34: 304, 320]. Part of the coupon statute was thus held invalid by the state court and also by this court.

The state had also passed a subsequent statute providing that the tax for a license to retail liquor should be paid in lawful money. This court (affirming in that respect the court below) held that act valid, because it was in effect a regulation of the liquor traffic, and the state could at all times legislate upon that subject, notwithstanding the coupon acts and the alleged contract therein created. *Hucless* v. *Childrey*, 135 U. S. 662, 709 [34: 304, 319]. Both of these decisions were made subsequently to the time when this court had held the coupon statute valid, and that a valid contract was therein created.

The state court has now decided in this case that as the coupon acts were invalid as to the payment of the school tax in coupons (a proposition concurred in by this court), the result was that the whole acts were invalid, that they could not stand partly valid and partly void, and that the whole coupon scheme was unconstitutional. This phase of the controversy has never before reached this court, and the court has therefore never before decided this particular point. It has said, generally, that the legislation was valid, but it said so only in cases where the general power of the legislature to enact the coupon statutes was in question, and it has never decided squarely the point that if the coupon acts be unconstitutional in some particulars they are nevertheless valid in all others. The fact is alluded to simply as matter of history.

But even if it had, that fact confers no jurisdiction upon this court to review this judgment, if it otherwise is without it. In other words, because this court has heretofore decided the question of the validity of the contract, in cases where it had jurisdiction, that fact furnishes no foundation for its jurisdiction in this case, where the state court has given no effect to any subsequent legislation. Prior decision is not the foundation of jurisdiction. What I say is, that whether there have been two or more decisions, is wholly immaterial; jurisdiction cannot be taken because it is said that in a second or subsequent decision the state court
[133]did not follow its first decision *in regard to the contract, although that decision had been affirmed, as to that point, by this court. In this decision now before us it has given no effect to subsequent legislation, and not having done so, but simply decided a question of local law regarding its own Constitution, the state court has given no decision which raises a Federal question, and therefore none that this court can review.

Under all the circumstances I can only see a determination to take jurisdiction in this case simply because this court, as it is said, has in cases in which it had jurisdiction decided the question differently from the decision in this case by the state court. That ground does not give jurisdiction, and that is the only ground that does exist.

The writ of error should be dismissed for want of jurisdiction.

UNITED STATES, *Appt.*,
v.
RANLETT & STONE.

(See S. C. Reporter's ed. 133–148.)

Appraiser of imported goods—when appraisement is valid—duty on American bags—foreign-made bags.

1. The judgment of an appraiser after actual examination, that imported goods are not as described, but fall within a different classification, must stand as against the importer, unless reversed on reappraisement, or by the board of general appraisers on protest filed.
2. An appraisement is not invalid as against the importer because the examination was not made in accordance with U. S. Rev. Stat. § 2901, which is intended for the benefit of the government.
3. The separation of American-made bags, which are free from duty, from foreign-made bags imported in the same bales, should be made by the importer if he wishes to obtain the exemptions on the former, and he cannot require the separation to be made by the government.
4. The prima facie showing that bags imported are of American manufacture is overturned when it appears that foreign bags in large numbers are included in the same bales with those of American make.

[No. 20.]

Argued and Submitted April 20, 1898. Restored to docket, and certiorari to bring up entire record ordered April 25, 1898. Submitted October 11, 1898. Decided December 5, 1898.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, after certification of questions to this court, to review a decree of the Circuit Court of the United States for the Fifth Circuit reversing the decision of the board of general appraisers and decreeing that certain duties paid by Ranlett & Stone on imported bags be refunded and that the liquidation of duties before made be set aside and the duties reliquidated. *Reversed*, with directions to enter a decree for the refunding of one fourth of the duties paid.

Statement by Mr. Chief Justice **Fuller:**

[134] *Ranlett & Stone imported at the port of New Orleans, from Liverpool, England, 2,925 bales of grain bags, known as cental bags, each bale containing one thousand bags, or 2,925,000 in all, by several vessels, the entries running from August 14, 1893, to January 15, 1894.

The bags were entered free of duty under paragraph 493 of the act of October 1, 1890 (26 Stat. chap. 1244, p. 603), as bags of American manufacture returned to the United States.

That paragraph is as follows:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; . . . but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. . . ."

[135] *The general regulations prescribed by the Secretary of the Treasury under this paragraph contained the following provisions:

"Art. 331. Articles of the growth, produce, and manufacture of the United States, exported to a foreign country and returned without having been advanced in value or improved in condition, by any process of manufacture or other means, and upon which no drawback or bounty has been allowed, are entitled to entry free of duty, but this privilege does not extend to articles exported in bond from a manufacturing warehouse and afterward returned to this country. The exportation must be bona fide, and not for the purpose of evading any revenue law.

. . . .

"If returned to the port of original exportation, the fact of regular clearance for a foreign destination must be shown by the records of the customs, . . . and by the declaration of the person making the entry. But when the reimportation is made into a port other than that of original exportation, there shall be required, in addition to the declaration, a certificate from the collector and the naval officer, if any, of the port, where the exportation was made, showing the fact of exportation from that port.

. . . .

"Art. 332. To guard against fraud, and to insure identity, the collector shall require, in addition to proof of clearance, the production of a statement, certified by the proper officer of the customs at the foreign port from which the reimportation was made, and authenticated by the consul of the United States, that such merchandise was imported from the United States in the condition in which it is returned, and that it has not been advanced in value or improved in condition by any process of manufacture or other means."

. . . .

"Art. 335. Casks, barrels, carboys, bags, and vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes, *are free of duties, [136] but in case drawback has been allowed upon the exportation of any such articles, they shall on importation be subject to a duty equal to the drawback. Proof of the identity of such articles must be made, and if any of them were subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded, or duty will accrue.

. . . .

"Art. 336. Before entry, the following proof shall be required by the collector:

"*First.* A certificate as follows from the shipper in triplicate, attested by a consul or other proper officer authorized to take affidavits, as follows:

"I hereby certify, under oath, that, to the best of my knowledge and belief, the †——— hereinafter specified, are truly of the manufacture of the United States, ‡ ———or were exported from the United States, filled with † ———, and that it is intended to reship the same to the port of ———, in the United States, § ———on board the ———, now lying in the port of ———. I further certify that, to the best of my knowledge and belief, the actual market value of the articles herein named, at this time and in the form in which the same are to be exported to the United States, is as follows †† ———.

——— ———.

"Sworn to before me, this — day of ———, 18—.

——— ———.

. . . .

"*Second.* A declaration in the entry by the importer of the name of the exporting vessel, the date of the ship's manifest, and the marks and numbers on the articles for which free *entry is sought. If the exportation was [137] made by railroad, the way bill may be substituted as evidence for the manifest. The mark and numbers should be such as to prove beyond any reasonable doubt the identity of the articles with those entered on the outward manifest. . . .

"†Name the articles.

"‡If the packages are empty, insert statement of the facts, as 'and were exported from the United States filled with the produce of that country.'

"§If the packages contain foreign merchandise, insert 'filled with' and a description of the merchandise they contain.

"††This blank is to be filled only when the merchandise contained in the packages is subject to a duty ad valorem."

"*Third.* An affidavit by the importer, attached to the entry, that the articles mentioned therein are to the best of his knowledge and belief truly and bona fide manufactures of the United States, or were bags exported therefrom filled with grain."

. . . .

"*Fifth.* Verification after examination, by the appraiser, with an indorsement stating whether the articles are of domestic or of foreign manufacture.

"Such bags and other coverings exported to be returned should, when practicable, be marked or numbered, in order that they may be identified on their return; and the marks or numbers should appear on the shipper's manifest upon which they are exported."

When the respective shipments arrived in this country free entry was made by the importer and evidence furnished regarding the right to free entry and the character of the goods. Samples of the respective invoices were then sent to the appraiser's office and examined as follows:

From one entry of 600 bales, 70 were ordered to the appraiser's store and 18 of that number were opened by him;

Of another entry of 650 bales, 43 were ordered to the store and 19 were opened;

Of a third entry of 325 bales, 38 were ordered to the store and 13 were opened;

Of a fourth entry of 850 bales, 85 were ordered to the store and 16 were opened;

Of a fifth entry of 300 bales, 21 were ordered to the store and 14 were opened;

Of a sixth entry of 100 bales, 100 were ordered to the store and 10 were opened;

And of a seventh entry of 100 bales, 100 were ordered to the store and 10 were opened.

[138] *The examination of the bales was made by the appraiser, assisted by an examiner. The appraiser reported as to each importation that the bales contained bags of foreign manufacture, subject to duty, and thereupon the collector, by direction of the Treasury Department, at the request of the importers, in order to obtain possession of the goods, made impost entries, assessing duties at the rate of two cents per pound on the entire consignment, under paragraph 365 of the act of 1890, 26 Stat. at L. 593, as "bags for grain made of burlaps." The importers protested against the "decision, liquidation, and rate and amount of duties assessed," on the grounds: That the bags were entitled to free entry under paragraph 493 of the free list as bags of American manufacture, exported filled with American products; that, if not free under that paragraph, they were entitled to free entry under the provisions of section seven of the act of February 8, 1875, and the regulations for the free entry of bags other than of American manufacture, prescribed by the Secretary of the Treasury thereunder; and that the goods were not fairly and faithfully examined by the appraisers; that the assessment of two cents per pound because the bales contained a mixture of foreign and American bags was incorrect, and that the goods being all of one value, whether of foreign or American make, did not come under the provisions of section 2910 of the Revised Statutes.

The Board of General Appraisers sustained the action of the collector. General Appraisers' Decisions, No. 2623.

The importers applied for a review of this decision to the circuit court of the United States for the fifth circuit, which, without taking any additional testimony, reversed the decision of the board, and entered a decree that the duties paid by Ranlett & Stone, namely, two cents per pound on the several consignments of bags, enumerating them, be refunded; "that the examination heretofore made of said bales of bags is void and not in conformity to law or the regulations of the Treasury Department, and any liquidation of duties based on said examination is illegal and void, and the liquidation of duties heretofore made be set aside, and the money *received from Ranlett & Stone [139]
as duties be refunded as aforesaid; and the court doth further order and decree that the collector direct a re-examination of said bales of bags to be made according to law, and on such re-examination to reliquidate the duties which may be lawfully due thereon."

The United States appealed from the decree to the circuit court of appeals, which certified certain questions to this court, whereupon a writ of certiorari was issued and the entire record brought up.

Messrs. **Henry M. Hoyt**, Assistant Attorney General, and **W. J. Hughes** for appellant on first and second argument and submission.

Mr. **William A. Maury** for appellees on first argument and submission.

Messrs. **Thomas J. Semmes** and **William A. Maury** for appellees on second submission.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*In respect of these importations, it must [139]
be assumed that the bags were not in fact all of American manufacture or substantially so.

The opinion of the General Appraisers stated that "it was admitted that there were bags of foreign manufacture and of American manufacture, all indiscriminately mingled together, no attempt being made on entry or afterwards to separate from these enormous totals of goods of the same class those claimed to be relieved from duty accompanied by the proof establishing such indulgence." The examiner testified that he "in some cases examined every bale of the whole entire invoice;" that he used his judgment "to try to open sufficient to get at the classification of the goods;" and that where he opened the bales and examined them he found of foreign make in general "from seventy-five to eighty per cent." Indeed we do not understand the importers to deny that these importations contained foreign-made bags.

Under title 33 of the Revised Statutes a duty was imposed on grain bags, except those manufactured in the United *States [140]

and exported containing American products, declaration having been made of intent to return the same empty. R. S. §§ 2504, 2505.

By section seven of the act of February 8, 1875 (18 Stat. at L. 307, 308, chap. 36), it was provided "that bags, other than of American manufacture, in which grain shall have been actually exported from the United States, may be returned empty to the United States free of duty, under regulations to be prescribed by the Secretary of the Treasury."

Section six of the tariff act of March 3, 1883 (22 Stat. at L. 488, 489, chap. 121), provided that on and after July 1, 1883, "the following sections shall constitute and be a substitute for title 33 of the Revised Statutes." The provision in regard to empty returned bags of American manufacture was re-enacted in substance in the free list, but that of section seven of the act of 1875 was omitted, and bags, excepting bagging for cotton, were made dutiable.

Paragraph 493 of the tariff act of 1890 retained the same exemption from duty upon returned empty bags of American manufacture and was silent in regard to returned empty foreign-made bags which were filled when exported.

In view of this legislation, acting Attorney General Maxwell advised the Secretary of the Treasury, July 20, 1893, that the provision of section seven of the act of 1875, exempting foreign-made grain bags, was repealed. 20 Ops. Atty. Gen. 630. This ruling was followed and approved by the Treasury Department, August 22, 1893, Syn. T. D. 14,281; and the same ruling was made by the Board of General Appraisers, February 3, 1894, in *Kent* v. *United States*, G. A. 2448, as it had been in prior decisions; by Judge Lacombe, in effect, April 21, 1891, in *Re Straus*, 46 Fed. Rep. 522; and specifically by Judge Townsend in *Kent* v. *United States*, 68 Fed. Rep. 536, June 2, 1895. The latter case was carried to the circuit court of appeals for the second circuit and the decree affirmed, April 7, 1896, 38 U. S. App. 554. The rule applied was that "when a later statute is a complete revision of the subject to which the earlier statute related, and the new legislation was manifestly intended as
[141] a substitute *for the former legislation, the prior act must be held to have been repealed;" and the opinion of Judge Shipman leaves nothing to be added in support of the conclusion reached.

Foreign-made bags, then, being dutiable at two cents per pound under paragraph 365 of the act of October 1, 1890, and these bales being permeated with bags of foreign manufacture, the appraiser reported all the bags as dutiable and the collector so assessed them.

But the importers insist that this assessment was illegal because of the insufficiency or invalidity of the examination; or of the absence of a statute specifically applicable; or because it was not confined to foreign-made bags.

Paragraph 493 required proof of the identity of articles entered as exempt thereunder, and this was not only repeated in the regulations, but article 336 required "verification, after examination, by the appraiser, with an indorsement stating whether the articles are of domestic or foreign manufacture." By section two of the customs administrative act of June 10, 1890, chap. 407, all invoices must contain a correct description of the merchandise, signed by the manufacturer or by the person owning or shipping the same, or by his duly authorized agent, which under section five might be adopted by the domestic consignee or owner, who by section nine was made liable for the employment or use of any fraudulent or false invoice or statement by means whereof the United States may be deprived of lawful duties. Under section ten it was the duty of the appraiser to ascertain, estimate and appraise the actual market value and wholesale price of merchandise imported, and the number of yards, parcels, and quantities. And evidently this ascertainment involves character and quality as well as value, since the statement, invoice, or entry must be true in respect of the character of the goods as well as of their value. 26 Stat. at L. 131, 136.

On the question of identity, then (which under the law includes the question of country of manufacture), the production of the papers required by the regulations are not conclusive proof, and if the appraiser, after actual examination had, *decides that the [142]
goods are not as described, but are such, in fact, as to fall within a different classification, and so reports to the collector, his judgment must stand unless reversed on reappraisement, or by the Board of General Appraisers on protest filed.

As to these bags, the examiner reported to the appraiser his finding of a very large percentage of foreign-made bags in the shipments, and the appraiser reported that he found the shipments to contain bags of foreign manufacture and that the importations were dutiable at two cents per pound under paragraph 365.

If the importers were not satisfied with the examination made, and objected to the competency of the examiner and appraiser, they should have applied for a re-examination; but they did not do this, nor did they offer evidence before the Board of General Appraisers tending to establish an objection on that ground.

But it is said that the appraisement was invalid because the examination was not in accordance with § 2901 of the Revised Statutes. That section, however, was intended for the benefit of the government, and we have held that it is not mandatory, and that official acts are not invalidated for want of strict compliance therewith. *Erhardt* v. *Schroeder*, 155 U. S. 125 [39: 94]; *Origet* v. *Hedden*, 155 U. S. 228 [39: 130].

The section reads thus:

"The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined and appraised, and shall

order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on
[143]conviction thereof before any *court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

Assuming that fraudulent intent was lacking, these bags were not held for forfeiture, but the collector, in effect, added them all to the entries, leaving it to the importers to prefer such claim to exemption as they might consider they were entitled to.

Section 2901 was brought forward from section 32 of the act of March 2, 1861 (12 Stat. at L. 197, chap. 68), and on December 28, 1868, Mr. Secretary McCulloch made the following ruling.

At that time the law imposed a duty of twelve cents per pound on all woolen rags, and admitted free rags composed of cotton and linen and intended for the manufacture of paper, and twenty-one bales of rags brought into the country from Canada and containing at least forty per cent of woolen rags, though imported as containing rags for the manufacture of paper, had been seized. The matter being referred to the Secretary, he ruled in a letter addressed to the collector of customs at Rochester as follows: "If you are satisfied that there was no intention on the part of the importers to conceal the dutiable rags by mingling them with others free of duty, you will not hold them for condemnation, but will allow the parties to separate such as are dutiable from such as are not so, and make entry accordingly, paying the proper duty on the former class. These instructions are to be considered as applicable only to such bales as contain so large a proportion of woolen rags as to render it worth while to collect a duty. Forty per cent of woolen rags is, however, much too large a percentage to be allowed entry as free goods."

Again, in July, 1890, it was held by the Treasury Department that where cargoes of anthracite and bituminous coal were imported, so mixed as to render it impracti-
[144]cable to *separate the free from the dutiable coal for the purpose of the accurate weighing of each kind, the whole cargo should be treated as dutiable. T. D. 10,098, Syn. 1890.

The general policy of the law is indicated in the statutory requirements that where goods of different qualities or different values are mingled, or are composed of material of different values, the highest rate of duty shall be imposed, as in the familiar instances of the classification of articles composed of two or more materials, at the rate of duty charged on the component material of chief value; in section 2911 of the Revised Statutes, that whenever articles composed wholly, or in part, of wool or cotton, of similar kind, but different quality are found in the same package charged at an average price, the appraisers shall adopt the value of the best article as the average value; in section 2912, that when bales of wool of different qualities are embraced in the same invoice at the same prices whereby the average price is reduced more than ten per centum below the value of the bale of the best quality, the value of the whole shall be appraised according to the value of the bale of the best quality, and that no bale, bag, or package shall be liable to a less rate of duty in consequence of being invoiced with wool of lower value; and in section 2910, that "when merchandise of the same material or description, but of different values, is invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate to which the highest valued goods in such invoice are subject."

Numerous provisions exist in the statutes and regulations designed to protect the Public Treasury from the bringing in of goods at a less rate of duty than they ought to pay under cover of association with goods properly subject to the lower amount; and the protection intended to be secured ought, on principle, equally to be accorded in respect of dutiable goods invoiced indiscriminately with free goods.

Of these seven importations, according to the importers, all the bales in two of them, and ten per cent of those in three of them, were ordered to the appraiser's store, while as to two of them, the number taken for examination fell a little *short of ten per cent; [145]
and of all these bales, one hundred were opened. It appeared also that all the merchandise covered by all the invoices was of the same character and description. Since the bales that were opened were found to contain foreign-made bags in large numbers in importations claimed to consist solely of American made bags, it is not easily seen how the examination of a larger number of bales would have affected the result arrived at by the appraiser. And, as before observed, if the importers believed that they had sustained injury because more bales were not opened, they should have applied for a re-examination, and they might have produced evidence before the Board of General Appraisers to maintain their claim that the bags were American made notwithstanding the return of the examiner and the report of the appraiser, or they might have protested on the ground that the duty should have been levied only on part thereof, and tendered evidence to support that contention.

If they had furnished evidence of the number of bags of domestic manufacture and the number of bags of foreign manufacture, or

had sought a re-examination with the view to an adjustment by proportion, and that had been had, then the collector might have assessed the foreign bags so ascertained and admitted the American bags free from duty. But it was for the importers, and not for the government, to make the separation on which such a claim for relief would have rested, or, at least, to have invoked the rule of proportion based on a re-examination.

The importers contended that they had complied with the law and the Treasury regulations by furnishing certain statements of the shippers as to the origin of the goods, and certain certificates as to their exportation filled with wheat, and that this prima facie evidence of the bags being of the manufacture of this country had not been disproved. But if it were admitted that these papers made a prima facie showing, that showing was overturned when it appeared that foreign-made bags in large numbers made up the importations.

The remedies provided by the act of June 10, 1890, furnish the equivalent for the ac-
[146]tion against the collector which was *originally the remedy for an illegal exaction of duties (*United States* v. *Passavant*, 169 U. S. 16 [42: 644]; *Schoenfeld* v. *Hendricks*, 152 U. S. 691 [38: 601]); and as in that action, so in this proceeding, the importer must establish the illegality in order to recover back duties paid under protest; and this, in a case like the present, involves, in substantiating that contention, the making proof of the identity of the merchandise. *Earnshaw* v. *Cadwalader*, 145 U. S. 247, 262 [36: 693, 699]; *Erhardt* v. *Schroeder*, 155 U. S. 125 [39: 95].

Moreover, where merchandise liable in large part to duty is entered as exempt therefrom, the collector has the right to assume that the mingling was intentional and with design to evade the revenue laws; and hence even where the confusion of goods is accidental or not fraudulent in fact, and forfeiture is not incurred, it yet devolves on the importer to show what part of the whole he contends should not be taxed.

But these importers planted themselves on the ground that all these bags were exempt under the act of 1875; or, if not, that the assessment was wholly void for insufficient examination; or illegal except as to foreign-made bags, which it devolved upon the government to segregate from the common mass.

In the case of Kent, already referred to, it was decided by the Board of General Appraisers, February 3, 1894 (G. A. 2448), that the act of February 8, 1875, was not in force, and a reliquidation was ordered for a classification according to the proportion of foreign and American bags found in two bales which by agreement had been examined as representative bales, bag by bag. On the second of May, 1894 (G. A. 2610), the Board of General Appraisers held, in the matter of Balfour, Guthrie, & Company, that inasmuch as bags made of burlaps were dutiable, except such as are described in paragraph 493, it was the duty of all persons bringing in goods claimed to be free out of a class otherwise dutiable to prove affirmatively the facts constituting the exemption, and that they should separate and designate such merchandise, accompanied by the evidence required by law. This decision was reaffirmed May 5, 1894 (G. A. 2613), and again in the case before us.

*On the 27th of April, 1894, which was aft- [147]
er this case had been carried before the Board of General Appraisers and the evidence had been taken, the Treasury Department (T. D. 14912) held that in the absence of any provision of law to prevent the importation of both free and dutiable second-hand bags baled together, collectors might pursue the course of examining the designated number of packages, making such investigation of their contents as would reveal the character of the bags contained therein, and then adopt the finding of the appraisers as the basis of the assessment of duty on bales not examined. And since then it has been determined that importers of bags must have bags of foreign and bags of domestic origin packed separately. T. D. 18425.

Notwithstanding the positions taken by the importers are, as we have seen, untenable, we are not disposed to hold, in the light of these rulings of the Department and the special circumstances of the case, that, if the proportion of dutiable bags sufficiently appeared or might reasonably have been ascertained, the circuit court could not have adjudged a recovery in that proportion, or directed a reliquidation.

A re-examination *de novo* is now impracticable, but it appears to us that the evidence taken by the Board affords an adequate basis for a conclusion. The examiner testified that he found "along about 80 to 86 per cent foreign make;" "in general from seventy-five to eighty per cent;" and that, in his judgment, there was no invoice "that would show over twenty-five per cent of American bags;" yet he also said that he could not give specific details of each invoice, and that he "supposed if seventy-five per cent of the bags in the bale were of foreign manufacture, it carried the whole of them."

In view of this testimony, and considering that the statute was not strictly pursued in the examination (though we perceive no reason to doubt the faithfulness of the officials in the discharge of their duties), and the difficulties in the way of determining the make of the bags disclosed by the evidence, and bearing in mind that the taxation of so many of the bags as were of American manufacture operated as a penalty in *spite [148]
of the concession that no fraud on the revenue was intended, we think it unnecessary to remand the cause for another hearing, and that the ends of justice will be best subserved by directing a decree for the refunding of one-fourth of the duties paid.

Decree reversed, and cause remanded with a direction to enter such a decree.

I. R. HARKRADER, Sheriff of Wythe County, Virginia, *Appt.*,
v.
H. G. WADLEY.

(See S. C. Reporter's ed. 148-170.)

Final order discharging prisoner from custody on writ of habeas corpus, appealable —final order—injunction against criminal prosecution—jurisdiction of court of equity —staying proceedings in state court in criminal case.

1. A final order overruling the return of the sheriff and discharging a prisoner from custody on writ of habeas corpus, made at a stated term of the circuit court of the United States, is appealable, although the original order was made at chambers.
2. An order discharging a prisoner on writ of habeas corpus, which, if valid, takes away his custody from the state court and puts an end to his imprisonment under the process of that court, is final for the purpose of an appeal to this court, although he is discharged only pending an injunction.
3. An injunction against a criminal prosecution in a state court under a valid state law, of a bank officer for embezzlement, cannot be granted by a Federal court because it had previously obtained jurisdiction in equity cases in which a receiver of the bank had been appointed and the civil liability of such officer was in litigation.
4. A court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused.
5. A circuit court of the United States sitting in equity in the administration of civil remedies has no jurisdiction to stay by injunction proceedings pending in a state court in the name of the state to enforce the criminal laws of such state.

[No. 41.]

Argued October 17, 1898. Decided December 5, 1898.

APPEAL from an order of the Circuit Court of the United States for the Western District of Virginia discharging H. G. Wadley, a prisoner, from custody, on writ of habeas corpus. *Reversed* and cause remanded with directions to restore the custody of said Wadley to the sheriff of Wythe County, Virginia.

Statement by Mr. Justice **Shiras:**

In the circuit court of the United States for the western district of Virginia, one H.
[149] G. Wadley filed a petition, signed *and sworn to August 10, 1896, praying for the allowance of a writ of habeas corpus. The petition was as follows:

To the Honorable Circuit Court of the United States in and for the Western District of Virginia, at Abingdon, Va., Fourth Circuit.

Your petitioner, H. G. Wadley, respectfully represents and shows to this honorable court that he is a citizen of the United States of America and a citizen of the state of North Carolina, and a resident of the city of Wilmington in that state; that he is unjustly and unlawfully detained and imprisoned in the county jail of Wythe county, Va., at Wytheville, Va., in the custody of I. R. Harkrader, sheriff of said county, and as such the warden and keeper of said jail, by virtue of a warrant or order of commitment made by the county court of Wythe county, Va., at Wytheville, Va., on Monday, the 10th day of August, 1896, a copy of which order or warrant of commitment is hereto annexed, marked Exhibit "A."

Your petitioner would now show that on a petition filed by him before the Honorable Charles H. Simonton, United States Circuit Court Judge for said fourth circuit, embracing said western district of Virginia, on the 5th of August, 1896, the said honorable judge, Simonton, entered an order on said petition allowing it to be filed in the equity cause of *H. G. Wadley* v. *Blount & Boynton et als.*, pending in said court, and on said petition, duly verified and sustained by affidavits, the said honorable judge, Simonton, on said 5th day of August, 1896, in accordance to the prayer of said petition, granted an injunction against Robert Sayers, the commonwealth's attorney of Wythe county, Va., J. A. Walker and C. B. Thomas, special prosecutors, and the creditors embraced in said petition, together with their counsel, from all further proceedings in said county court of Wythe upon an indictment obtained against the said H. G. Wadley in said county court on the 16th day of May, 1894, and especially from exacting or requiring any bail or any commitment to imprisonment of said H. G. Wadley on said indictment in said county court.

A certified copy of the said petition which
was presented *to Judge Simonton on the 5th [150]
of August, 1896, is herewith filed, marked Exhibit "B", and a certified copy of the said order of Judge Simonton of the 5th of August, 1896, on said petition is likewise herewith filed, marked Exhibit "C."

Your petitioner, H. G. Wadley, would further show that heretofore, to wit, on the 31st of January, 1895, on an injunction theretofore awarded by him to your petitioner in his case of *H. G. Wadley* v. *Blount & Boynton et als.*, in this court, by the Honorable Nathan Goff, he, by a decree of that date, fully sustained the contention of your petitioner by refusing to dissolve said injunction and continuing it in full force, and by said decree enjoined and prohibited all further prosecution of said indictment in the county court of Wythe county, Va., as shown by copy of the said decree and the opinion of the Honorable Nathan Goff, herewith filed, marked Exhibit "D."

Your petitioner had hoped that after this final decree in the United States circuit court by the Honorable Nathan Goff on said injunction, prohibiting all further prosecution of said indictment, that the order of that honorable court would have been obeyed; but that was a vain conjecture, as the said Robert

Sayers, commonwealth's attorney of Wythe county, Va., and said special prosecutors, J. A. Walker and C. B. Thomas, persisted and continued, from term to term or from time to time, in calling up said indictment in said county court, and asking for a continuance of the said indictment and for the commitment of the said H. G. Wadley to the county jail of Wythe county, and he was bailed with sureties for his appearance before the said county court to appear on Monday, the 10th of August, 1896, being the first day of the August term of the said county court. Your petitioner would now show that notwithstanding the fact that the honorable judge, Simonton, as aforesaid, did on the 5th of August, 1896, enter said order especially forbidding any further order in said case in said court except a mere order of continuance, and although copies of the said order were duly executed on said commonwealth attorney, Robert Sayers, and on said special prosecutors, J. A. Walker and C. B. Thomas, and all of the creditors named in said peti-
[151]tion and upon their counsel *of record by the marshal for the western district of Virginia; which order was duly executed on Saturday, the 8th of August, 1896—

Your petitioner, H. G. Wadley, would now show that in flagrant and contemptuous violation of both of the orders named, that of the Honorable Nathan Goff, of the 31st of January, 1895, prohibiting all further prosecution of said indictment, and in violation likewise of the said order of the Honorable Charles H. Simonton of the 5th of August, 1896, upon the calling of the said indictment this day in said county court of Wythe county, Va., the said commonwealth's attorney and one of the special prosecutors asked for a continuance and stated that they had nothing to do with the question of bail or with the question of the commitment of petitioner, but that that was the duty of the court, and thus indirectly accomplished what the order of Judge Simonton in express words prohibited, for the said commonwealth's attorney and special prosecutors, instead of asking a compliance by the said county court with the order of Judge Simonton, indirectly asked the court to commit him by saying it was the duty of the court to do so, and thereupon W. E. Fulton, the judge of the county court of Wythe county, Va., in violation of said orders of the United States court, did order the said petitioner, H. G. Wadley, to be committed to the sheriff of Wythe county, to keep and hold him over to answer said indictment, which is now enjoined by the said United States court, and your petitioner is now in the custody of the sheriff of Wythe county, at Wytheville, who is *ex officio* the warden and jailer of said county, and your petitioner is thus deprived of his personal liberty by the said court on its own motion committing petitioner to the custody of the jailer of Wythe county, Va., procured as aforesaid.

Petitioner avers that the said indictment upon which petitioner was committed was illegally and improperly obtained, in violation of petitioner's rights as a citizen of the United States, by the counsel for the said creditors having themselves summoned before the grand jury of the county court of Wythe county, Va., on the 16th of May, 1894, and carrying *before the grand jury and reading [152]
to them a copy of the deposition of your petitioner, which had been taken of petitioner in an equity suit of *Blount & Boynton et als.* v. *H. G. Wadley, et als.*, and thus indirectly by said record or deposition from the United States court taken in a cause in that court indirectly required petitioner to testify against himself in a criminal case, and upon the mere copy of said deposition of petitioner, illegally taken from the files of the said cause in the United States court and read to said grand jury of Wythe county, petitioner was indicted. A copy of said indictment is fully set forth, with said exhibit, along with the petition filed on the 5th of August, 1896, and is here referred to as a part of this petition.

Petitioner avers that his term of imprisonment, now complained of, began on the 10th day of August, 1896, at 12 o'clock M., and that such imprisonment still continues, and that he is now in the custody of the said sheriff, as such jailer, at Wytheville, Va.

Your petitioner will now show that his detention and imprisonment as aforesaid is illegal in this, to wit:

First. That this court, by two decrees, that of Judge Goff of 31st of January, 1895, as also by the second order of Judge Simonton of 5th of August, 1896, declares and adjudicates the prior jurisdiction of the said United States court, both of the person of your petitioner, and also of the subject-matter of the controversy and of the issues involved in said indictment, and that said prior jurisdiction of the said United States court renders such detention and imprisonment of prisoner by said county court illegal.

Second. That, as stated by the Honorable Nathan Goff in his petition filed with his order of the 31st of January, 1895, in the injunction case, the indictment against petitioner in said county court of Wythe county, Va., was obtained against him illegally and in violation of his constitutional rights as a citizen of the United States, by the misuse and abuse of the records of the United States court, in the withdrawal therefrom of a copy of the deposition of petitioner taken in said court in said equity cause and read and used *before the said grand jury of said county [153]
court of Wythe as the foundation of said indictment.

Wherefore, to be relieved from said unlawful detention and imprisonment, your petitioner, H. G. Wadley, prays that a writ of habeas corpus, to be directed to I. R. Harkrader, sheriff of Wythe county, Va., at Wytheville, Va., and keeper of the said jail of the said county, and in whose custody petitioner now is, may issue in his behalf, so that your petitioner, H. G. Wadley, may be forthwith brought before this court, to do, submit to, and receive what the law may direct, and upon the hearing thereof that your honor will discharge petitioner from all further custody or imprisonment, and that he go hence without bail.

There was attached to said petition the following exhibit:

This day came the commonwealth, by her attorney, and James A. Walker and C. B. Thomas, assistant prosecutors, as well as the accused, in his own proper person, in discharge of his recognizance; whereupon the attorney for the commonwealth moved the court to continue this cause on the ground that there are documents, books, and papers in the possession of I. C. Fowler, clerk of the circuit court of the United States for the western district of Virginia, at Abingdon, and that there are other documents, papers, and books in the possession of H. B. Maupin, receiver of the said circuit court of the United States, in the chancery cause of Paul Hutchinson, administrator, against the Wytheville Insurance & Banking Company, pending therein, which said papers, books, and documents are material evidence of the commonwealth in the prosecution of the said indictment against the said H. G. Wadley, and that the commonwealth cannot safely go to trial without the said papers, books, and documents; that the said J. L. Gleaves, then attorney for the commonwealth of Virginia for Wythe county aforesaid, at a former term of the circuit court of the United States, applied to the said circuit court for an order directing the said clerk and the receiver to obey any subpœna duces tecum issued from the clerk's office of this court, requiring said clerk and
[154] said receiver to produce *said papers, books, and documents before this court on the trial of this prosecution, and that since said order was entered in the said circuit court of the United States the said J. L. Gleaves, attorney for the commonwealth aforesaid, procured subpœna duces tecum to be regularly issued from the clerk's office of this court for said I. C. Fowler, clerk as aforesaid, residing in Abingdon, Virginia, and H. B. Maupin, receiver as aforesaid, residing in Wythe county, Virginia, requiring them to produce said papers, books, and documents in their possession as aforesaid; which said subpœnas duces tecum were duly executed on the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, but that they refused and declined to obey the same or to produce said papers, books, and documents, because since said order was entered by the United States court and since said subpœnas duces tecum were issued and served, the accused, H. G. Wadley, had prepared and sworn to a bill asking for an injunction restraining the said I. C. Fowler, clerk, and the said H. B. Maupin, receiver, from obeying any such subpœna duces tecum, which bill was presented by counsel for the said H. G. Wadley to the Hon. Nathan Goff, one of the circuit judges of the United States for the fourth circuit, and on the *ex parte* motion of the said Wadley the said judge awarded an injunction restraining the said J. L. Gleaves, attorney for the commonwealth of Wythe county, Virginia, either by himself or the agreement of others; I. C. Fowler, clerk of the said United States circuit court; H. B. Maupin, receiver as aforesaid, by themselves or by their agents or defendants, from all further proceedings or participation by them or either of them in a prosecution now pending in the county court of Wythe county, in the name of *The Commonwealth* v. *H. G. Wadley*, for the embezzlement of the assets of the Wytheville Insurance & Banking Company, restraining and enjoining them and all other defendants named in said bill, including their attorneys, clerks, agents, either directly or indirectly, through their own agency or the agency of others, from in any manner using against said H. G. Wadley in any other court, state or Federal, in any other case, civil or criminal, the deposition of the said Wadley *taken in [155]
another case of *Paul Hutchinson, Adm'r*, v. *The Wytheville Insurance & Banking Company*, pending in the circuit court of the United States for the western district of Virginia or any copy thereof or extract therefrom.

And the prayer of said bill is in the following words:

Forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed for, and that they may answer to the matters hereinbefore stated and charged, the prayer of your orator is—

That this bill of injunction and for relief be treated as incidental to said suit now pending in your honor's said court at Abingdon; that your honor may grant a writ of injunction issuing out of and under the seal of this honorable court, restraining and enjoining, under the penalty for a violation hereof, all of the defendants to this bill, including their attorneys, clerks, and agents, either directly or indirectly, through their own agency or through the agency of others, from in any manner using against orator in any other court, state or Federal, in any other case, civil or criminal, the said deposition of your orator aforesaid taken in said suit in equity, or any copy thereof, or the report of Master Commissioner Gray, taken and filed therein, or any copy thereof, or any of the books, papers, records or correspondence, or any copies thereof or extracts therefrom, of the Wytheville Insurance & Banking Company, in the possession or that came under the control of said Gray, commissioner, or of H. J. Heuser, late receiver, or of H. B. Maupin, present receiver, or of I. C. Fowler, clerk in said equity suit that was brought in this court by said creditors; that your honor will likewise enjoin each and all of said defendants, creditors, who are now parties by the decrees of this court in said suit in equity now pending in this court, whether they are parties to the original bill or interveners by petition or are plaintiffs in the amended, supplemental and cross bill, or whose claims have been allowed by or presented to the master commissioner, Gray, for allowance, together with all their attorneys, clerks, or agents either through their *own agency [156]
or acts or through the agency or acts of others and also the said J. L. Gleaves, the

commonwealth's attorney of Wythe county, Virginia, either by himself or by the agency of others, and said commissioner Gray, receivers Heuser and Maupin, and said clerk, Fowler, by themselves or their agents or deputies, from all further prosecution of or participation by them or by either of them in the criminal procedure now pending in the county court of Wythe county, Virginia, in the name of *The Commonwealth of Virginia* v. *H. G. Wadley*, upon an indictment for embezzlement of the assets of the Wytheville Insurance & Banking Company, the said creditors having already submitted themselves and their claims affected by or involved in said criminal procedure, by their bill in equity, to the prior jurisdiction of this court; that your honor, upon a final hearing of this cause, will punish the parties involved for their unjust and unlawful misuse of the records of this court in said equity suit, for the promotion and prosecution by said creditors of said criminal procedure against your orator, now pending in the said county court of Wythe county, Virginia, put on foot by said creditors and their attorneys.

Copy. Attest: I. C. Fowler, Clerk.

The restraining order is in the following words:

This day came H. G. Wadley, one of the defendants in the above proceedings in equity now pending in the above-named court, and he presented his bill for an injunction in his name against said Blount and Boynton *et als.*, and this said bill being duly sworn to by H. G. Wadley and fully supported by the affidavits of J. H. Gibboney, H. J. Heuser, and J. B. Barrett, Jr., the cause came on this day to be heard upon said bill for injunction, and upon all the exhibits filed thereto, and upon a transcript of the record of said original bill and said amended, supplemental and cross bill above named, and, upon reading said bill and affidavits and the said exhibits and transcripts, the court is of opinion that the equity jurisdiction of the United States court above named first attached to both the persons and the subject-matter involved in
[157] said suits *in equity, and that it is improper that the records of the pleadings, proofs, books, and papers filed in and parts of said equity suits now in litigation and pending unadjudicated in this court between said parties, or copies thereof, should be withdrawn therefrom and used by anyone in any criminal or other proceedings, in any other court, against the said party to any of said suits, in regard to any matters in issue in said suits in equity, until the same have been fully adjudicated by this court; and it appearing to this court from said bill for injunction that such has been done, and is now threatened by parties to said suits in equity for the use in a criminal proceeding just begun by them in the county court of Wythe county, Virginia, against said H. G. Wadley, for matters involved in and growing out of said suits in equity which were first instituted and are still pending in litigation and undetermined in this court, it is ordered that an injunction be awarded to said H. G. Wadley according to the prayer of his bill; and it appearing to the court that the defendants in said bill are quite numerous, it is further ordered that service of this order on their counsel shall be equivalent to personal service on them.

But before this injunction shall take effect the said H. G. Wadley will execute a bond before the clerk of the court in the penalty of $10,000, conditioned according to law, with N. L. Wadley as his surety, who is approved as such surety, proof of her solvency being now made.

June 8, 1894.

To I. C. Fowler, clerk United States Circuit Court, Abingdon, Va.

N. Goff, Circuit Judge.

And thereupon, on motion of the attorney for the commonwealth, the case is continued until the next term.

And the court, of its own motion, required the prisoner to enter into a bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county.

Enter. Wm. E. Fulton, Judge.

*In pursuance of this petition a writ of [158]
habeas corpus was issued, on August 11, 1896, directed to I. R. Harkrader, sheriff of Wythe county, Virginia, and, as such, jailer of said county, commanding him to bring said H. G. Wadley, together with the day and cause of his caption and detention, before Charles H. Simonton, judge of the circuit court of the United States within and for said district aforesaid, on August 14, 1896.

On August 14, 1896, I. R. Harkrader, sheriff, produced the body of said Wadley and made the following return:

To the Honorable Judge of the United States Circuit Court for the Fourth Circuit of the United States:

In the matter of the petition of H. G. Wadley and the writ of habeas corpus ad subjiciendum which issued from the clerk's office of the Circuit Court of the United States for the Western District of Virginia on the 11th day of August, 1896, and returnable on the 14th day of August, 1896, in the town of Wytheville, Wythe county, Virginia, this respondent, for answer to the said writ, says that he here produces the body of the said H. G. Wadley, the person named in the said petition for the said writ, in obedience to the command and direction thereof, and for further return and answer to said writ here avers that he detained in his custody the body of said H. G. Wadley, under and by virtue of an order of the county court of Wythe county, state of Virginia, entered in the case of *The Commonwealth of Virginia* v. said *H. G. Wadley* on the 10th day of August, 1896, upon an indictment for a felony pending in said court against said Wadley. So much of said order as relates to the custody of

said Wadley is here inserted in the words and figures following, to wit:

"And the court, of its own motion, required the prisoner to enter into bond, with security, in the penalty of $10,000, and until such bond is given he is committed to the custody of the jailer of this county."

And now respondent, having fully answered, prays that said writ may be discharged, and that he may be awarded his [159] *costs about his return to the writ aforesaid in this behalf expended; and, in duty bound, he will ever pray, etc. I. R. Harkrader,

Sheriff of Wythe County, Va., and as such Jailer Thereof.

To this return Wadley filed a reply in the following words:

The petitioner, H. G. Wadley, comes and says that for aught contained in the said return of I. R. Harkrader, sheriff of Wythe county, Virginia, to his petition for habeas corpus, that petitioner is entitled to his discharge because he denies, as contained in said return, said county court of Wythe county, Virginia, had any jurisdiction of said petitioner or the subject-matter of said indictment at the time it was found or now has such jurisdiction. Petitioner denies the validity of the order of commitment of said court of petitioner to said sheriff of 10th August, 1896, relied on in said return, and says that commitment is void, because said court has no jurisdiction to enter it, and also because the indictment upon which the petitioner was so committed was obtained in violation of the Constitution of the United States by the illegal and unconstitutional use of petitioner's deposition withdrawn from the files of this court and carried before and read to the said grand jury which found the said indictment, and hence said custody is unlawful, and petitioner is deprived illegally of his personal liberty."

He also filed the following demurrer:

"And now comes H. G. Wadley in his own proper person and by his counsel, Blair and Blair, and having heard the return of said sheriff read in answer to the writ of habeas corpus awarded in this cause, he says that the said return and the matters therein contained and set forth are not sufficient in law, and that the said return shows no legal ground for petitioner's detention by said sheriff, and that it is not sufficient answer to the matters of law and facts contained in said petition and exhibits; and this he is ready to verify; wherefore, for want of any sufficient return in this behalf, said H. G. Wadley, the petitioner, prays judgment [160] that the said *return be held insufficient; that an order be entered discharging petitioner from the custody of the said sheriff.

The record, as certified, discloses the following proceedings:

On this the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair. and this cause coming on to be heard upon the petition for a writ of habeas corpus and for order of discharge, with the exhibits filed with the said petition, and said petition being duly verified by the affidavit of the petitioner, and upon the writ of habeas corpus issued on said petition on the 11th of August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe county, and as such the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of said sheriff to said writ of habeas corpus, with the commitment filed therewith as the authority under which he acts, upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner to said return, and upon the record in said case of *H. G. Wadley* v. *Blount & Boynton et al.*, and upon the production of the body of said H. G. Wadley before this court by the said sheriff, the said sheriff appearing in person, and also by counsel, attorney general of Virginia, and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe county, Virginia, by virtue of an order of the judge thereof, committing him to custody in default of bail, entered on the 10th of August, 1896, on an indictment of the *Commonwealth of Virginia* v. *H. G. Wadley*, on a complaint of felony set up in the petition, notwithstanding the injunction and writ of this court, it is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe county, Virginia, and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court.

*And it is further ordered that the United [161] States marshal for the western district of Virginia serve a copy of this order upon I. R. Harkrader, sheriff of Wythe county, Virginia, and as such the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, judge of said court, and Robert Sayers, Jr., the commonwealth's attorney for Wythe county, Virginia.

15th August, 1896.

To I. C. Fowler, clerk of this court at Abingdon, Va.

Charles H. Simonton, Circuit Judge.

The attorney general of Virginia, in his proper person, states that from this order the commonwealth of Virginia desires to appeal.

Charles H. Simonton.

Thereafter, I. R. Harkrader, sheriff of Wythe county, Va., by R. Taylor Scott, attorney general of Virginia and counsel for petitioner, filed a petition for an appeal to the Supreme Court of the United States, which was, on October 12, 1896, allowed by the circuit judge of the circuit court for the western district of Virginia.

Mr. **A. J. Montague,** Attorney General of Virginia, for appellant.

Mr. **F. S. Blair** for appellee.

[161] *Mr. Justice **Shiras** delivered the opinion of the court:

The appellee has moved the dismissal of the appeal because, as is alleged, the order discharging the prisoner on the writ of habeas corpus was made by a judge, and not by a court; because the order, whether made by a judge or a court, was not final, as the prisoner was discharged only "pending said injunction," and was held subject to the further order of the United States circuit court, and because there was no certificate from the court below as to the distinct question of jurisdiction involved.

[162] *It is, indeed, true, as was decided in *Carper* v. *Fitzgerald*, 121 U. S. 87 [30: 882], that no appeal lies to this court from an order of a circuit judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record discloses that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within *Re Palliser*, 136 U. S. 262 [34: 517].

We see no merit in the suggestion that the order discharging the prisoner was not a final judgment. It certainly, if valid, took away the custody of the prisoner from the state court, and put an end to his imprisonment under the process of that court.

That the jurisdiction of the circuit court was put in issue by the petition for the writ of habeas corpus and the return thereto, is quite evident. The contention made, that such question has not been presented to us by a sufficiently explicit certificate, we need not consider, for the case plainly involves the application of the Constitution of the United States. The division and apportionment of judicial power made by that instrument left to the states the right to make and enforce their own criminal laws. And while it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States, it is also its duty to guard the states from any encroachment upon their reserved rights by the general government or the courts thereof. As we shall presently see, this is the nature of the question raised by this record.

It is doubtless true, as urged by the appellee's counsel, that an assignment of error cannot import into a cause questions of jurisdiction which the record does not show distinctly raised and passed on in the court below; but we think that this record does disclose that the assignments of error, which were embodied in the prayer for an appeal, set up distinctly the very questions of jurisdiction which were contained in the record and passed by the trial court.

[163] *The further contention on behalf of the appellee, that the record does not show that the appeal as allowed was ever "filed" in the United States circuit court, and that therefore this court is without jurisdiction to entertain the case, we cannot accept, because we think the record, as certified to us, distinctly shows that the petition for appeal was filed on October 8, 1896; that the appeal was allowed on October 12, 1896; that the bond, containing a recital that the said Harkrader, sheriff, had "obtained an appeal and filed a copy thereof in the clerk's office of said court," was filed and approved on October 12, 1896; and that the citation was served and duly filed. This is a plain showing that the appeal as allowed was duly "filed." It is sufficient to cite *Credit Co.* v. *Arkansas Central Railway Co.* 128 U. S. 261 [32: 450], where it was said: "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court. This is done by filing the papers, *viz.*, the petition and allowance of appeal (where there is such petition and allowance), the appeal bond, and the citation. In *Brandies* v. *Cochrane*, 105 U. S. 262 [26: 989], it was held that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a sufficient compliance with the law requiring the appeal to be filed in the clerk's office."

We now come to the question, thus solely presented for our consideration, Had the circuit court of the United States authority to issue a writ of habeas corpus to take and discharge a prisoner from the custody of the state court when proceeding under a state statute not repugnant to the Constitution or laws of the United States, under which the prisoner had been indicted for an offense against the laws of the state?

Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: First. When a state court has entered upon the trial of a *criminal case, under a statute not [164]
repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a writ of habeas corpus. *Andrews* v. *Swartz*, 156 U. S. 272 [39: 422]; *Bergmann* v. *Baker*, 157 U. S. 655 [39: 845]. Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases. *Freeman* v. *Howe*, 24 How. 450 [16:749]; *Buck* v. *Colbath*, 3 Wall. 334 [18: 257]; *Taylor* v. *Taintor*, 16 Wall. 366 [21: 287]; *Ex parte Crouch*, 112 U. S. 178 [28: 690].

In the present case it is not contended that the state statute, under which the county court of Wythe county was proceeding, was repugnant to the Constitution or any law of the United States, or that the state did not have jurisdiction of the offense charged and of the person of the accused.

But it is claimed, under the second of the above propositions, that as the circuit court of the United States had obtained prior and therefore exclusive jurisdiction of the affairs and assets of the Wytheville Banking & Insurance Company, a corporation of the state of Virginia, by virtue of two suits in equity brought in said court in October, 1893, by creditors of the said banking company, in which suits a receiver to take charge of the property of the bank, and a master to take all necessary accounts, had been appointed, it followed that the state court had no jurisdiction, pending those suits, to proceed by way of indictment and trial against an officer for the offense of embezzlement, as created and defined by a valid statute of the state of Virginia. For the state court to so proceed, it is claimed, constituted an interference with the Federal court in the exercise of its jurisdiction; and that hence it was competent for the United States court to grant an injunction against the prosecu-
[165]tion of the *criminal case and to release the prisoner by a writ of habeas corpus directed to the sheriff.

It is not denied, on behalf of the appellee, that by § 720 of the Revised Statutes it is enacted that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction may be authorized by any law relating to proceedings in bankruptcy. Nor do we understand that it is denied that, apart from the effect of § 720, the general rule, both in England and in this country, is that courts of equity have no jurisdiction, unless expressly granted by statute, over the prosecution, the punishment or pardon of crimes and misdemeanors, or over the appointment and removal of public officers and that to assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. *Re Sawyer*, 124 U. S. 200 [31: 402].

But, as respects section 720, it is argued that it must be read in connection with section 716, which provides that "the Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law;" and the cases of *French* v. *Hay*, 22 Wall. 253 [22: 858], and *Dietsch* v. *Huidekoper*, 103 U. S. 494 [26: 497], are cited to the alleged effect that the prohibition in section 720 does not apply where the jurisdiction of a Federal court has first attached.

The cited cases were of ancillary bills, and were in substance proceedings in the Federal courts to enforce their own judgments by preventing the defeated parties from wresting replevied property from the plaintiffs in replevin, who by the final judgments were entitled to it.

As was said in *Dietsch* v. *Huidekoper:* "A court of the United States is not prevented from enforcing its own judgments *by the [166]
statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Dietsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin, which had been pending and was finally determined in the United States circuit court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented. The bill in the case was filed for that purpose and that only."

Nor was there any attempt made in those cases to enjoin the state courts or any state officers engaged in the enforcement of any judgment or order of a state court.

It is further contended that when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court, by a bill in equity, as to the matter or right involved, a bill for an injunction will lie to prevent interference by criminal procedure in another court; and the decision of this court in *Re Sawyer* 124 U. S. 200 [31: 402], is cited, where Mr. Justice Gray said: "Modern decisions in England, by eminent equity judges, concur in holding that a court in chancery has no power to restrain criminal proceedings *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*" So, also, the case of *The Mayor of York* v. *Pilkington*, 2 Atk. 302, is cited, and in that case, where plaintiffs in a chancery bill and cross bill to establish in equity their sole right of fishing in a certain stream, while their bill was still pending, caused the defendant to be indicted at the York criminal court for a breach of the peace for such fishing, Lord Hardwicke awarded an injunction to restrain the plaintiffs from all further criminal proceedings in other courts, and said that if a plaintiff filed a bill in equity against a defendant for a right to land and a right to quiet the possession thereof, and after that he had preferred an indictment against such defendant for a forcible entry into said land, the court of equity would certainly stop the indictment by an injunction.

But the observations quoted had reference to cases where *the same rights were involved [167]
in the civil and criminal cases, and where the legal question involved was the same. Thus the case of the fishery, both in the civil and the criminal proceeding, involved the right of defendant to fish in certain waters where the plaintiff claimed an exclusive right, and, as no actual breach of the peace was alleged, the public was not concerned. And when, in the latter case of *Lord Montague* v. *Dudman*, 2 Ves. Sr. 396, where an injunction was prayed for to stay proceedings in a mandamus, his ruling in *Mayor of York* v. *Pilkington* was cited, Lord Hardwicke said: "This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an in-

formation. As to *Mayor of York* v. *Pilkington*, the court granted an order to stay proceedings because the question of right was depending in the court, in order to determine the right, and therefore it was reasonable they should not proceed by action or indictment until it was determined."

If *any* case could be supposed in which a court of equity might look behind the formal proceeding, in the name of the state, to see that its promoters are parties to the case pending in the court of equity, using the process of the criminal court, not to enforce the rights of the public, but to coerce the defendant to surrender in the civil case, it is sufficient to say that, in the present case, the indictment whose prosecution the circuit court sought to stay, appears to have been regularly found, and to assert an offense against a law of the state, the validity of which is not assailed.

The fallacy in the argument of the appellee in the present case is in the assumption that the *same right* was involved in the criminal case in the state court and in the equity case pending in the Federal court. But it is obvious that the civil liability of Wadley to indemnify the plaintiffs in the equity suits, by reason of losses occasioned by his misconduct as an officer of the bank, is another and very different question from his criminal liability to the commonwealth of Virginia for embezzlement of funds of the bank. There might well be different conclusions reached in the two courts. A jury in the criminal case might, properly
[168] enough, conclude that, however *foolish and unjustifiable the defendant's conduct may have been, he was not guilty of intentional wrong. The court, in the equity case, might rule that the defendant's disregard of the ordinary rules of good sense and management was so flagrant as to create a civil liability to those thereby injured, without viewing him as a criminal worthy of imprisonment. The verdict and judgment in the criminal case, whether for or against the accused, could not be pleaded as *res judicata* in the equity suits. Nor could the conclusion of the court in equity as to the civil liability of Wadley, be pleadable either for or against him in the trial of the criminal case. Surely if, by reason of a compromise or of failure of proof, the court in equity made no decree against Wadley, the commonwealth of Virginia would not be thereby estopped from asserting his delinquencies under the criminal laws of the state. Nor would the court in equity be prevented, by a favorable verdict and judgment rendered in the state court, from adjudging a liability to persons injured by the defendant's official misbehavior.

And this reasoning is still more cogent where the respective courts belong one to the state and the other to the Federal system.

Embezzlement by an officer of a bank organized under a state statute is not an offense which can be inquired into or punished by a Federal court. Such an offense is against the authority and laws of the state. The judicial power granted to their courts by the Constitution of the United States does not cover such a case. The circuit court of the United States for the western district of Virginia could not, in the first instance, have taken jurisdiction of the offense charged in the indictment, nor can it, by a bill in equity, withdraw the case from the state court, or suspend or stay its proceedings.

In both of the injunctions pleaded in answer to the return of the sheriff the attorney of the commonwealth of Virginia for Wythe county was named as such, and was thereby prohibited from all further prosecution of the indictment pending in the county court of Wythe county in the name of the *Commonwealth of Virginia* v. *H. G. Wadley*, charged with *embezzlement of the funds of [169]
the Wytheville Insurance & Banking Company.

No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia, and the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in *Re Ayres*, 123 U. S. 443, 497 [31: 216, 227]: "How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

It is further contended, on behalf of the appellee, that even if the injunctions in the equity causes, restraining the proceedings in the county court, were erroneous, they could not be attacked collaterally by this appeal in the habeas corpus case. The obvious answer to this is that this court is dealing only with the question of the jurisdiction of the court below. To the return of the sheriff, justifying his detention of the prisoner by setting up the order of the county court, the petitioner, Wadley, by way of reply, pleaded the injunctions. This, of course, raised the question of the validity of those injunctions. If they were void, they conferred no jurisdiction upon the circuit court to enforce them as against the officers and process of the state court.

Again, it is urged that the indictment had been improperly found by reason of the admission before the grand jury of Wadley's deposition in the civil case. But, even if what passed in the grand jury room can be inquired into on a writ of habeas corpus, and this we do not concede, the remedy for *such [170]
misconduct must be sought in the court having control and jurisdiction over the proceedings.

So, too, any offense to the dignity or authority of the circuit court, by the misuse of its records or papers, by its suitors or

their counsel, can be corrected by that court without extending its action so as to include the state court or its officers.

We are of opinion, then, that a court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain by injunction proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused. Much more are we of opinion that a circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to enforce the criminal laws of such state.

Therefore the judgment of the circuit court of the United States for the western district of Virginia, discharging said H. G. Wadley from the custody of the said I. R. Harkrader, sheriff of Wythe county, Virginia, and from the custody of said county court of Wythe county is hereby

Reversed and the cause is remanded to that court with directions to restore the custody of said W. G. Wadley to the sheriff of Wythe County, Virginia.

---

[171] TERRITORY OF NEW MEXICO, *Appt.*,
v.
UNITED STATES TRUST COMPANY of New York, and C. W. Smith, Receiver of the Property of the Atlantic & Pacific Railroad Company.

(See S. C. Reporter's ed. 171-186.)

Exemption from taxation of a right of way of a railroad.

The right of way through the public lands for 100 feet each side of a railroad, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, which is exempt from taxation within the territories of the United States, under the act of Congress of July 27, 1866, does not mean the right of passage merely, but is real estate of corporeal quality, and the exemption includes all that is erected upon it.

[No. 106.]

Argued October 25, 26, 1898. Decided December 5, 1898.

APPEAL from the decree of the Supreme Court of the Territory of New Mexico reversing an order of the District Court for Bernalillo County, that the receiver of the Atlantic & Pacific Railroad Company pay taxes due upon station houses and other improvements in said county and decreeing that said assessments were illegal and void. *Decree affirmed.*

Statement by Mr. Justice **McKenna:**

This case was begun by the filing in the district court for Bernalillo county, in the territory of New Mexico, by the district attorney for the territory, of an intervening petition on behalf of the territory praying for an order against the receiver of the Atlantic & Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894, and 1895.

The case was submitted upon the following agreed statement of facts:

"For the purposes of the hearing to be had upon the intervening petition of the territory of New Mexico, in the above-entitled cause, and answers thereto of C. W. Smith, the receiver of the Atlantic & Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by *and between said above-named parties, that [172]
the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

"That on and prior to January 1, 1892, the Atlantic & Pacific Railroad Company, under the provisions of its charter, definitely located its line of road and right of way through Bernalillo county, which said right of way so located involved all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water stations. That upon said right of way so located through the city of Albuquerque, in said county, was definitely located necessary grounds for station buildings, workshops, depots, machine shops, side tracks, turn tables and water stations; and there was also located upon said right of way at the Atlantic & Pacific Junction at Chaves or Mitchell, at Coolidge, at Wingate, at Gallup, and at Manuelito, necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables, and water stations.

"That thereafterwards and prior to 1893 there was built and constructed upon said right of way by the Atlantic & Pacific Railroad Company from a point of junction with the Atchison, Topeka, & Sante Fé Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way, from said junction point to the Colorado river, in the territory of Arizona; that the Atlantic & Pacific Railroad Company has, under an agreement with the Atchison, Topeka & Santa Fé Railroad Company, occupied and used the tracks of the last-named company between the junction of the two railroads at Isleta and the city of Albuquerque as and for the railroad of the Atlantic & Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself; or, in other words, under contract between the two companies the railroad of the Atchison, Topeka, & Santa Fé Railroad Company through the city of Albuquerque to the junction at Isleta,

a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., aforesaid, of the At-
[173] lantic & Pacific Railroad Company at *Albuquerque; that the right of way so located by the Atlantic & Pacific Railroad Company and upon which it built its railroad, as aforesaid, runs through Bernalillo county, and is situated in Bernalillo county as follows:

"Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction 4 miles 3,780 feet to the division line between Bernalillo county and Valencia county, and then after crossing a portion of Valencia county at a point known as station 5,247 it again runs through Bernalillo county 68 miles and 44 feet to the west line of the county of Bernalillo, being the west line of the territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is of the width of 200 feet, being 100 feet on each side of the center of the railroad track located thereon.

"That in due time the former receivers of the property of the Atlantic & Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo county as property belonging to said railroad company, taxable in said county, certain property, which was and is described in said returns as follows, to wit:

"List of personal property belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic & Pacific Railroad Company (western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico.

"The line of its road running through the counties of Bernalillo and Valencia in said territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai, and Mojave, in the territory of Arizona, to the eastern boundary line of the state of California; thence through the counties of San Bernardino and Kern, in said state, to the western end of said line, and its terminus at Mojave, in said county of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said territory of New Mexico being 166.6, of which 73.142 are in Bernalillo county, and 93.458 miles are in Valencia county.

"And the receivers of the property of said
[174] company *make a full report of all its personal property as follows, to wit:

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat, and coal cars, push cars, hand cars, and all other equipments owned, possessed, or used by said receivers or said company upon the entire line aforesaid................	$452,960
Track tools, and all other personal property not having its situs or domicil in some other state or territory, including office and station furniture, law library, books, stationery, supplies and material, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup, and Manuelito...	78,000
Personal property within the city limits of Albuquerque................	200 000
Personal property within the city limits of Gallup......................	5,000

"That the above and foregoing was all the property returned for taxation in Bernalillo county by said receivers or by the railroad company itself; and that the same was made as the assignment of the property of said company subject to taxation in said county for the year A. D. 1895; that the county assessor of Bernalillo county in the year 1895, under the direction of the board of county commissioners of said county, placed on the assessment roll an assessment of property against the Atlantic & Pacific Railroad Company for the year 1893. A true and correct copy of the assessment roll showing such assessment so placed thereon is filed with this as a part hereof, and as 'Exhibit 1,' which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said board, placed upon said assessment roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by 'Exhibit 2,' herewith filed and made a part hereof.

"That the said assessor at the same time placed upon said *assessment roll property [175]
claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which said assessment roll, with said last-named assessment placed upon it, is shown by 'Exhibit 3,' hereto attached and made a part hereof and filed herewith.

"That these exhibits show precisely the descriptions of property entered by the assessor, the penalties added, and the values and also the taxes levied thereon. 'Exhibit 3' also shows the description of the property as returned by the receivers.

"That all the property so placed upon the assessment roll by the assessor, outside of that returned by the receivers, was placed upon said assessment roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment roll by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon situated on the right of way of the Atlantic & Pacific Railroad Company in Bernalillo county, in the territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic & Pacific Railroad Company under its charter and in accordance with the provisions thereof; and the machine shops, station buildings, water tanks, section houses, and other buildings of like character connected with and a part of the machinery used in the operation of said railroad; that each and every item of property described in the assessments so placed upon the said assessment roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic & Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops,

turntables, side tracks, switches, water tanks, station buildings, and other buildings of the same class and character actually used and needed in the operation of said railroad, and that no part of the same was, at the time of the placing of said assessment upon said
[176]assessment rolls by the *assessors, detached from the actual right of way and station grounds of said railroad company; but, on the contrary, was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27, 1866, known as the charter of the Atlantic & Pacific Railroad Company, the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

"That during the year 1893 there were no receivers in possession of said property, and that said railroad was being operated by the railroad company itself, and, if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo county, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

"That at Albuquerque, upon the reservations and station grounds, there were situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the western division of the Atlantic & Pacific Railroad Company, and, since the appointment of receivers, of the receivers operating the same.

"That the assessor, in placing each of these three assessments upon the assessment rolls as stated, added to the actual value of the property one fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

"That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds, under the honest belief that the same constituted a part of the right of way, and was exempt from taxation."

Subsequently, the case came on to be heard, upon the intervening petition of the
[177]territory and the answer thereto *of the United States Trust Company and of the receiver, C. W. Smith, and the agreed statement of facts. Upon the hearing the judge of the district court ordered the receiver to pay to the treasurer of the county of Bernalillo the sum of forty-three thousand two hundred and fifty-four dollars and seventy cents ($43,254.70), the amount ascertained by a special master to be the aggregate of the taxes levied upon the additional assessments and penalties. An appeal was taken from this order by the United States Trust Company, and also by the receiver. C. W. Smith, who had obtained from the court permission to take such an appeal. The order appealed from was reversed upon hearing before the supreme court of the territory, the court determining that the additional assessments placed upon the rolls were illegal and void. An application was made for a rehearing, which the court denied, and an appeal was taken to this court.

The sections of the act of July 27, 1866, with which we are concerned, are inserted in the margin;† also sections 2807, 2822, 2834,

†Sec. 1. . . . And said corporation is hereby authorized and empowered to lay out, locate, and construct, furnish, maintain, and enjoy a contiuuous railroad and telegraph line, with the appurtenances, namely, beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth.

Sec. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction *of a railroad [178]
and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States. . . .

Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other

and 2835 of the*Compiled Laws of 1884 of [180]
New Mexico relating to taxation.‡

Mr. **Frank W. Clancy,** *Felix H. Lester,* and *Thomas N. Wilkerson* for appellant.

Messrs. **Victor Morawetz, C. N. Sterry,** *E. D. Kenna,* and *Robert Dunlap* for appellees.

*Mr. Justice **McKenna** delivered the opin- [181]
ion of the court:

The right of way is granted to the extent of two hundred feet on each side of the railroad including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase "the right of way?" A mere right of passage, says appellant. *Per contra,* appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted that all that was attached to it became part of it, and partook of its exemption from taxation.

---

claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers. . . .

Sec. 5. *And be it further enacted,* That said Atlantic & Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. . . .

Sec. 7. *And be it further enacted,* That the said Atlantic & Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts,
[179]*standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its roadbed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. . . .

Sec. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic & Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

Sec. 9. *And be it further enacted,* That the United States make the several conditional grants herein, and that the said Atlantic & Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

Sec. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Atlantic & Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

Sec. 11. *And be it further enacted,* That said Atlantic & Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

. . . .

Sec. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend, or repeal this act.

‡2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

First. The term "real estate" includes all lands within the territory to which title or right to title has been acquired; all mines, minerals, and quarries, in and under the land, and all rights and privileges appertaining thereto and improvements.

Second. The term "improvements" includes all buildings, structures, fixtures, and fences erected upon or fixed to land, whether title has been acquired to said land or not.

Third. The term "personal property" includes everything which is subject of ownership not included within the term "real estate."

Fourth. The term "credit" includes every

To support its contention, appellant urges the technical meaning of the phrase "right of way," and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing—not as an abstract right. It is to be two hundred feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad.

The phrase "right of way," besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private
[182] purposes *and another thing in a grant to a railroad for public purposes—as different as the purposes and uses and necessities respectively are.

In *Keener* v. *Union Pacific Railroad Co.* 31 Fed. Rep. 128, Mr. Justice Brewer defined the words "right of way" as follows: "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross—a right of crossing, a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed."

Mr. Justice Blatchford said in *Joy* v. *St. Louis*, 138 U. S. 44 [34:857]: "Now the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; *and it is also used to describe that strip* of land which railroad companies take, upon which to construct their roadbed." That is, the land itself—not a right of passage over it. So, this court in *Missouri, Kansas & Texas Railway Co.* v. *Roberts*, 152 U. S. 144 [38: 377], passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that state title could be tried in ejectment. Title was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

Washburn in his work on Easements, on page 10, says: "Whether the thing granted be an easement in land or the land itself may depend upon the nature and use of the thing granted." To sustain this view the learned author cites *Jamaica Pond Aqueduct Corporation* v. *Chandler and others*, 9 Allen, 159. In that case the court said: "Whenever a grant is made of a *right or easement [183]
in lands which fall within the class sometimes described as 'non-continuous'—that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land—the reasonable interpretation is, that an easement in the soil, and not the fee, is intended to be conveyed. Among the most prominent of this class of easements is a way." An ordinary way, of course, the court meant, one the use of which would be non-continuous—only intermittent and occasional; but a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land, might require the fee for its enjoyment—certainly would require more than a mere right of passage. "Unlike the use of a private way—that is,

claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected for services to be rendered, are not included in the above term.

2822. The assessor is required, between the first day in March and the first day in May of each year, to ascertain the names of all taxable inhabitants and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list showing separately:

First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier, or managing agent.

Second. The county in which such property is situated, or in which it is liable to taxation.

Third. A description by legal subdivisions or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufacture; number of horses, mules, cattle, sheep, swine, and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

2834. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headlines, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to "unknown owners" shall be entered.

2835. Each tract of land shall be valued and assessed separately except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

discontinuous—the use of land condemned by a railroad company is perpetual and continuous." *New York S. & W. R. R. Co.* v. *Trimmer*, 53 N. J. L. 3.

But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

In *Smith et al.* v. *Hall et al.* [103 Iowa, 95], 72 N. W. Rep. 427, the supreme court of Iowa says, speaking of the right of way of a railroad: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine."

"The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston & Me. R. R. Co.* 2 Gray, 580.

[184] *In *Southern Pacific Co.* v. *Burr*, 86 Cal. 279, the supreme court of California sustained an action of ejectment for land constituting a part of the right of way granted to the Central Pacific Railroad by the act of July 1, 1862, by language similar to the grant in the case at bar.

Distinguishing the case from *Wood* v. *Truckee Turnpike Co.* 24 Cal. 474, in which it was held that "a road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments," the court said: "We think that case plainly distinguishable from this. Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." The court quoted and approved the views expressed in the *City of Winona* v. *Huff*, 11 Minn. 119, that for a mere easement perhaps an action of ejectment would not lie; but wherever a right of entry exists and the interest is tangible so that possession can be delivered, an action of ejectment will lie." The same distinction was made in *New York S. & W. R. R. Co.* v. *Trimmer*, *supra*, and the court said that if the interest of the railroad company was a naked right of way it would constitute no such right of possession of the land itself as would sustain the action; for such a right would be an incorporeal one upon which there could be no entry, nor could possession of it be given under an habere facias possessionem. In this case it was held that the interest taken by the railroad was not an easement.

The interest granted by the statute to the Atlantic & *Pacific Railroad Company, [185]
therefore, is real estate of corporeal quality, and the principles of such apply. One of these, and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased (*Galveston H. & H. Railroad Co.* v. *Cowdrey*, 11 Wall. 459 [20: 199]; *United States* v. *New Orleans Railroad Co.* 12 Wall. 362 [20: 434]; *Thompson* v. *White Water Valley R. Co.* 132 U. S. 68 [33: 256]), even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same (*Porter* v. *Pittsburg Steel Bessemer Co.* 122 U. S. 267 [30: 1210] and cases cited); in determining the relation of the rails to the right of way, *Joy et al.* v. *City of St. Louis*, 138 U. S. 1 [34: 843]. In this case, Mr. Justice Blatchford said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way." See also *Palmer* v. *Forbes et al.* 23 Ill. 301; *Hunt* v. *Bay State Iron Co. et al.* 97 Mass. 279; *City of New Haven* v. *Fair Haven & W. R. R. Co.* 38 Conn. 422.

The principle has also illustrations in cases of taxation. *People* [*Dunkirk & F. R. Co.*] v. *Cassity*, 46 N. Y. 46; *Appeal Tax Court of Baltimore City* v. *The Baltimore Cemetery Co.* 50 Md. 432; *Osborne* v. *Humphrey*, 7 Conn. 335; *Parker* v. *Redfield*, 10 Conn. 490; *Lehigh Coal and Navigation Co.* v. *Northampton County*, 8 Watts & S. 334; *Chicago, Milwaukee & St. P. R. R. Co.* v. *Crawford County Supers.* 48 Wis. 666; *Richmond* v. *Richmond & D. R. R. Co.* 21 Gratt. 604; *Mayor etc. of Baltimore* v. *Baltimore & O. R. R. Co.* 6 Gill, 288 [48 Am. Dec. 531]; [*Osborn* v. *New York & N. H. R. Co.*] 40 Conn. 491; [*Richmond & D. R. Co.* v. *Alamance Comrs.*] 84 N. C. 504; *Worcester* v. *Western Railroad Corporation*, 4 Met. 564.

It is urged, however, that the rule of construction declared in *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 [29: 770], and *the cases there cited and approved, and re- [186]
peated in *Yazoo & M. Valley Railroad Co.* v. *Thomas*, 132 U. S. 184 [33: 306]; *Wilmington & W. Railroad Co.* v. *Alsbrook*, 146 U. S. 294 [36: 978]; *Keokuk & W. Railroad Co.* v. *Missouri*, 152 U. S. 306 [38: 453]; *Norfolk & Western R. R. Co.* v. *Pen-*

dleton, 156 U. S. 667 [39: 574]; and *Covington & L. Turnpike Road Co.* v. *Sandford,* 164 U. S. 578 [41: 560],—determines in favor of appellant's contention. That we do not think so is probably sufficiently indicated, but we cite the cases to preclude the thought that they have been overlooked, or that the rule announced by them is questioned. Indeed, we regard it as salutary, and not impaired by our decision, which simply rests on the terms of the statute.

The decree is affirmed.

TERRITORY OF NEW MEXICO, *Appt.,*
v.
UNITED STATES TRUST COMPANY of New York *et al.*

SAME
v.
SAME.

(See S. C. Reporter's ed. 186.)

[Nos. 169, 170.]

APPEALS from the Supreme Court of the Territory of New Mexico.

Mr. Frank W. Clancy for appellant.

Messrs. Victor Morawctz, C. N. Sterry, E. D. Kenna, and *Robert Dunlap* for appellees.

On the authority of the foregoing opinion the decrees in these cases are *affirmed.*

THE ELFRIDA.†

(See S. C. Reporter's ed. 186–206.)

Salvage contract, when valid—contract to pay one fourth the value of the vessel—contract as to steamship Elfrida, valid.

1. A salvage contract for stipulated compensation, dependent upon success within a limited time, although the amount may be much larger than a mere *quantum meruit,* will not be set aside unless corruptly entered into, or made under fraudulent representations, a clear mistake, or suppression of important facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or unless its enforcement would be contrary to equity and good conscience.
2. An agreement to pay one fourth of the value of a vessel as salvage, although it gives a very large compensation for the work which actually proves necessary to be done, will not be considered unconscionable or exorbitant, when it was made after a refusal by the master of an offer to do the work for such salvage as the court should award, and after receiving bids and full advice from the owners of the vessel and the underwriters' agent, who came to the vessel and saw her situation, and when the vessel, though in serious danger, was in fact never in imminent peril.
3. The salvage contract between the steamship Elfrida and its owners of the one part, and Charles Clarke & Company of the other part, by which the former agreed to pay the latter $22,000 to release the Elfrida, then stranded near the mouth of the Brazos river, was not of such character or made under such circumstances as to require the court to relieve the Elfrida against the payment of such stipulated compensation.

[No. 60.]

Argued November 10, 11, 1898. Decided December 12, 1898.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree of that court reversing the decree of the District Court of the United States for the Eastern District of Texas in favor of the libellant Charles Clarke & Co., against the British Steamship Elfrida for $22,000 and interest, and remanding the case with instructions to enter a decree in favor of libellants for $10,000, with interest at 6 per cent. Decree of the Circuit Court of Appeals *reversed,* and the case remanded to the District Court for the Eastern District of Texas, with directions to execute its original decree.

See same case below, 41 U. S. App. 585.

Statement by Mr. Justice **Brown:**

*This was a libel *in rem* by the firm of [187] Charles Clarke & Co., of Galveston, Texas, against the British steamship Elfrida, to recover the sum of $22,000, with interest and costs, claimed to be due them for services rendered in the performance of a salvage contract with the master, to release the Elfrida, then stranded near the mouth of the Brazos river.

The principal averments of the answer were in substance that the agreement was signed by the master under a mutual mistake of fact, or by mistake on his part, which libellants took advantage of, as to the danger in which the vessel was, and that it was improvidently made for an excessive compensation, *without a proper understand- [188] ing by him of the vessel's alleged freedom from danger; that the master had been prevented from carrying out his instructions to accept a tender made, if lower impossible, by information of the cable being conveyed to the salvors before the master saw it; that the parties were not upon an equal footing; that libellants made an unreasonable bargain with the master because of the stress of the situation and that of his vessel, and acted collusively with other salvors in obtaining from him the agreement.

On Friday, October 5, 1894, the Elfrida, a steel steamship of 1454 tons register, 290 feet long, 38 feet in width, and drawing 11 feet 10 inches, bound for the port of Velasco, Texas, in ballast, grounded on the bar between the jetties which extend from either bank of the river, about a mile into the Gulf, the outer end of these jetties, for a distance of a thousand feet or more, being submerged. The heel of the ship touched, there being but five inches between the bottom and the bar, and an easterly wind swung her bow against the west jetty. The captain ran out a kedge from the starboard bow, hove taut with the windlass, put her engine full speed astern, but could not move the ship. The

†The docket title of this case is "Charles Clarke and Robert P. Clarke, Petitioners, v. The Steamship Elfrida, etc."

wind and sea increased during the afternoon and evening, while the ship was straining and bumping heavily. The weather moderated somewhat on the following day, and the same efforts were continued unsuccessfully until the evening, when the sea rose, carrying her over the submerged outer end of the jetty, and some distance farther shoreward on the beach. She brought up that night about a cable's length to the west of the west jetty. That part of the jetty which was above high water projected seaward beyond her stern and sheltered her from easterly winds. She lay parallel with the jetty about four or five hundred feet from the beach, head on, and about one thousand feet from water of sufficient depth to float her. The shore at this point is very flat, the bottom consisting of a layer of quicksand about ten feet deep. The steamer settled in the quicksand to her normal draft, rocking and
[189]moving in it whenever there was a high *sea. She lay in nine feet of water at high tide. The weather continued generally favorable from the 7th to the 17th, with occasional gales and high seas. The ship drifted somewhat further on the beach, but efforts to relieve her by her own resources seem to have been practically abandoned.

On Tuesday, October 9, the master sent the following letter to the libellants:

Velasco, Oct. 9, 1894.

Capt. Chas. Clarke, *re S. S. Elfrida.*

Dear Sir: Please tender for to float and place in a place of safety, say Galveston, where her bottom can be examined, furnishing diver and his apparatus. Also to furnish all material and labor in floating said steamship Elfrida, also time required. Reply at your earliest convenience under seal to Jas. Sorely, Lloyds' agent, or myself.

No cure, no pay.

Yours truly,

By B. Burgess, Master.

P. S.—A convenient time to be laid to get the ship off, and if at the expiration of the time the vessel is still aground, all claim on this contract to cease and to be null and void.

B. Burgess, Master.

In reply to this libellants submitted a tender, offering to perform the service for the sum of $22,000, which was accepted by the advice of Lloyds' agent, who was on board the vessel at the time, and with the consent of Pyman, Bell, & Co., of Newcastle-on-Tyne, owners of the Elfrida.

The following contract, which forms the basis of the present suit, was thereupon entered into:

The State of Texas, }
County of Brazoria. }

This agreement made and entered into this 15th day of October, 1894, between the steamship Elfrida and the owners thereof, represented herein by B. Burgess, master of said steamship, as party of the first part, and Charles Clarke & Co., of Galveston, Texas, as party of the second part.

Witnesseth, that for and in consideration
[190]of the covenants *and agreements herein contained on the part of the said party of the first part, to be kept and performed, the said party of the second part hereby agrees and binds himself, his administrators and assigns, to float and place in a safe anchorage, Quintana or Galveston, as directed, the S. S. Elfrida, which is now stranded west of and near to the west jetty at the mouth of the Brazos river, in said county and state; to furnish all labor and material at the cost of said party of the second part, and to furnish diver and necessary apparatus to survey or examine the bottom of said steamship, and to complete the same within twenty-one (21) days from date hereof.

The said party of the first part agrees to pay to the said party of the second part for such service, *i. e.*, when he shall have successfully floated said ship, as above set forth, the sum of twenty-two thousand dolllars (22,000). The said party of the first part, however, reserving the right hereby to abandon the ship to and in favor of the said second party in lieu of the amount of $22,000 agreed to be paid as aforesaid.

It is further understood and agreed by and between the parties hereto that a failure to float and place in a position of safety, as above stated, said steamship within the time hereinbefore specified, to wit, twenty-one days from date hereof, that said party of the second part shall receive no compensation whatever from said first party for work performed, labor, tools, or appliances furnished.

Anything that may be discharged to enable vessel to float shall be replaced when she is in a position of safey. It is also agreed and understood that the use of crew and engine shall be at the use and disposal of said party.

Witness the hand of B. Burgess, master of the steamship Elfrida, for himself, said ship and the owners, party of the first part, and the hand of Charles Clarke & Co., party of the second part, this 15th day of October, 1894.

Benj. Burgess.
Chas. Clarke & Co.

Witnesses:
M. P. Morrissey.
J. H. Durkie,
Master S. S. Lizzie, of Whitby.

*The day before the contract was signed, [191]
the libellants, having learned that their tender for the work had been accepted, hired the schooner Louis Dolsen, of fifteen tons, for which they paid $100, to take their plant to Galveston in tow of their tug Josephine. They also hired a large force of men, procured nearly a month's supplies, cables, chains, anchors, two tug-boats, two lighters, and two schooners, fully manned and equipped. Some of this plant belonged to them, but the schooners and lighters and their equipments were hired. For one of the lighters they agreed to pay $6,500 if she should be lost. Their entire outfit was worth from $30,000 to $50,000. On arriving at Velasco on the same or following day, they engaged a derrick lighter for use in laying the anchors, and on the two following days, the 16th and

17th, the salvors were at work planting the anchors and connecting cables from them to the winches of the ship. This work was completed during the afternoon of the 17th, the water ballast pumped out, when the Elfrida's engines, winches, and windlass were started by her own steam, and in less than half an hour she began to move herself off. She went slowly for the distance of about a thousand feet when she floated clear, but was carried by the current against the west jetty. The libellant's tug then for the first time took hold of her and towed her away from the jetty, and at 7.40 P. M., four hours after the work of hauling her off was begun, she was free and clear of everything, and put to sea under control of the pilot. Subsequent examination of her bottom, in the dry dock at Newport News, showed that she was wholly uninjured except for a slight indentation about a foot long in the bilge, which was probably caused by contact with the jetty. At the time she was stranded she was insured for the sum of £18,000, subsequently reduced to £16,000.

Upon a full hearing upon pleadings and proofs, the district court entered a final decree in favor of the libellants for the stipulated sum of $22,000, with interest and costs. Claimants appealed to the circuit court of appeals, which reversed the decree of the district court, one judge dissenting,
[192]*and remanded the case, with instructions to enter a decree in favor of libellants for the sum of $10,000, with interest at six per cent, 41 U. S. App. 585. A petition for rehearing having been denied, libellant applied to this court for a writ of certiorari, which was granted.

Messrs. **James B. Stubbs**, *Charles J. Stubbs*, *Joseph H. Wilson*, and *Henry M. Earle* for libellants and petitioners.

Mr. **J. Parker Kirlin** for appellees and respondents.

[192] *Mr. Justice **Brown** delivered the opinion of the court:

But a single question is presented by the record in this case: Was the contract with the libellants of such a character, or made under such circumstances, as required the court to relieve the Elfrida against the payment of the stipulated compensation?

We are all of opinion that this question must be answered in the negative. Salvage services are either (1) voluntary, wherein the compensation is dependent upon success; (2) rendered under a contract for a *per diem* or *per horam* wage, payable at all events; or (3) under a contract for a compensation payable only in case of success.

The first and most ancient class comprises cases of pure salvage. The second is the most common upon the Great Lakes. The third includes the one under consideration. Obviously where the stipulated compensation is dependent upon success, and particularly of success within a limited time, it may be very much larger than a mere *quantum meruit*. Indeed, such contracts will not be set aside unless corruptly entered into or made under fraudulent representations, a clear mistake or suppression of important facts, in immediate danger to the ship, or under other circumstances amounting to compulsion, or when their enforcement would be contrary to equity and good conscience. Before adverting *to the facts of this par- [193]
ticular case, it may be well to examine some of the leading authorities where salvage contracts have been set aside and compensation awarded in proportion to the merit of the services.

In the case of *The North Carolina*, 15 Pet. 40 [10: 653], the master of a vessel which had struck upon one of the Florida reefs was improperly, if not corruptly, induced to refer the amount of salvage to the arbitrament of two men, who awarded thirty-five per cent of the vessel and cargo. The court found that under the circumstances the master had no authority to bind his owners by the settlement; that the settlement was fraudulently made, and that the salvors, by their contract, had forfeited all claims to compensation even for services actually rendered.

In *The Tornado*, 109 U. S. 110 [27: 874], the owners of three steam tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for a compensation of $50 per hour for each boat, "to be continued until the boats were discharged." When the boats were about to begin pumping the United States marshal seized the ship and cargo upon a warrant on a libel for salvage. After the seizure the marshal took possession of the ship, and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about eighteen hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for twelve days, but their attendance was unnecessary, and not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage, the owners of the tugs claimed each $50 per hour for the whole time, including the twelve days, as salvage. The court held that as the contract was to pump out the ship for an hourly compensation the right of the steam tugs to compensation must be regarded as having terminated when the ship and cargo were raised, and that, as the marshal seized the ship as the tugs began to pump her out, the authority of the master was displaced, and the boats must be regarded as having been discharged under any fair *in- [194]
terpretation of the contract. Standing by for a period of twelve days was found to have been unnecessary, and not required by any peril to the Tornado or her cargo. The case was not one where the contract was set aside as inequitable, though found to be so, but where it had been completed by pumping out the ship and the supersession of the master. See also *Bondies* v. *Sherwood*, 22 How. 214 [16: 238], where the court overruled an attempt on the part of the salvors to repudiate their contract as unprofitable and recover on a *quantum meruit*.

These are the only cases in our reports in which the question of nullifying a salvage contract was squarely presented, although there is in the case of *Post* v. *Jones*, 19 How. 150, 160 [15: 618, 622], an expression of the court to the effect that "courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit." Indeed, it may be said in this connection that the American and English courts are in entire accord in holding that a contract which the master has been corruptly or recklessly induced to sign will be wholly disregarded. *The Theodore*, Swab, Adm. 351; *The Crus. V*, 1 Lush. 583; *The Generous*, L. R. 2 Adm. & Eccl. 57, 60.

The intimations of this court have been followed, except in very rare instances, by the subordinate courts. Thus, in the case of *The Agnes I. Grace*, 49 Fed. Rep. 662, and 2 U. S. App. 317, a schooner bound for Port Royal, South Carolina, put into Tybee Roads under stress of weather. She came up on the sands in an exceedingly perilous condition. The ground was treacherous and dangerous, and while lying there she was exposed to the full force of the sea and winds. A towboat company offered its services, and a contract was entered into to pay the sum of $5,000 as salvage. A portion of the cargo, amounting to
[195] $7,000, was saved, as well as the *schooner, which was sold for $5,030, probably about one half her value. The contract was sustained. The court put its decision upon the ground that the case could not be considered as belonging to that class "where the master being upon the high seas or an uninhabited coast, at a distance from all other aid, is absolutely helpless and without power to procure assistance other than that offered, and is compelled in consequence to make a hard and inequitable contract. He was within easy reach of Savannah, where, had he desired to assume the risk for his owners, he could have procured lighters and other tugs to render the service."

The cases in these courts are too numerous for citation, but it is believed that in nearly all of them the distinction is preserved between such contracts as are entered into corruptly, fraudulently, compulsorily, or under a clear mistake of facts, and such as merely involve a bad bargain, or are accompanied with a greater or less amount of labor, difficulty, or danger than was originally expected.

In the earliest of these (1799), *Cowell* v. *The Brothers*, Bee, 136, the libellant very properly relinquished his written agreement and applied to the court for such compensation as his services appeared to deserve, although the court expressed the opinion that the contract would have been held void as having been made under circumstances of great distress. To the same effect is *Schutz* v. *The Nancy*, Bee, 139.

In the case most frequently cited, *The Emulous*, 1 Sumn. 207, the parties treated the contract at an end on account of unexpected difficulties, but Mr. Justice Story expressed the opinion that salvage contracts were within control of the court, and that the salvor could not avail himself of the calamities of others to force upon them a contract unjust, oppressive, or exorbitant. In the subsequent case of *Bearse* v. *Three Hundred and Forty Pigs of Copper*, 1 Story, 314, Justice Story found that no fixed or definite contract for the services existed, although he had previously remarked that it was "one of the few and excepted cases in which there may be a private contract fixing the rate of salvage, which will be, and ought to be, obligatory between *the parties." We do not [196]
think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, prima facie, be enforced, and that it belongs to the defendant to establish the exception. *The A. D. Patchin*, 1 Blatchf. 414; *Harley* v. *Four Hundred and Sixty-seven Bars Railroad Iron*, 1 Sawy. 1; *The R. D. Bibber*, 33 Fed. Rep. 55; *The Wellington*, 48 Fed. Rep. 475; *The Sir Wm. Armstrong*, 53 Fed. Rep. 145; *The Alert*, 56 Fed. Rep. 721; *The Silver Spray's Boilers*, Brown, 349.

In *Eads* v. *The H. D. Bacon*, Newberry, 274, certain salvors, by the use of their machinery and diving bell worth $20,000, raised a badly sunken steamboat in the Mississippi, valued at $20,000, in twelve hours. It was held that the contracted price of $4,000 was just and reasonable.

In *The J. G. Paint*, 1 Ben. 545, an agreement to pay a steamboat $5,000 for towing a vessel worth $8,000, with a cargo of sugar, for twenty-seven hours, was sustained by Judge, subsequently Mr. Justice, Blatchford.

In most of the cases where the contract was held void the facts showed that advantage was taken of an apparently helpless condition to impose upon the master an unconscionable bargain. *Brooks* v. *Stmr. Adirondack*, 2 Fed. Rep. 387; *The Young America*, 20 Fed. Rep. 926; *The Don Carlos*, 47 Fed. Rep. 746.

It must be admitted that some of these courts have exercised a wide discretion in setting aside these contracts, and have laid down the rule that they are to be closely scrutinized, and will not be upheld when it appears that the price agreed upon by the master is unreasonable or exorbitant. We do not undertake to say that these cases were improperly decided upon their peculiar facts, but we are unable to assent to the general proposition laid down in some of them, that salvage contracts are within the discretion of the court, and will be set aside in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable. If such were the law, contracts for salvage services would be of no practical value, and salvors would be forced to rely upon the liberality of the courts.

Nor is such a contract objectionable, when prudently entered into, *upon the ground that [197]
it may result more or less favorably to the parties interested than was anticipated when

the contract was made. A person may lawfully contract against contingencies; in fact, the whole law of insurance is based upon the principle that, by the payment of a small sum of money, the insured may indemnify himself against the possibility of a greater loss; or, by the expenditure of a trifling amount to-day in the way of premium, his family may receive a much larger sum in case of his subsequent death. If there were ever any doubt with respect to the validity of such contracts it was long since removed by the universal concurrence of the courts, and an enormous business has grown up all over the world upon the faith of their validity. Indeed, nearly every contract for a special undertaking or *job* is subject to the contingencies of a rise or fall in the price of labor or materials, to the possibility of strikes, fires, storms, floods, etc., which may render it unexpectedly profitable to one party or the other.

We do not say that, to impugn a salvage contract, such duress must be shown as would require a court of law to set aside an ordinary contract; but where no such circumstances exist as amount to a moral compulsion, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. The presumptions are in favor of the validity of the contract. *The Helen and George,* Swab. Adm. 368; *The Medina,* L. R. 2 Prob. Div. 5, although in passing upon the question of compulsion the fact that the contract was made at sea, or under circumstances demanding immediate action, is an important consideration. If when the contract is made the price agreed to be paid appears to be just and reasonable in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salving property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, this sum ought not to be reduced by an unexpected success in accomplishing the work, unless the compensation for the work actually done be grossly exorbitant.

[198] *While in England there has been some slight fluctuation of opinion, by the great weight of authority, and particularly of the more recent cases, it is held that if the contract has been fairly entered into, with eyes open to all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain, or that the service was attended with greater or less difficulty than was anticipated, will not justify setting it aside. *The Mulgrave,* 2 Hagg. Adm. 77; *The True Blue,* 2 W. Rob. 176; *The Henry,* 15 Jur. 183; *S. C.* 2 Eng. L. & Eq. 564; *The Prinz Heinrich,* L. R. 13 Prob. Div. 31; *The Strathgarry* [1895] P. 264.

In *The Kingalock,* 1 Spinks, Eccl. & Adm. 263, an agreement was set aside upon the ground that when the vessel was taken in tow the master concealed the fact that she had been compelled to slip an anchor and cable, and that her foresail was split. Dr. Lushington thought that whether the omission to state those facts would vitiate the agreement depended upon whether they could, with any reasonable probability, affect the services about to be performed. He found that the weather was very tempestuous and the task was made much more difficult for the want of ground tackle, and hence that the agreement was null and void. *Per contra,* in the case of *The Canova,* L. R. 1 Adm. & Eccl. 54, he held that, as no danger to property was proved, the agreement would not be set aside by reason of the fact that a great part of the crew of the vessel was disabled by illness.

In *The Phantom,* L. R. 1 Adm. & Eccl. 58, an agreement for eight shillings six pence as an award for salvage services was set aside as futile, where it appeared that there was real danger to the salvors in rendering the services. The value of the Phantom was about seven hundred pounds. The case was certainly a very hard one upon the salvors, who appeared to have been ignorant beachmen. But it is somewhat difficult to reconcile that with the prior case of *The Firefly,* Swab. Adm. 240, where the court distinctly held that it would not set aside a salvage agreement because it seemed to be a hard bargain; or that of *The Helen and George,* Swab. Adm. 368, unless proved to be grossly exorbitant, or to have been obtained *by compulsion or fraud. It was also held in *The Waverley,* L. R. 3 Adm. & Eccl. 369, that a steamer which contracts to render salvage services for a fixed sum will be held strictly to her agreement, and that it is no ground for extra salvage remuneration that the service was prolonged or became more difficult. See also *The Jonge Andries,* Swab. Adm. 303. [199]

In *The Cargo ex Woosung,* L. R. 1 Prob. Div. 260, it appeared that the ship was wrecked on a reef in the Red sea, and was in a position of imminent peril, and subsequently went to pieces. A government vessel was sent to her relief from Aden, and the master of the Woosung, "under circumstances of enormous pressure," agreed to pay half of the proceeds of the cargo saved. The agreement was upheld by the admiralty court (Sir Robert Phillimore), but was set aside by the court of appeal upon the ground that the officers of government ships, while entitled to salvage, could not impose terms upon the persons whose property they saved, and refuse to render assistance unless these terms were accepted. The circumstances showed a clear case of compulsion. So, too, in *The Medina,* L. R. 1 Prob. Div. 272; *S. C.* L. R. 2 Prob. Div. 5, where the master of a vessel found passengers of another steamer (550 pilgrims) wrecked on a rock in the Red sea in fine weather, and refused to carry them to Jeddah for a less sum than four thousand pounds, and the master of the wrecked vessel was by such refusal compelled to sign an agreement for that sum, and the service was performed without difficulty and danger, the agreement was held inequitable and set aside. The compulsion in this case was even clearer than in the last.

In *The Silesia,* L. R. 5 Prob. Div. 177, a vessel which with her cargo and freight was valued at £108,000, on a voyage from New

York to Hamburg, became disabled about 340 miles from Queenstown. The weather was fine and the sea smooth, but after tossing about for four or five days, she hoisted signals of distress. Another steamer bore down upon her bound from Antwerp to Philadelphia, and demanded £20,000 to take her to Queenstown. The master of the Silesia offered £5,000, and finally agreed to pay £15,000, under threat of the other steamer to leave him. The service occupied three
[200]days. *The court set aside the agreement as exorbitant, and awarded £7,000. Evidently advantage was taken of the helpless condition of the Silesia, and the agreement was signed under compulsion.

In *The Prinz Heinrich*, L. R. 13 Prob. Div. 31, the master of the Prinz Heinrich, which was in a position of serious danger, and ashore upon a barbarous and thinly inhabited coast, entered into a written agreement with the master of the salving steamer, whereby he agreed to pay £200 a day for every day the latter stood by and assisted by towing to get the Prinz Heinrich off, and in the event of her being got off, or coming off the rocks during the continuance of the agreement, to pay £2,000 in addition. The Prinz Heinrich came off the same day, either owing to the jettison of her cargo or to the towing of the salving steamer. The court held the agreement to be reasonable, and that the salvors were entitled to recover the full £2,200, although the Heinrich was so much damaged that she was subsequently sold for £3,500. The cargo was valued at £14,000. This is a strong case in favor of sustaining the agreement.

In *The Mark Lane*, L. R. 15 Prob. Div. 135, a steamer becoming disabled in the Atlantic Ocean in fine weather, about 350 miles from Halifax, agreed to pay another steamer £5,000 to tow her to Halifax, and, in case of failing in the attempt to reach there, to pay her for the services rendered. The value of the property saved was somewhat less than £30,000. The contract was set aside, apparently because of the stipulation in the agreement to pay for the services rendered even if they were unsuccessful. The court found the contract to have been signed under compulsion and threat of the salvage steamer to leave her if the master refused.

In *The Rialto* [1891] P. 175, a steamer in the Atlantic fell in with another which had broken her main shaft. Her master thereupon entered into an agreement that the owner should pay £6,000 for being towed to the nearest port, believing that unless he consented to such terms the salvors would not assist. The distance towed was about 450 miles, and the value of the saved prop-
[201]erty £38,000. The weather was fine *when the contract was made. There was no serious risk to the salvors or their vessel. The court found the contract to be inequitable, that the parties stood on unequal terms, and reduced the amount to £3,000.

The most recent case in the English courts is that of *The Strathgarry* [1895] P. 264. In this case a master of a vessel whose cylinders were disabled entered into an agreement with a passing steamship to pay £500 for half an hour's towage, in order to get his engines to work. The hawser broke immediately after the completion of the agreed time, and the steamship refused to continue the towage. It was held that although no benefit had resulted from the service, the agreement had been duly carried out, and that it was not, under the circumstances, manifestly unfair and unjust, and therefore the stipulated sum must be paid. The case was certainly a hard one, but the court held that, notwithstanding the services lasted but thirty minutes, the whole £500 should be paid.

In none of these cases, except, perhaps, that of *The Phantom*, was the agreement set aside except upon proof of corruption, suppression of facts, or circumstances amounting to a compulsion. In the case of *The Phantom* the circumstances were peculiar. The salvors were seven ignorant longshoremen, who agreed for a consideration which amounted to but little more than a shilling apiece to undertake the salving of a vessel worth £700. The salvors labored for two hours at great risk of their lives, and the court naturally held the consideration to be merely nominal.

Under the continental system the courts appear to exercise a wider discretion, and to treat contracts as of no effect when made while the vessel is in danger. Some intimations go so far as to say that they will be disregarded whenever made before the services are rendered. The doctrine of these courts seems to have arisen from the following extract from the fourth article of the Rules of Oleron:

"And yf it were so, that the mayster and the marchauntes have promised to folke, that shuld helpe them to save the shyp and the said goodes, the thyrde parte or half of the said goodes which shuld be saved for the
peryll that they be in, *the justyce of the [202]
country ought well to regarde what payne and what labour they have done in saving them, and after that payne, notwithstanding that promise which the said mayster and the merchauntes shall have made, rewarde them. This is the judgement."

By the German Commercial Code, art. 743, it is enacted that, "when during the danger an agreement has been made as to the amount of salvage or payment for assistance, such agreement may nevertheless be disputed on the plea that the amount agreed upon was excessive, and the reduction of the same to an amount more in accordance to the circumstances of the case may be demanded."

Under the Scandinavian Code, art. 27, the master may, within two months, bring the question of contract before the court, which can refuse the amount if considerably in excess of a reasonable payment for the services performed. Even if it be agreed that the amount be settled by arbitration, the person liable to pay may repudiate the agreement if he does so within fourteen days.

By the Commercial Code of Holland, art. 568, every agreement or transaction regard-

ing the price of assistance or of salvage may be modified or annulled by the judge, if it has been made in the open sea or at the time of stranding. Nevertheless, when the danger is passed, it shall be lawful for both to make regulations or agreements as to the price of assistance or salvage.

By the Commercial Code of Portugal, art. 1608, and by that of the Argentine Republic, § 1469, every agreement for salvage made upon the high seas or at the time of stranding, with the captain or other officer, shall be null both with respect to the vessel and to the cargo; but after the risk has terminated the price may be agreed upon, although it will not be binding upon the owners, consignees, or underwriters who have not consented to it.

The French, Belgian, Italian, Spanish, and Brazilian Codes have no special provisions upon the subject, and the question of sustaining or annulling them is rather a question of fact than of law.

[203] *We have examined the cases cited by counsel in the Revue Internationale de Droit Maritime, and find that they are more favorable to the respondent than the English and American authorities. In short, they appear to pay much less regard to the sanctity of contracts than obtains under our system, and we are loath to accept them as expressing the true rule upon the subject. Indeed, we have had frequent occasion to hold that the maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence. *The John G. Stevens*, 170 U. S. 113, 126 [42: 969, 975], and cases cited.

The facts in this case are somewhat peculiar, and, in entering into the contract, unusual precautions were taken. On October 5, the Elfrida in entering the river grounded by the stern about mid-channel, her bow drifting over toward the west jetty. Her crew were unable to get her off, either upon that or the following day, when, owing to the sea rising, she was carried over the jetty and a very considerable distance further on to the beach (about 600 feet), where she remained in seven or eight feet of water, gradually working inward and making a bed for herself in the sand, which had a tendency to bank up about her bows. She appears to have been at no time in imminent peril, but her situation could have been hardly without serious danger, unless she was released before a heavy storm came on, which might have broken her up or driven her so far ashore that her rescue would have been impossible. It was shown that in previous years a number of vessels had gone ashore in this neighborhood, several of which were lost by bad weather coming on. In other cases the difficulty of getting them off had been very largely increased by similar causes. The testimony shows that while the Elfrida lay there the wind was at times blowing a gale with a rough sea, in which the ship strained and bumped heavily. On Saturday the 6th, the day of her final stranding, the master having given up his idea of getting her off with her own anchors, telegraphed his owners and also Lloyds' agent at Galveston, who appear to have sent Mr. Clarke, one of the libellants, *down on Sunday evening. He of- [204]
fered to undertake the relief of the ship for what the court would allow him. This offer the master declined. About the same time Mr. Sorley, Lloyds' agent, came down to the vessel, saw her situation, remained there two days, and advised the master to invite bids for her relief. He obtained two bids, one for $24,000 and one made by the libellants for $22,000, and on the advice of Sorley and of his owners, Pynam, Bell & Co., of Newcastle-on-Tyne, with whom he kept in constant communication by cable, he accepted libellants' bid, and a contract was entered into, whereby they agreed to float the Elfrida and place her in a safe anchorage, and to complete the job within twenty-one days from date. The master agreed to pay therefor the sum of $22,000, but reserved the right to abandon the ship in lieu of this amount. At the request of the owners he also inserted a further stipulation that if the libellants should fail to float the ship and place her in a position of safety within twenty-one days, they should receive no compensation whatever for the work performed, or the labor, tools, or appliances furnished. This contract was made at Velasco on October 15. Clarke proceeded at once to get ready a wrecking outfit, consisting of a tugboat and a schooner, with fifteen or sixteen men, went to the wreck, and spent about two days planting anchors and connecting cables from them to the winches of the ship. The tugboat took no part in the actual relief of the vessel which was effected by the aid of the anchors and the steamer's engines, although after the Elfrida was afloat she drifted against the west jetty and the tug hauled her off.

For the work actually done the stipulated compensation was undoubtedly very large, and if the validity of the contract depended alone upon this consideration, we should have no hesitation in affirming the decree of the circuit court of appeals; but the circumstances under which the contract was made put the case in a very different light. In the first place, the libellants offered to get the vessel off for such salvage as the court should award, but the master declined the proposition, and, acting under the advice of Lloyds' agent and of Moller & Co., the owners' agents at Galveston, invited bids *for the [205]
service. This certainly was a very proper step upon his part, and there is no evidence showing any collusion between the bidders to charge an exorbitant sum. The conditions imposed upon the libellants were unusual and somewhat severe. Their ability to get her off must have depended largely upon the continuance of good weather. Their ability to get her off within the time limited was even more doubtful, and yet under their contract they were to receive nothing—not even a *quantum meruit*—unless they released her and put her in a place of safety within twenty-one days. Further than this, if in getting her off, or after she had been gotten off,

she proved to be so much damaged that she was not worth the stipulated compensation, the master reserved the right to abandon her.

We give no weight to the advice of Pynam, Bell & Co., her owners, to enter into the contract, since in the nature of things they could have no personal knowledge of her situation or of the possibility of relieving her; but it shows that her master, though a young man and making his first voyage as a master, acted with commendable prudence. He took no step without the advice of his owners and that of the underwriters' agent at Galveston, Mr. Sorley; who was a man over seventy years of age, perfectly honest, and of large experience in these matters. Sorley visited the vessel, saw her situation, and advised an acceptance of the bid. The value of the ship is variously estimated at from $70,000 to $110,000,, but the sum for which she was insured, £18,000 or $90,000, may be taken as her approximate value. Under the stringent circumstances of this contract, we do not think it could be said that an agreement to pay one quarter of her value if released, could be considered unconscionable or even exorbitant, and, unless the fact that it proved to be exceedingly profitable for the libellants is decisive that it was unreasonable, it ought to be sustained. For the reasons above stated we think that the disproportion of the compensation to the work done is not the sole criterion. Very few cases are presented showing a contract entered into with more care and prudence than this, and we are clear in our opinion
[206] that it should be sustained. *Had the agreement been made with less deliberation or pending a peril more imminent our conclusion might have been different.

The decree of the Circuit Court of Appeals must therefore be reversed, and the case remanded to the District Court for the Eastern District of Texas with directions to execute its original decree.

UNITED STATES, *Plff. in Err.*,

v.

CHARLES LOUGHREY *et al.*

(See S. C. Reporter's ed. 206-232.)

Railroad land grant to Michigan—timber cut upon the lands—forfeiture of the grant did not give the United States the right to recover for timber previously cut—right to bring the action.

1. The land grant to the state of Michigan in aid of the construction of railroads, by the act of Congress of June 3, 1856, vested the fee of the lands in the state, subject to a condition subsequent that if the roads were not completed in ten years the lands unsold should revert to the United States.
2. The timber cut upon such lands prior to the forfeiture under said act belonged to the state.
3. The forfeiture of such land grant by the act of Congress of March 2, 1889, did not operate by relation to revest in the United States title to timber which had been cut prior to the act of forfeiture, so as to give the United States a right of action against a trespasser who cut the timber.
4. The rule that a mere trespasser cannot defeat the right of the plaintiff in trover by showing a superior title in a third person, without showing himself in privity or connecting himself with such third person, has no application to cases wherein the plaintiff has shown no prima facie right to bring the action.

[No. 22.]

Argued and Submitted April 21, 1898. Decided December 12, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court affirming a judgment of the United States Circuit Court for the Eastern District of Wisconsin dismissing the complaint in an action brought by the United States, plaintiff, against George Loughrey *et al.* to recover the value of timber cut from lands in the state of Michigan. *Affirmed.*

See same case below, 34 U. S. App. 575.

Statement by Mr. Justice **Brown:**

This was an action originally begun by the United States in the circuit court for the eastern district of Wisconsin, to recover the value of timber cut from the north half of the northwest quarter of the northeast quarter of section thirteen, township forty-four north, of range thirty-five west, in the state of Michigan. The complaint charged the cutting of the timber by one Joseph E. Sauve, and that he removed from the lands 80,000 feet of timber so cut, and left the balance *skidded upon the lands. The defend- [207]
ants were charged as purchasers from Sauve. The amount of timber cut by Sauve was alleged to have been 600,000 feet, and the time of the cutting in the winter of 1887-8 and prior to the first day of March, 1888.

The case was tried by the court without a jury upon facts stipulated as follows:

First. The defendants, prior to the first day of March, 1888, cut and removed from the north half (½) of the northwest quarter (NW. ¼), and the northwest quarter (NW. ¼) of the northeast quarter (NE. ¼), and the southeast quarter (SE. ¼) of the northeast quarter (NE. ¼) of section thirteen (13), in township forty-four (44) north, of range thirty-five (35) west, in the state of Michigan, four hundred thousand (400,000) feet of pine timber, and converted the same to their own use.

Second. That such cutting and taking of said timber by the defendants from said land was not a wilful trespass.

Third. That none of the lands in question were ever owned or held by any party as a homestead.

Fourth. That the value of said timber shall be fixed as follows: That the value of the same upon the land or stumpage, at $2.50 per thousand, board measure; that the value of the same when cut and upon the land, $3.00 per thousand, board measure; that the value of the same when placed in the river was $5.00 per thousand, board measure;

that the value of the same when manufactured was $7.00 per thousand, board measure.

Fifth. That the lands above described were a part of the grant of lands made to the state of Michigan by an act of the Congress of the United States approved June 3, 1856, being chapter 44 of volume 11 of the United States Statutes at Large, and that said lands were accepted by the state of Michigan by an act of its legislature approved February 14, 1857, being public act No. 126 of the laws of Michigan for that year, and were a part of the lands of said grant within the six-mile limit, so called, outside of the common limits, so called, certified, and approved to said state by the Secretary of the Interior, to aid in the construction of the railroad mentioned
[208]*in said act No. 126 of the laws of Michigan of 1857, to run from Ontonagon to the Wisconsin state line, therein denominated "The Ontonagon & State Line Railroad Company."

The finding of facts by the court was in accordance with the foregoing stipulation, with the additional finding that said railroad was never built, and said grant of lands was never earned by the construction of any railroad.

And as conclusions of law the court found:

First. That the cause of action sued on in this case did not, at the time of the commencement of this action, and does not now, belong to the United States of America.

Second. That the defendants are entitled to judgment herein for the dismissal of the complaint upon its merits.

No exceptions were taken to the findings of fact, and no further requests to find were made. Exceptions were only taken to the conclusions of law found by the court, and for its failure to find other and contrary conclusions.

Upon writ of error sued out from the circuit court of appeals, the judgment of the circuit court dismissing this complaint was affirmed. 34 U. S. App. 575.

Whereupon the United States sued out a writ of error from this court.

Messrs. **George Hines Gorman** and *John K. Richards*, Solicitor General, for plaintiff in error.

Mr. **W. H. Webster** for defendants in error.

[208] *Mr. Justice **Brown** delivered the opinion of the court:

To entitle the plaintiff to recover in this action, which is substantially in trover, it is necessary to show a general or special property in the timber cut, and a right to the possession of the same at the commencement of the suit.

There is no question that the lands be-
[209]longed to the United *States prior to June 3, 1856. By an act of Congress passed upon that date (11 Stat. at L. 21, chap. 44), it was enacted that "there be, and hereby is granted to the state of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the last two named places to the Wisconsin state line," with others not necessary to be mentioned, "every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; . . . which lands . . . shall be held by the state of Michigan for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads: *Provided, further*, That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which said lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever." By the third section it was enacted that the "said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other." Provision was made in the fourth section for a sale of the lands for the benefit of the railroads as they were constructed. The last clause provided that "if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States."

1. Under this act the state of Michigan took the fee of the lands to be thereafter identified, subject to a condition subsequent that if the roads were not completed within ten years the lands unsold should revert to the United States. With respect to this class of estates Professor Washburne says that, "so long as the estate in fee remains, the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another,—something more than a possibility of a reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the premises." *1 Wash. Real [210]
Prop. 5th ed. 95. As was said in *De Peyster* v. *Michael*, 6 N. Y. 467, 506 [57 Am. Dec. 470], a right of re-entry "is not a reversion, nor is it the possibility of reversion, *nor is it any estate in the land.* It is a mere right or chose in action, and, if enforced, the grantor would be in by a forfeiture of a condition, and not by a reverter. . . . It is only by statute that the assignee of the lessor can re-enter for condition broken. But the statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other estate. . . . When property is held on condition, *all the attributes and incidents of absolute property belong to it until the condition be broken.*" Had the state through its agents cut timber upon these lands, an action would have lain by the United States upon the covenant of the state that the lands should be held for railway purposes only and devoted to no other use or purpose; but the state was not responsible for the unauthorized acts of a mere trespasser, and it was no violation of its covenant that another person had stripped the lands of its timber.

In the case of *Schulenberg* v. *Harriman*, 21 Wall. 44 [22: 551], an act immediately pre-

ceding this, granting public lands to the state of Wisconsin to aid in the construction of railroads in that state, and precisely similar to this act in its terms, was construed by this court as a grant *in præsenti* of title to the odd sections designated, to be afterwards located; that when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the lands. As it is stipulated in this case that the lands from which the timber was cut were a part of the grant of June 3, 1856, to the state of Michigan, and were a part of the lands within the six-mile limit, certified and approved to the state by the Secretary of the Interior, no question arises with respect to the identity of the lands.

The case of *Schulenberg* v. *Harriman* was also an action for timber cut upon lands granted to the state, against an agent of the state who had seized the logs, which had been cut after the ten years had expired for the construction of the railroad, but before any [211] action had been taken by Congress *to forfeit the grant. The complaint in the case alleged property and right of possession in the plaintiffs. It was stipulated by the parties that the plaintiffs were in the quiet and peaceable possession of the logs at the time of their seizure by the defendants, and that such possession should be conclusive evidence of title in the plaintiffs against evidence of title in a stranger, unless the defendant should connect himself with such title by agency, or authority in himself. The title of the plaintiffs was not otherwise stated. It was held that the title to the lands did not revert to the United States after the expiration of the ten years, in the absence of judicial proceedings in the nature of an inquest of office, or a legislative forfeiture, and that until a forfeiture had taken place the lands themselves and the timber cut from them were the property of the state. Said Mr. Justice Field, in delivering the opinion of the court, p. 64: "The title to the land remaining in the state, the lumber cut upon the land belonged to the state. While the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued, as previously, the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property." The same rule regarding the construction of this identical land grant was applied by this court in *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354 [39: 183]. Indeed, the principle is too well settled to require the citation of authorities. The case of *Schulenberg* v. *Harriman*, 21 Wall. 44 [22: 551], differs from the one under consideration in the fact that no act forfeiting the grant was ever passed; but it is pertinent as showing that under a statute precisely like the present the title to the timber cut before such forfeiture is in the state, and not in the general government.

It follows that the United States, having no title to the lands at the time of the trespass, and no right to the possession of the timber, are in no position to maintain this suit. Neither a deed of land nor an assignment of a patent for an *invention carries [212] with it a right of action for prior trespasses or infringements. Such rights of action are, it is true, now assignable by the statutes of most of the states, but they only pass with a conveyance of the property itself where the language is clear and explicit to that effect. 1 Chitty, Pl. 68; *Gardner* v. *Adams*, 12 Wend. 297, 299; *Clark* v. *Wilson*, 103 Mass. 219, 223 [4 Am. Rep. 532]; *Moore* v. *Marsh*, 7 Wall. 515 [19: 37]; *Dibble* v. *Augur*, 7 Blatchf. 86; *Merriam* v. *Smith*, 11 Fed. Rep. 588; *May* v. *Juneau County*, 30 Fed. Rep. 241; *Kaolatype Engraving Company* v. *Hoke*, 30 Fed. Rep. 444.

So, where a landowner, intrusts another with the possession of his lands, either by lease, by contract to sell, or otherwise, the right of action for trespasses committed during such tenancy belongs to the latter, and except under special circumstances an action for a trespass, such as the cutting of timber, will not lie in favor of the landlord. *Greber* v. *Kleckner*, 2 Pa. 289; *Campbell* v. *Arnold*, 1 Johns. 511; *Tobey* v. *Webster*, 3 Johns. 468; *Cutts* v. *Spring*, 15 Mass. 135; *Lienow* v. *Ritchie*, 8 Pick. 235; *Ward* v. *Macauley*, 4 T. R. 489; *Revett* v. *Brown*, 5 Bing. 7; *Harper* v. *Charlesworth*, 4 Barn. & C. 574; *Graham* v. *Peat*, 1 East, 244; *Lunt* v. *Brown*, 13 Me. 236; 2 Greenl. Ev. § 616.

Although, as was said by Lord Kenyon in *Ward* v. *Macauley*, 4 T. R. 489, "the distinction between the actions of trespass and trover is well settled; the former are founded on possession; the latter on property;"—yet they are concurrent remedies to the extent that, wherever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained. The plaintiff is bound to prove a right of possession in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract he cannot maintain trover for them. *Smith* v. *Plomer*, 15 East, 607; *Wheeler* v. *Train*, 3 Pick. 255; *Gordon* v. *Harper*, 7 T. R. 9; *Ayer* v. *Bartlett*, 9 Pick. 156; *Fairbank* v. *Phelps*, 22 Pick. 535.

It does not aid the plaintiffs' case to take the position (the soundness of which we by no means concede) that the state held the lands as trustee to deliver them over to the railroads *upon certain contingencies, and to [213] return them to the United States in case the conditions subsequent were not performed, since nothing is better settled than that a trustee has the legal title to the lands, and that actions at law for trespasses must be brought by him, and by him alone. 1 Perry, Trusts, § 328, and cases cited; *Fenn* v. *Holme*, 21 How. 481 [16: 198].

Certain cases having a contrary bearing will now be considered. Several of these are to the effect that if a man leases an estate for a term of years, and the tenant unlawfully cuts timber, the lessor may sue in trespass, and perhaps in trover, upon the ground that

the title to the land remains in the lessor during the pendency of the lease.

In *Richard Liford's Case*, 11 Coke, 46, which was an action of trespass by a tenant against the agent of the owner of the inheritance for certain trees cut, it was said "that when a man demises his land for life or years the lessee has but a particular interest in the trees, but the general interest of the trees remains in the lessor; for the lessee shall have the mast and fruit of the trees, and shadow for his cattle, etc., but the interest of the body of the trees is in the lessor as parcel of his inheritance; and this appears in 29 Hen. VIII. [*Malever* v. *Spinke*] 1 Dyer, 36, where it is held in express words that it cannot be denied that the property of great trees, *scil.* the timber, is reserved by the law to the lessor, but he cannot grant it without the termor's license, for the termor has an interest in it, *scil.* to have the mast and fruit growing upon it, and the loppings thereof for fuel, but the very property of the tree is in the lessor as annexed to his inheritance." Again, speaking of disseisin and the respective rights of the disseisee and disseisor when the former regains possession, it is said: "That after the regress of the disseisee the law adjudges, as to the disseisor himself, that the freehold has continued in the disseisee, which rule and reason doth extend as well to corn as to trees or grass, etc. The same law, if the feoffee, or lessee, or the second disseisor, sows the land, or cuts down trees or grass, and severs, and carries away, or sells them to another, yet after the regress of the disseisee he may take as well the corn as the trees and grass to what place soever
[214] they are carried; for the regress *of the disseisee has relation as to the property, to continue the freehold against them all in the disseisee *ab initio*, and the carrying them out of the land cannot alter the property."

In *Gordon* v. *Harper*, 7 T. R. 9, it was held that where goods had been leased as furniture with a house, and had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff, pending the lease, because he did not have the right of possession as well as the right of property at the time. The case was distinguished from one where the thing was attached to the freehold, and the doctrine of *Liford's Case* was reiterated, that where timber is cut down by a tenant for years the owner of the inheritance may maintain trover for the timber notwithstanding the lease because the interest of the lessee in it remained no longer than while it was growing on the premises, and determined instantly when it was cut down. See also *Mears* v. *London & S. W. Rwy. Co.* 11 C. B. N. S. 850; *Randall* v. *Cleaveland*, 6 Conn. 328; *Elliot* v. *Smith*, 2 N. H. 430; *Starr* v. *Jackson*, 11 Mass. 519.

These cases obviously have no application to one where there has been a conveyance of the fee of the land prior to the cutting of the timber, and no re-entry or analogous proceeding on the part of the vendor for a breach of a condition subsequent.

The same distinction was taken in *Farrant* v. *Thompson*, 5 Barn. & Ald. 826, in which certain mill machinery, together with the mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized under execution by the sheriff and sold by him. It was held that no property passed to the vendee, and the landlord was entitled to bring trover for the machinery, even during the continuance of the term, upon the ground that the machinery attached to the mill was a part of the inheritance which the tenant had a right to use, but not to sever or remove.

So, in *United States* v. *Cook*, 19 Wall. 591 [22: 210], it was held that timber standing upon lands occupied by Indians cannot be cut by them for the purposes of sale, although it may be for *the purpose of improving the [215]
land, as the Indians had only the right of occupancy, and the presumption was against their authority to cut and sell the timber. In such case the property in the timber does not pass from the United States by severance, and they may maintain an action for unlawful cutting and carrying it away. To the same effect is *E. E. Bolles Wooden-Ware Co.* v. *United States*, 106 U. S. 432 [27: 230]

In *Wilson* v. *Hoffman*, 93 Mich. 72, the same principle was extended to a plaintiff in ejectment, who was held entitled to maintain an action for trover for logs cut by the defendant during the pendency of the suit, which had been determined in the plaintiff's favor, although the defendant was in possession of the land under a bona fide claim of title adverse to the plaintiff. This is but another application of the doctrine which allows the plaintiff in ejectment to recover mesne profits upon the theory that the land has always been his, and that the defendant illegally obtained possession of it. See also *Morgan* v. *Varick*, 8 Wend. 587; *Busch* v. *Nester*, 62 Mich. 381, 70 Mich. 525.

In *Moores* v. *Wait*, 3 Wend. 104, a person entered into possession of wild lands under a contract of sale giving him the right of entry and occupancy, reserving to the landlord the land as security until the payment of the consideration by withholding the deed. It was held that he had a right to enter and enjoy the land for agricultural purposes, but that he had no right to cut timber for any other purpose than for the cultivation, improvement and enjoyment of the land as a farm; and that the owner of the inheritance, who had never parted with his title, might maintain an action of trover for it against anyone in possession, although a bona fide purchaser under the occupant. This was also upon the principle that the vendor had never parted with title to his land. But see *Scott* v. *Wharton*, 2 Hen. & M. 25; *Moses Bros.* v. *Johnson*, 88 Ala. 517.

In *Burnett* v. *Thompson*, 51 N. C. (6 Jones, L.) 210, the plaintiff had a life estate *pur autre vie* in a lease of Indian lands for ninety-nine years, and also a reversion after the expiration of the term. A stranger entered and cut down *cypress trees and carried them [216]
off. The plaintiff was permitted to recover. It was held that "if there be a tenant for years or for life, and a stranger cuts down a tree,

the particular tenant may bring trespass, and recover damages for breaking his close, treading down his grass, and the like. But the remainderman, or reversioner in fee, is entitled to the tree, and, if it be converted, may bring trover and recover its value. The reason is, the tree constituted a part of the land, its severance was waste, which is an injury to the inheritance, consequently the party in whom is vested the first estate of inheritance, whether in fee simple or fee tail (for it may last always), is entitled to the tree, as well after it is severed, as before; his right of property not being lost by the wrongful acts of severance by which it is converted into a personal chattel." See also *Halleck* v. *Mixer*, 16 Cal. 574.

While these cases run counter to some of those previously cited, they are all distinguishable from the one under consideration in the fact that the plaintiff was the owner of the inheritance, and had the legal title to the land at the time the trespass was committed. We see nothing in them to disturb the doctrine announced by this court in *Schulenberg* v. *Harriman*, 21 Wall. 44 [22: 551], that timber cut upon the lands prior to the forfeiture belongs to the state. The fact is that nothing remained of the original title of the United States but the possibility of a reversion, a contingent remainder, which would be an insufficient basis for an action of trover. *Gordon* v. *Lowther*, 75 N. C. 193; *Matthews* v. *Hudson*, 81 Ga. 120; *Farabow* v. *Green*, 108 N. C. 339; *Sager* v. *Galloway*, 113 Pa. 500. To sustain this action there must be an immediate right of possession when the timber is cut. This might arise if the severance of the timber involved a breach of obligation on the part of the tenant, but if the timber were cut by a third person, the question would be as to the right to the timber so cut as against the trespasser, and unless the case of *Schulenberg* v. *Harriman* is to be overruled, it must be held to be that of the state.

2. As the United States can take title to
[217] the timber involved *in this case only through its ownership of the lands, it remains to consider whether the act of March 2, 1889, (25 Stat. at L. 1008, chap. 414), forfeiting the lands granted by this act to aid in the construction of a railroad from Marquette to Ontonagon, operated by relation to revest in the United States title to the timber which had been cut during the winter of 1887 and 1888 and prior to the act of forfeiture. This act provided that "there is hereby forfeited to the United States, and the United States hereby resumes title thereto, all lands heretofore granted to the state of Michigan . . . which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain."

The position of the plaintiffs must necessarily be that this act of forfeiture not only revested in the United States the title to the lands as of a date prior to the cutting of the timber in question, but also revested them with the property in the timber which had been cut while the lands belonged to the state of Michigan. Had this act of forfeiture not been passed, there could be no question that, under the case of *Schulenberg* v. *Harriman*, 21 Wall. 44 [22:551], this timber would have belonged to the state of Michigan, and no other action therefor could have been brought by the United States.

But conceding all that is contended for by the plaintiffs with respect to the revestiture of the title to the lands by this act, it does not follow that the title to the timber which had been cut in the meantime was also revested in the United States. As was said in *Schulenberg* v. *Harriman*, the title to the timber remained in the state after it had been severed. But it remained in the state as a separate and independent piece of property, and if the state had elected to sell it a good title would have thereby passed to the purchaser, notwithstanding the subsequent act of forfeiture. It did not remain the property of the state as a part of the lands, but as a distinct piece of property, although the state took its title thereto through and in consequence of its title to the lands. From the moment it was cut the state was at liberty to deal with *it as with any other piece of [218]
personal property. *Brothers* v. *Hurdle*, 32 N. C. (10 Ired. L.) 490 [51 Am. Dec. 400].

We know of no principle of law under which it can be said that timber which was the property of the state when cut becomes the property of the United States by an act of Congress resuming title to the land from which it was cut, although the timber may in the meantime have been removed hundreds of miles from the lands, and passed into the hands of one who knew nothing of the source from which it was derived. It may be, in such a case, that if the state sues for and recovers the value of such timber, it might be accountable to the United States for the proceeds in case the government resumed title to the lands.

Two cases cited by the Solicitor General lend support to the doctrine that the resumption of title by the United States operates upon the timber already cut, as well as upon the lands. In the first of these, *Heath* v. *Ross*, 12 Johns. 140, the action was in trover for a quantity of timber cut upon lands for which the plaintiff had applied for a patent before the timber was cut. The patent was not granted until after the timber was cut. The patent was held, upon well-settled principles, to relate back to the date of application. The defendant knew he had no title to the lot or right to cut the timber. The plaintiffs were held entitled to recover.

The other case is that of *Musser* v. *McRae*, 44 Minn. 343. In that case an act of Congress granting lands to the state of Wisconsin in aid of the construction of railroads, provided that it should be lawful for the agents appointed by the railway company, entitled to the grant, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States, "deficiency" lands within certain indemnity limits. It was *held* that the issuance of a patent to the railway company for the lands

so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date of the selection. And it was further held that where, after the lands had been so selected, but prior to the
[219]issue of the patent, *timber had been wrongfully cut and removed by trespassers, the title acquired by the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land, or its value.

These cases are distinguishable from the one under consideration in the fact that the plaintiffs had an inchoate title to the lands, —a title which no one could disturb, and which the state was bound to perfect by the issue of a patent, provided the plaintiffs followed up their application. We do not think the doctrine of these cases ought to be extended.

3. Nor are the plaintiffs entitled to avail themselves of the rule that in an action of trover a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title in a third person without showing himself in privity or connecting himself with such third person. The cases in which this principle is applied are confined to those where the plaintiffs were either in possession of the property or entitled to its immediate possession, and thus showed a prima facie right thereto. It has no application to cases wherein the plaintiff has shown no such right to bring the action. *Jeffries* v. *Great Western Railway Co.* 5 El. & Bl. 802; *Weymouth* v. *Chicago & N. W. Railway Co.* 17 Wis. 550 [84 Am. Dec. 763]; *Wheeler* v. *Lawson,* 103 N. Y. 40; *Halleck* v. *Mixer,* 16 Cal. 574; *Terry* v. *Metevier,* 104 Mich. 50; *Stevens* v. *Gordon,* 87 Me. 564; *Fiske* v. *Small,* 25 Me. 453. Counsel are mistaken in supposing that the plaintiffs had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, forfeiting the grant. Up to that time the title was in the state, and until then the United States had no more right to enter and take possession than they would have had to take possession of the property of a private individual.

As the plaintiffs failed to show title to or right of possession to the timber in question, there was no error in the action of the court of appeals, and its judgment is therefore *affirmed.*

[220] *Mr. Justice **White,** with whom concur Mr. Chief Justice **Fuller** and Mr. Justice **Harlan,** dissenting:

The United States donated the land from which the timber was cut to the state of Michigan in aid of a contemplated railroad. The donating act dedicated the property thus conveyed to the state, for the sole purpose of aiding in the construction of the railroad, and it contained a provision that if the road was not built within a designated period the land conveyed was to revert to the United States. The road was never built, and the granted land was forfeited by act of Congress, because of noncompliance with the conditions contained in the grant.

The issue presented for decision is the right of the United States to recover in an action of trover the proceeds of timber cut from the land by a trespasser while the legal title was in the state, but after the period had elapsed when the right in the United States to assert a forfeiture had arisen. The decision of the court is that a recovery cannot be had, because at the time of the severance of the timber by the trespasser the legal title was in the state. It is thus in effect decided that it was in the power of a trespasser, while the legal title to the land and its incidents was in the state, to destroy the value of the land by severing and appropriating the timber, and that there exists no remedy by which the right of property of the United States can be protected. Such a consequence strikes me as so abnormal that I cannot bring my mind to assent to its correctness; and, thinking as I do that it involves a grave denial of a right of property, not only harmful in the case decided, but harmful as a precedent for cases which may arise in the future, I state the reasons for my dissent.

At the outset it becomes necessary to determine the nature of the rights of the state and those of the United States created by and flowing from the act of donation. That the land from which the timber was cut belonged to the United States at the time of the grant goes without saying. It was conveyed by the act of Congress to the state,
not for the use and benefit*of the state, but[221]
for the sole purpose of aiding in the construction of a railroad. The state had no right to dispose of the land except for the declared object; and while it is true that a power to sell the land was vested by the act in the state, it was a power which the state could only call into being as the work progressed, and, to quote from the act, "for the purposes aforesaid and no other,"— that is, the specific object stated, namely, the construction of the railroad referred to. The granting act clearly imported that in the event of a forfeiture before the land had been earned and conveyed by the state, the land should be restored to the United States in its integrity.

I submit that the effect of the act of Congress was to create a trust in the land and to vest the legal title thereto, with incidents such as timber, in the state of Michigan for the purposes of the trust, to hold, primarily, for the benefit of the owners of a line of railroad if constructed, and, secondarily, for the benefit of the United States, in the contingency that a forfeiture was declared for a breach of the condition subsequent as to the time of completion of the road. The state, in all reason, was bound to restore the land and timber which passed to its possession to the United States, upon the declaration of the forfeiture, retaining no benefit whatever from the land for itself by reason of such custody and control. Being clothed with the legal estate in the land, the state,

while it so held the land, "possessed all the power and dominion over it that belonged to an owner." *Stanley* v. *Colt*, 5 Wall. 167 [18: 510]. As the timber when severed belonged to the true owner of the land, the state, as the trustee of an express trust and representing such owner, was the proper party, during the continuance of the trust, to recover any portion of the inheritance wrongfully converted by a trespasser, and this would have been the case even if the United States had stipulated to retain possession until a conveyance of the land by the state. *Wooderman* v. *Baldock*, 8 Taunt. 676; *White* v. *Morris*, 11 C. B. 1015; *Barker* v. *Furlong* [1891] 2 Ch. 172; *Myers* v. *Hale*, 17 Mo. App. 204. Clearly this was so, because, to maintain replevin or trover, it is
[222] essential that the plaintiff *have *at the time of suit brought* the legal title to the property, and, until the enactment of the forfeiting act, the legal title to this timber was in the state of Michigan.

It was manifestly because the legal title was in the state that this court in *Schulenberg* v. *Harriman*, 21 Wall. 44 [22: 551], declared that a state was the owner of timber which had been wrongfully cut by trespassers from land granted in aid of a railroad by a statute similar to the one above referred to. The Schulenberg action was instituted, however, at a time when no forfeiture had been declared, and the controversy was simply between a trespasser and the state as to their respective rights in timber which had been unlawfully severed from the granted land. That land so conveyed, with all that formed part thereof, was deemed to be held upon trust is manifest from the opinion, for, speaking through Mr. Justice Field, the court said, p. 59 [22: 554]:

"The acts of Congress made it a condition precedent to the conveyance by the state of any other lands that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could pass any title to the company."

And this view was reiterated by this court, speaking through Mr. Justice Brewer, in *Lake Superior Ship Canal R. & I. Co.* v. *Cunningham*, 155 U. S. 354 [39: 183], when, in interpreting the very statute now under consideration, it was said, p. 373 [39: 190]:

"Further, the grant to the state of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the acts of Congress that the lands should be applied by the state to no other purpose. Even if there had been no such declaration such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the state of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the state could accomplish that which the state itself had no power to do."

To reason, however, to establish that, in so far as the granting act restricted the state
[223] to the use of the land and that *which adhered in it for a particular purpose, it engendered an express trust, is wholly unnecessary, since it is admitted that had the the state through its agents cut timber upon the land before the passage of the forfeiture act, a right of action would have arisen on behalf of the United States against the state as upon a covenant by the state that it would keep the land and its incidents for railway purposes only. This conclusion necessarily carries with it as a legal resultant the proposition that the granting act contained an express trust. How, then, I submit, can it in reason be held that there was a right which could only exist upon the hypothesis of an express trust arising from the granting act, and yet it at the same time be decided that there was no trust whatever implied in the act, or that the rights which would obtain if there were a trust have no being? It cannot be doubted that the act restricted the use to a particular purpose, nor can it be gainsaid that the right of re-entry was stipulated only as respects the non-completion of the railroad. But the failure to preserve a right of re-entry in case of the misuse of the property did not destroy the terms of the act restricting the use, and as, therefore, the restriction as to use was unaccompanied with a clause of re-entry, the effect was to give rise to a trust upon the grantee with reference to such use. This last principle, I submit, is sustained by authority. *Stanley* v. *Colt*, 5 Wall. 119, 165 [18: 502, 509]; *Packard* v. *Ames*, 16 Gray, 329, and cases cited; *Sohier* v. *Trinity Church*, 109 Mass. 1, 19.

As the state held the land with power simply to sell on the happening of a particular event, until the occurrence of that event the state had no greater rights in the land than would have existed in favor of one who was entitled to the mere use and occupancy of the land. It could not therefore sell the timber for purposes of mere profit, for, as said in *United States* v. *Cook*, 19 Wall. 591 [22: 210]:

"The timber while standing is a part of the realty, and can only be sold as the land could be. The land cannot be sold, . . . consequently the timber, until rightfully severed, cannot be."

If, therefore, the state could not rightfully acquire the *absolute ownership, in its own [224]
right, of timber, the cutting of which it had authorized, it is clear that it would not become such owner by reason of the unlawful act of an unauthorized person. As the state of Michigan was without power to have authorized a sale of the timber contrary to the purpose of the trust, it is obvious that the act of a mere trespasser, without authority from the state, in denuding the land of its timber, could not operate to vest the state or the trespasser with the absolute ownership, in its or his own right, of said timber; and it is the settled doctrine of this court that the sale of timber by a trespasser does not devest the title of the real owner, and that a purchaser, even though acting in good faith, is liable to respond to the true owner for the timber or its value. *United States* v. *Cook*, 19 Wall. 591 [22: 210]; *E. E. Bolles Wooden-ware Co.* v. *United States*, 106 U. S.

432 [27: 230]; *Stone* v. *United States*, 167 U. S. 192, 195 [42: 133, 134].

The simple question presented, then, is this, and this alone: Where the legal title to land, with its incidents, is in one person burdened with an express trust in favor of another, can the *cestui que trust*, upon the cessation of the trust, when the title to the land and its incidents has revested in him, recover from a wrongdoer the value of timber cut, without color of right and unlawfully removed from the land while the legal title and possession thereto was in the trustee?

This question is, I think, fully answered by the rulings of this court in *Schulenberg* v. *Harriman* and *Lake Superior Ship Canal R. & I. Co.* v. *Cunningham, supra,* because, as already stated, in the first case it was said that "no conveyance in violation of the terms of these acts, the road not having been constructed, could pass any title to a grantee of the state;" and in the second, that, "as the state of Michigan had no power to appropriate these lands to any other purpose, certainly no act of any executive officer of the state could accomplish that which the state itself had no power to do." Now, no one will gainsay that this court in those cases declared that if the land was conveyed in violation of the terms of the act of Congress, an occupant under such an unlawful grant might be ousted by the United States, either forcibly
[225] *or by suit in ejectment. With this doctrine thus settled by this court in opinions which are now approvingly cited, is it yet to be held that if the occupant under a void grant from the state before forfeiture denuded the land of all its timber,—that is, of one of its material incidents,—the land might be recovered by the United States from the trespasser, but not the timber or its value? I submit that, upon general considerations, as between the wrongdoer and the *cestui que trust*, the better right is in the latter, that such right can be enforced, and that though ordinarily in an action of trover it is essential that the plaintiff should have had at the time of the unlawful conversion the legal title and right of possession to the property claimed by him, yet, under such circumstances as I have indicated, a title by relation is a sufficient basis for the action.

Relation is a fiction of law, adopted solely for the purposes of justice (*Gibson* v. *Chouteau*, 13 Wall. 100 [20: 537]), and by it one who equitably should be so entitled is enabled to assert a remedy for an injury suffered, which otherwise would go unredressed. The doctrine is considered at much length in *Butler* v. *Baker*, 3 Coke, 25, in resolutions of the Justices of England and the Barons of the Exchequer, and "many notable rules and cases of relations" (p. 35*b*) are there stated. The action was trespass, and the refusal of a wife, after the death of the husband, to accept a jointure by which an estate tail had vested in her prior to the death of the husband, was held to relate back as to certain lands, and not as to others. It was laid down (p. 28*b*) "that relation is a fiction of law to make a nullity of a thing *ab initio* (to a certain intent) which *in rei veritate* had essence, and the rather for necessity, *ut res magis valeat quam pereat.*" And in Lord Coke's comments on the case he observes (p. 30*a*): "The law will never make any fiction, but for necessity and in avoidance of a mischief."

Early in England the doctrine of relation was applied in favor of the King in cases where, until office found, the title or right of possession to property, real or personal, was not in the Crown. Thus, Viner in the eighteenth volume of his Abridgment, at page 292, title *Relations*, states the following case:

"2. *In quare impedit*, where the King is entitled to the *advowson by office by death of [226]
his tenant, the heir being within age and in ward of the King by tenure *in capite*, this office shall have relation to the death of the tenant of the King; so that if there be a mesne presentment the King shall avoid it by relation. (Br. Relations, pl. II. cites 14 H. VII. 22.)"

Several instances of the application of the doctrine in favor of the King are referred to at length in the report of the case of *Nichols* v. *Nichols*, 2 Plowd. 488 *et seq.*, one of which, I submit, is precisely parallel to the case at bar, and is thus stated in the report:

"In an action of trespass brought in 19 Edw. IV. for entering into a close and taking the grass, the defendant pleaded that it was found by office that the tenement escheated to the King before the day of the trespass, and there it seems that, as to such things as arise from the land, as the grass, and the like, the action which was well given to the plaintiff was taken away by the office found afterwards, which by its relation entitled the King thereto; but, as to the entry into the land, or breaking of fences, which don't arise from the land, nor are any part of the annual encrease of it, the action was not taken away by the office."

This last case is reviewed, approvingly, in the opinion of Bayley, J., in *Harper* v. *Charlesworth*, 4 Barn. & C. 587, where, in an action of trespass brought by one in the possession of lands under a parol license from agents of the Crown, which possession was not good as against the Crown because not granted in conformity to statute, it was adjudged that, as the King had not proceeded against the occupant, the action might be maintained, though the right of such occupant to recover for the trees was denied in the opinion of Holroyd, J., presumably because they form part of the inheritance.

The doctrine was early enforced in England to vest a right of action in trover in an administrator. In 18 Viner's Abr., title *Relation*, p. 285, it is said:

"(1. If a man dies possessed of certain goods, and after a stranger takes them and converts them to his own use, and then administration is granted to J. S., this administration shall relate back to the death of the testator, so that J. S. *may maintain an ac- [227]
tion of trover and conversion for this conversion before the administration granted to him. Trin. 10 Car. B. R. between Locksmith and Creswell adjudged, this being moved in arrest of judgment, after verdict for the plaintiff. Intratur. Hill, 9 Car. Rot. 729.)"

In the marginal note it is stated: "For this is to punish an unlawful act; but relations shall never devest any right legally vested in another between the death of the intestate and the commission of administration."

An administrator has likewise been held, by relation, to have such constructive right of possession in the goods of the intestate before grant of letters as to be entitled to maintain an action of trespass. *Tharpe* v. *Stallwood,* 5 Mann. & G. 760, and cases there cited. And, in *Foster* v. *Bates,* 12 Mees. & W. 226, Parke, B., said (p. 233):

"It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. All the authorities on this subject were considered by the court of common pleas, in the case of *Tharpe* v. *Stallwood,* 12 L. J. C. P. N. S. 241 (a), where an action of trespass was held to be maintainable. The reason for this relation given by Rolle, C. J., in *Long* v. *Hebb,* Style, 341, is, that otherwise there would be no remedy for the wrong done."

The title of an assignee in bankruptcy was also early held to relate back, for the purpose of maintaining trover, to the time of the commission of the act of bankruptcy. See the subject reviewed in *Balme* v. *Hutton,* 9 Bing. 471, particularly pages 524, 525, where Tindal, C. J., observed that in *Brassey* v. *Dawson,* 2 Strange, 978, Lord Hardwicke, then chief justice of the King's bench, stated this relation to be a fiction of law, but that, subsequently, when chancellor, in *Billon* v. *Hyde,* 2 Ves. Sr. 330, he seemed to be of opinion that the terms of the bankrupt act, by necessary construction, imported that such relation was intended.

Another illustration of the application of [228] the doctrine is *where a grantee or mortgagee ratifies an unauthorized delivery of a conveyance or mortgage to a third person, in which case it is held that the title may relate back to the unauthorized delivery, except as to vested rights of third persons. See a review of numerous authorities in *Rogers* v. *Heads Iron Foundry Company,* 51 Neb. 39 [37 L. R. A. 429]. See also *Wilson* v. *Hoffman,* 93 Mich. 72, where it was held that a successful plaintiff in ejectment might maintain an action of trover for logs cut by the defendant from standing timber and removed from the land during the pendency of the suit, and while in possession of the land under a bona fide claim of title adverse to the plaintiff. In that case the court said (p. 75):

"In the present case the true owner brings trover against the party who cut the logs, under a bona fide claim of title adverse to the owner, after the title to the land has been determined in favor of the plaintiff. . . . If in the present case the logs had been upon the land when the ejectment suit was determined, that determination would have established the title in the plaintiff. Suppose, however, that before the determination of the ejectment suit the logs had been skidded upon adjoining land, would the ownership or right of possession depend upon which party first reached the skids? As is said in the *Busch Case,* as between the wrongdoer and the true owner of the land, the title to what is severed from the freehold is not changed by the severance, whatever may be the case as to strangers. If the true owner may keep his own property when he gets it, why may not he get it if another has it?"

Many decisions of this and other courts illustrate the application of the doctrine to various conditions of fact. Thus, where one has claimed land under a donation act, or has entered upon land under homestead or pre-emption statutes, the legal title subsequently acquired by patent has been held to relate back to a prior period, to quote the language of this court in *Gibson* v. *Chouteau,* 13 Wall. 100 [20: 536], "so far as it is necessary to protect the rights of the claimant to the land, and the rights of parties deriving their interests from him."

Among the cases recognizing and applying the doctrine *that the legal title when ac- [229] quired may be held, for certain purposes, to relate back to the inception of an inchoate right in the land, which, however, was in no sense an estate in the land, may be cited the following: *Ross* v. *Barland,* 1 Pet. 665 [7: 302]; *Landes* v. *Brant,* 10 How. 348 [13: 449]; *Lessee of French* v. *Spencer,* 21 How. 228, 240 [16: 97, 100]; *Grisar* v. *McDowell,* 6 Wall. 363 [18: 863]; *Beard* v. *Federy,* 3 Wall. 478 [18: 88]; *Lynch* v. *Bernal,* 9 Wall. 315 [19: 714]; *Stark* v. *Starrs,* 6 Wall. 402 [18: 925]; *Gibson* v. *Chouteau,* 13 Wall. 92, 100 [20: 534, 537]; *Shepley* v. *Cowan,* 91 U. S. 330 [23: 424]; *Heath* v. *Ross,* 12 Johns. 140; and *Musser* v. *McRae,* 44 Minn. 343. As was said in *Gibson* v. *Chouteau, supra,* 13 Wall. 101 [20: 537], the doctrine of relation is "usually" applied in this class of cases, but is so applied "for the purposes of justice." I submit it is clear that the inchoate rights in land held in the cases above cited to be sufficient to warrant the application of the doctrine of relation were of no greater legal or equitable merit or efficacy than the interest or expectant right in land with its incidents reserved to the United States by virtue of the granting act of 1856 here considered, and this it strikes me is patent when it is borne in mind that it is conceded that the interest of the United States in the land was such that, if the timber had been cut by the state, the United States had the better right to the avails, and might, by an action for breach of covenant, recover the same from the state. But if the state, which held the legal title subject to an express trust, can be held to account by way of damages in an action of covenant for timber cut under its authority, why "for the purposes of justice" should not the doctrine of relation be applied in favor of the United States, at this time when, otherwise, a naked trespasser, who had no title of any kind, and whom the state, while it was trustee, chose not to sue and cannot now sue, will escape liability and the United States be defrauded

of the value of its property? To deny relief under such a state of facts is, I submit, to hold that if A conveys land in fee to B in trust, to be held for C until the happening of a certain event, and, after the contingency has happened, and the land has been conveyed to C and the trust thus terminated, the former *cestui que trust* discovers that the land had been stripped of all its timber
[230] by a trespasser and rendered practically valueless, he is without remedy, and must endure the pecuniary injury without complaint.

If, as it seems to me is clearly the fact, the state of Michigan held title to the timber merely as an incident to the land, and could only exercise such powers with respect to the timber as it was entitled to exercise as respects the land itself, it results that the state did not stand in the attitude of a grantee of land upon condition subsequent, to whom an *absolute* conveyance had been made, *for its sole use and benefit.* Authorities, therefore, to the point that in the case of *such* a conveyance, the only right of the grantor is to receive back, upon re-entry, the granted land in the condition in which it might then exist, have no pertinency in a case like the present, where the grant was to the state, not as absolute owner, but as a mere trustee So, also, I submit that decisions which hold that upon the commission of a trespass upon land where the legal title and possession is in the real owner, or upon an infringement of a patent the legal title to which is in the real owner, a right of action to recover damages for the trespass or infringement immediately vests in such owner and becomes personal to him, so as not to pass upon a subsequent conveyance of the land or assignment of the patent, have no relevancy in cases like that at bar, where at the time of the trespass or infringement complained of the legal title and the possession were held by one who was a trustee for another, and had no real, beneficial interest in the land.

Nor can I see the appositeness of the citation of authorities holding that, during the existence of a trust, the trustee, and not the *cestui que trust*, is the proper person to sue. This is readily conceded, and such was the decision of this court in *Schulenberg* v. *Harriman* and in *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham.* The question here is not, Who may sue during the existence of the trust? but, What are the rights of the *cestui que trust* when the power of the trustee has ended and the property has reverted under the terms of the trust?

The decisions are uniform, that even where land is in the possession of a lessee, upon an
[231] unauthorized severance of *growing timber, the title and right of possession to the severed timber is at once vested in the owner of the land, or, as it is sometimes expressed, the owner of the inheritance; and the latter may resort to the appropriate remedies against one who unlawfully removes the severed timber from the land. *Liford's Case*, 11 Coke, 46*b*, 48*a*; *Ward* v. *Andrews*, 2 Chitty, 636; *S. C.* 4 Kent, Com. 120; *United States* v. *Cook*, 19 Wall. 591, 594 [22: 210, 211]; *Burnett* v. *Thompson*, 51 N. C. (6 Jones, L.) 210, 213; *Mathers* v. *Ministers of Trinity Church*, 3 Serg. & R. 515 [8 Am. Dec. 663], and cases cited; *Moores* v. *Wait*, 3 Wend. 104, 108; *Gordon* v. *Harper*, 7 T. R. 13; 1 Chitty, Plead. 16th ed. 217, star paging 168; 1 Wash. Real Prop. 5th ed. 498, note *T*, star paging 314; and the same principle applies to whatever is part of the inheritance and is wrongfully severed and removed from the land. *Farrant* v. *Thompson*, 5 Barn. & Ald. 826, 828.

To summarize, therefore: The state of Michigan was not the beneficial owner of the land from which the timber in question was severed, but held the legal title merely as a trustee, though, by virtue of being vested with the legal estate, the state was entitled to enforce, for the benefit of the real owner, such remedies as the latter might have resorted to had he held the legal title. But if the owner, the United States, is not permitted to maintain the present action, it loses property which it had a clear right to receive, and the wrongdoer goes unpunished. These circumstances present all the elements which justify resort to the fiction of law by which a person who, in equity and good conscience, was the real owner at the time of an unlawful conversion, is to be regarded, as against the wrongdoer, to have had the legal title and possession, by relation, in him at the time of such conversion, and therefore as having had such a title and possession as, when his disability to assert his rights no longer exists, will entitle him to maintain an action of trover.

Indeed, it seems to me that in reason it is impossible to deny the right of the true owner to recover the timber, without involving the mind in irreconcilable propositions and in addition making use of a complete *nonsequitur*, that is to say, first, that there was no trust, and yet that rights existed
*which could only arise by reason of a trust; [232]
and second, that the trustee alone could sue during the existence of the trust, therefore, on the termination of the trust, the same doctrine applies. Reduced to its last analysis, the doctrine now announced is, I submit, really this: That the United States could not recover whilst the trust existed because the trustee must assert the right, and that it likewise could not recover after the termination of the trust, and, hence, could not recover at all. The result in effect concedes the existence of a right of property, but holds that it cannot be protected because the law affords no remedy. The maxim, *Ubi jus, ibi remedium*, lies at the very foundation of all systems of law, and, because, as has been stated at the outset, I cannot believe that the common law departs from it, I refrain from giving my assent to the conclusions of the court, and express my reasons for dissenting therefrom.

WILLIAM GRANT, Receiver of the Estate of Oliver J. Morgan, *Plff. in Err.*,
v.
JOHN A. BUCKNER.

(See S. C. Reporter's ed. 232-239.)

Date of pre-existing right—set-off of rent—suit in state court by receiver appointed by Federal court—allowance of set-off.

1. An adjudication that a party is entitled under a conveyance to one half the estate is a determination of a pre-existing right which dates from the time of the conveyance.
2. One half the rent paid to a receiver by one who took a lease from him rather than be dispossessed, but who is subsequently adjudged to be the owner of one half the estate, may be set off against the rent thereafter accruing for the half that is subject to the receiver.
3. A receiver in a Federal court who voluntarily goes into a state court cannot question the right of that court to determine the controversy between himself and the other party.
4. A counterclaim or set-off comes within the spirit of the act of Congress of August 13, 1888, allowing a receiver of a Federal court to be sued in a state court without leave of the court appointing him.

[No. 89.]

Submitted November 29, 1898. Decided December 19, 1898.

IN ERROR to the Supreme Court of Louisiana to review a judgment of that court affirming a judgment of the District Court of the Seventh Judicial District for East Carroll Parish, Louisiana, in favor of the defendant, John A. Buckner, allowing his set-off for rent to the claims of William Grant, receiver of the estate of Oliver J. Morgan, plaintiff in an action brought by him to recover one half the stipulated rent of the Melbourne plantation in that state. *Affirmed.*

See same case below 49 La. Ann. 668.

The facts are stated in the opinion.

Mr. **J. D. Rouse** for plaintiff in error.

Mr. **Thomas Marshall Miller** for defendant in error.

[233] *Mr. Justice **Brewer** delivered the opinion of the court:

This case comes on error to the supreme court of the state of Louisiana. It is perhaps the last step in a litigation which has been going on for a quarter of a century, and which has twice appeared in this court. *Johnson* v. *Waters*, 111 U. S. 640 [28: 547]; *Mellen* v. *Buckner*, 139 U. S. 388 [35: 199]. In those cases the full story of the litigation is told. For the present inquiry it is sufficient to note these facts: Prior to the late civil war Oliver J. Morgan was the owner of five plantations in the state of Louisiana. His wife died intestate in 1844, leaving two children as her sole heirs. The property standing in his name was community property. In 1858 he conveyed the plantations to his children and grandchildren. The purpose of this conveyance was, first, to secure to the grantees their shares in the property as the heirs of his wife, and secondly, to make a donation from himself. He died in 1860. In 1872 certain *creditors of Morgan, creditors [234] of him individually, and not of the community, brought suit in the circuit court of the United States to set aside the conveyance and subject his interest in the property to the payment of their debts. Their contention was sustained by the circuit court, and its decree was substantially affirmed by this court. 111 U. S. 640 [28: 547]. Thereafter, and in May, 1884, the circuit court appointed a receiver to take charge of all the property conveyed by Morgan. Melbourne plantation was at the time in the possession of the present defendant in error, claiming under the conveyance made by Morgan in 1858. After the appointment of the receiver the defendant in error, rather than be dispossessed, leased from him the plantation. The litigation continued, and, new parties being named, came to this court again in 1891. 139 U. S. 388 [35: 199]. It was then decided that one undivided half of the Melbourne plantation belonged to the defendant in error, and that only the remaining half was subject to the debts of Morgan. The language of the decree was: "The said heirs are entitled to have and retain a certain portion of said Oliver J. Morgan's estate free from the claims of his creditors, as follows, to wit: two fifths of the four plantations, Albion, Wilton, Westland, and Morgana, are directed and decreed to be reserved for the benefit of the heirs of Julia Morgan, deceased; and one half of Melbourne plantation is directed and decreed to be reserved for the benefit of the heirs of Oliver H. Kellam, Jr., deceased; and that the remaining interest in the said plantations is decreed and adjudged to be subject to the payment and satisfaction of the debts due to the administrator of said William Gay," etc.; and further, after providing for other matters, "but if the heirs shall not desire a severance of their portions, then the whole property to be sold and they to receive their respective portions of the proceeds, but no allowance for buildings. Any moneys in the hands of the receiver, after paying his expenses and compensation, are to be divided between the creditors and heirs in the proportions above stated, applying the amount due to the heirs, so far as may be requisite, to the costs payable by them." Two years thereafter the interest of *Morgan in the [235] plantation was sold in accordance with the terms of the decree. The defendant had paid to the receiver the rent of the entire plantation from 1884 up to the decree in 1891, but paid nothing thereafter. This action was commenced by the receiver in the district court of the seventh judicial district for East Carroll parish, Louisiana, to recover one half the stipulated rent of the Melbourne plantation for the years 1891 and 1892, as well as one half of the taxes thereon for those years. The defendant answered, not questioning his liability for the matters set forth in the petition, but alleging that between 1884 and 1891 he had paid the receiver rent for the entire plantation, one half of which had been

finally adjudged to be his property, and not subject to the claims of creditors of Morgan, and prayed to set off the one half of the rent wrongfully collected between 1884 and 1891 against the one half due for the years 1891 and 1892, and for a judgment over against the receiver for any surplus. The trial court sustained his defense so far as to decree a full set-off to the claims of the receiver. The supreme court of the state affirmed the trial court in this respect, but amended the judgment so "as to reserve the defendant's right to demand of and recover from the plaintiff the residue of the amount of the rents he has collected in excess of the sum actually due by the defendant, after a sufficiency thereof has been used to extinguish by compensation the demands of said receiver in this suit." 49 La. Ann. 668. Whereupon the receiver sued out this writ of error.

Two questions are presented: First, Was the defendant entitled to set off against the rent unquestionably due for the undivided half of the plantation for 1891 and 1892, one half of the amount paid by him for rent between 1884 and 1891, on the ground that it had been finally adjudged that he was the owner of one undivided half of the plantation, and therefore that the receiver had improperly collected the rent therefor and, second, if he was entitled to such set-off, was he precluded from obtaining the benefit of it in the state courts by the fact that the receiver was an officer of the Federal court, or by any proceedings had in that court?

[236] *The contention of the receiver is that the defendant's right to one half of the plantation dates from the decree in 1891, while the defendant insists that it dates from the conveyance in 1858, and that the decree only determined a pre-existing right. We concur in the latter view. As a rule courts do not create, but simply determine rights. The adjudication that the defendant was entitled to an undivided one half of the plantation was neither a donation nor an equitable transfer of property in lieu of other claims. It was a determination of a pre-existing right, and that right dates and could only date from the conveyance in 1858.

The conclusions of the circuit court of the United States, as expressed in an opinion and passed into a decree,—a decree not appealed from, and therefore final between the parties,—are to the same effect. Such opinion and decree appear in the record. In the opinion, which was announced after the decision of this court in 139 U. S. 388 [35: 199], it was said: "From this last opinion and decree of the supreme court in the matter, we are forced to conclude that the portions of lands set off and adjudged to the heirs of Julia Morgan and heirs of O. H. Kellam, Jr., were so set off and adjudged to them as the owners thereof in their own right as the heirs of Julia Morgan and O. H. Kellam, Jr., who were the heirs of Narcisse Deeson, the wife of Oliver J. Morgan, and not to them in any way as the heirs of Oliver J. Morgan or as creditors or claimants of his estate. . . . The heirs of Julia Morgan and Oliver H. Kellam, Jr., participated in the fund recovered in the original case of *Gay, Administrator*, v. *Morgan, Executor, et al.*, but the careful reading and consideration which we have given the opinions and decrees of the supreme court, and particularly the supplemental decree in all the cases consolidated, give us the firm impression that the court intended to hold and declare that the portions recovered by said heirs were theirs of right, and that they were to have them, not only free of the claims of creditors of the estate of Oliver J. Morgan, but free from all costs and claims except as in the several decrees adjudged, and as thereafter might be necessary in effecting partition." And in the decree it was among *other things adjudged that "so much of said [237] decree of June 2, 1893, as the same is of record herein, as charges or attempts to charge the said John A. Buckner and Etheline Buckner as the owners of one half of Melbourne plantation, or that attempts to charge their said one half of said Melbourne plantation with lien privilege to contribute or to recuse the contribution of the sum of seven thousand three hundred and forty-seven .30 dollars to the payment of costs, disbursements, and solicitors' fees allowed by the court in and for the prosecution of the bill and action in case No. 6612 of the cases herein consolidated, be, and the same are, canceled, abrogated, annulled, and taken from said decree, and that the said John A. Buckner and Etheline Buckner, be, and are now decreed to take and hold said one half of the said Melbourne plantation allotted to them free from said charge and liability for said costs, disbursements, and solicitors' fees charged against them in said decree of June 2, 1893, as contribution to the expenses of the prosecution of said cause No. 6612 and of the causes herein consolidated." Obviously, the effect of this last decree was to materially modify the terms of prior orders and decrees, and to change the relations of the defendant as the owner of one half of the Melbourne plantation to the receivership.

The provision in the decree of this court in reference to the division between the creditors and the heirs of the moneys in the hands of the receiver after paying his expenses and compensation is one evidently applicable in case of the sale of the entire property, and cannot be construed as charging against the defendants, the heirs of Mrs. Morgan, any share of the costs incurred by the creditors of Mr. Morgan, in their efforts to subject his property to the payment of their debts.

Rents follow title, and the owner of the realty is the owner of the rent. So that from 1884 to 1891, and while the question of title was in dispute, the defendant was paying to the receiver rent for an undivided half of the plantation, property which was absolutely his own, and which the receiver ought not to have had possession of. The rent thus collected belonged to defendant, and could not be taken *by creditors of Morgan or appro- [238] priated to pay the cost of their lawsuits. So it is that the receiver, having in his possession money belonging to the defendant, to wit, the rent of one half the property from 1884 to 1891, now asks a judgment which

shall compel defendant to pay him a further sum. This cannot be. This is not a case in which a defendant indebted to an estate which is insolvent and can therefore pay its creditors only a *pro rata* amount seeks to set off a claim against the estate in absolute payment of a debt due from him to the estate, thus obtaining a full payment which no other creditors can obtain. For here one undivided half of the plantation was never the property of the estate vested in the receiver. It was wrongfully taken possession of by him. The rent therefor all the while belonged to the defendant, and the receiver holds it, not as money belonging to the estate, but to the defendant. To allow him to keep that money, and still recover an additional sum from the defendant, would be manifestly unjust.

It is said in the brief that the court first acquiring jurisdiction has a right to continue its jurisdiction to the end. We fail to see the application of this. The receiver voluntarily went into the state court, and, having voluntarily gone there, cannot question the right of that court to determine the controversy between himself and the defendant. A similar proposition was often affirmed in cases of bankruptcy, although by § 711, Revised Statutes, the courts of the United States are given exclusive jurisdiction "of all matters and proceedings in bankruptcy." *Mays* v. *Fritton*, 20 Wall. 414 [22: 389]; *Winchester* v. *Heiskell*, 119 U. S. 450[30: 462], and cases cited in the opinion. The same rule applies here. The question presented is, not how the estate belonging to the receiver shall be administered, but what is the estate belonging to him. The two questions are entirely distinct. Further, the right to sue a receiver appointed by a Federal court without leave of the court appointing him is granted by the act of August 13, 1888, chap. 866, § 3, 25 Stat. at L. 436. A counterclaim or set-off comes within the spirit of that act. And certainly no objection can be made to the allowance of a set-off, when, as here, it
[239] is *simply in harmony with the decrees of the Federal court, and in no manner questions their force or efficacy.

The jurisdiction of the state court is therefore clear, and the *judgment of the Supreme Court of Louisiana is affirmed.*

C. G. BLAKE, ROGERS, BROWN, & CO., and Hull Coal & Coke Co., *Plffs. in Err.*,
v.
CALVIN M. McCLUNG, William P. Smith, William B. Keener, Franklin H. McClung, Jr., and Charles J. McClung, Jr., Partners as C. M. McClung & Co., *et al.*

(See S. C. Reporter's ed. 239-269.)

State statute, when unconstitutional—equal privileges and immunities to citizens—corporation, when not a citizen—participation in assets—due process of law—corporation, when not within jurisdiction of state—Tennessee statute of March 19, 1877.

1. A state statute giving to residents of that state a priority over nonresidents in the distribution of the assets of a foreign corporation which, by filing its charter or articles of association in the state is deemed a corporation of that state, is, so far as it discriminates against citizens of other states, in violation of U. S. Const. art. 4, giving equal privileges and immunities to the citizens of the several states.
2. The constitutional guaranty of equal privileges and immunities to citizens forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to the people, by and for whom the government of the Union was established.
3. A corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."
4. A corporation of another state cannot invoke the constitutional guaranty of equal privileges and immunities of citizens in case of a discrimination against it in favor of the residents of a state, in respect to participation in the assets of an insolvent corporation.
5. A corporation of another state is not deprived of property without due process of law by denying it equality with residents of the state in the distribution of the assets of an insolvent corporation.
6. A corporation not created by the laws of a state, nor doing business in that state under conditions that subject it to process from the courts of that state, is not within the jurisdiction of that state, within the meaning of the constitutional provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws."
7. The Tennessee statute of March 19, 1877, so far as it subordinates the claims of private business corporations of other states, who are creditors of a corporation doing business in that state under that statute, to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws," secured by the 14th Amendment to the Federal Constitution to persons within the jurisdiction of the state.

[No. 6.]

Submitted November 8, 1897. Decided December 12, 1898.

IN ERROR to the Supreme Court of the state of Tennessee to review a judgment of that court adjudging that the Tennessee law of March 19, 1877, was constitutional, and that creditors of an insolvent company, residents of the state of Tennessee, are entitled to priority of payment out of the assets of said company over all other creditors of said company, who do not reside in said state, etc. *Affirmed as to the Coal & Coke Company, and reversed as to other plaintiffs,* citizens of Ohio, and cause remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Heber J. May** and **Tully R. Cornick** for the plaintiffs in error.

Messrs. **Henry H. Ingersoll, John W. Green,** and **Charles Seymour** for defendants in error.

[240] *Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a final judgment of the supreme court of Tennessee sustaining the validity of certain provisions of a statute of that state passed March 19th, 1877.

The chief object of the statute was declared to be to secure the development of the mineral resources of the state, and to facilitate the introduction of foreign capital. § 7.

It provides, among other things, that "corporations chartered or organized under the laws of other states or countries, for the purpose of mining ores or coals, or of quar-
[241] rying stones *or minerals, of transporting the same, or erecting, purchasing, or carrying on works for the manufacture of metals, or of any articles made of or from metal, timber, cotton, or wool, or of building dwelling houses for their workmen and others, or gas works, or waterworks, or other appliances designed for the promotion of health, good order, or general utility, in connection with such mines, manufactories, and dwelling houses, may become incorporated in this state, and may carry on in this state the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights and do the things therein specified, upon the terms and conditions, and in the manner and under the limitation herein declared." § 1.

The second section provides for the filing in the office of the secretary of state by "each and every corporation created or organized under or by virtue of any government other than that of the state, of the character named in the first section of this act, desiring to carry on its business" in the state, of a copy of its charter or articles of association, and the recording of an abstract of the same in the office of the register of each county in which the corporation proposes to carry on its business or to acquire any lands. § 2.

The third section declares that, "such corporations shall be deemed and taken to be corporations of this state, and shall be subject to the jurisdictions of the courts of this state, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this state." § 3.

The fifth section provides:

"§ 5. That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities, and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements, and contracts. Nevertheless, creditors who may be *residents of this state* shall have *a priority in the distribution of assets*, or subjection of the same, or any part thereof, to the payment of debts over all simple *contract [242]
creditors, being residents of *any other country or countries*, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this state, and the property of its citizens is or may be liable to taxation, but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may be hereafter granted to citizens or corporations for the purpose of encouraging manufacturers in this state, or otherwise." Acts of Tenn. 1877, p. 44, chap. 31.

The case made by the record is substantially as follows:

The Embreeville Freehold Land, Iron, & Railway Company, Limited,—to be hereafter called the Embreeville Company,—was a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes. In 1890 it registered its charter under the provisions of the above statute, and established a manager's office in Tennessee. It purchased property and did a mining and manufacturing business there, transacting its affairs in this country at and from its Tennessee office.

On the 20th day of June, 1893, C. W. McClung & Co. and others filed an original general creditors' bill in the chancery court of Washington county, Tennessee, against this company and others, alleging its insolvency and default in meeting and discharging its current obligations; charging that it had made a conveyance in trust of certain personal property in fraud of the rights of its other creditors, and asking the appointment of a receiver and the administration of its affairs as an insolvent corporation. The court took jurisdiction of the corporation, sustained the bill as a general creditors' bill, appointed a *receiver of its property in Ten- [243]
nessee, administered its affairs in that state, and passed a decree adjudicating the rights and priorities of certain creditors.

No question is made in respect of the amount due to any one of the creditors whose claims were presented.

The company maintained its home office in London, its managing director resided there, and after this suit was instituted liquidation under the companies' acts of Great Britain was there ordered and begun.

There were holders of debentures executed by the British company whose claims were not specifically adjudicated in the decree below. The original debenture issue amounted to $500,000, and another issue, subsequent

in time, and in respect of which priority in right was claimed, amounted to $125,000. All the holders of those issues are nonresidents of Tennessee and of the United States. There was also a general trade indebtedness aggregating about $90,000 due by the company to residents of Great Britain. Those claims were specifically adjudicated by the decree.

Among the creditors of the company at the time this suit was instituted were the plaintiffs in error, namely: C. G. Blake, whose residence and place of business was in Ohio; Rogers, Brown, & Company, the members of which also resided in Ohio and carried on business in that state; and the Hull Coal & Coke Company, a corporation of Virginia. In the intervening petitions filed by those creditors it was averred that the plaintiffs in the general creditors' bill, residents of Tennessee, claimed priority of right in the distribution of the assets of the insolvent corporation over other creditors of the corporation "citizens of the United States, but not of the state of Tennessee;" and that the said statute was unconstitutional so far as it gave preferences and benefits to the plaintiffs or other citizens of Tennessee over the petitioners or other citizens of the United States.

By the final decree of the chancery court of Washington county, it was, among other things, adjudged that the act of 1877 was constitutional; that all of the creditors of the Embreeville Company residing in Tennes-
[244] see were entitled to *priority* *of satisfaction out of its assets (after the payment out of the proceeds of the real estate of the claim of the Pittsburgh Iron & Steel Engineering Company) as against its other creditors who were "residents and *citizens of other states* of the United States or other countries;" that the creditors who were "*citizens of other states* of the United States, and who contracted with the company as located and doing business in Tennessee, are entitled to share ratably in its assets, being administered in this cause next after the payment of the Pittsburgh Iron & Steel Engineering Company *and the Tennessee creditors.*"

Upon appeal to the chancery court of appeals the decree of the chancery court was reversed in certain particulars. In the findings of the chancery court of appeals it was stated that the chancery court of Washington county adjudged, among other things, that "under the act of 1877 (which was adjudged constitutional) all the creditors of said Embreeville Company residing in Tennessee are entitled to priority of satisfaction out of the assets of the Embreeville Company (after the payment out of the proceeds of the real estate of the claim of the Pittsburgh Iron & Steel Engineering Co.) as against the other creditors of said company who are nonresidents and citizens of other states of the United States or other countries; that the other creditors of the Embreeville Company who are *citizens of other states of the United States,* and who contracted with the said Embreeville Company as located and doing business in the state of Tennessee, are entitled to share ratably in the assets of the defendant Embreeville Company being administered in this cause after the payment of the Pittsburgh Iron & Steel Engineering Company and the Tennessee creditors (except the coke stopped *in transitu*)." And the decree in the chancery court of appeals contained, among other provisions, the following: "That all of the holders and owners of the debenture bonds of the company are simple-contract creditors of said company, and stand upon the same footing in reference to the distribution of the assets of the company as all other of its creditors residing out of the state of Tennessee;" and that the "portion of the chancellor's decree giving priority of payment to such of the creditors of *said company who [245]
reside in the United States of America, but not in the state of Tennessee, and to such creditors now residents of Tennessee who dealt with the company in relation to its Tennessee office, over all alien creditors of said company, be, and the same is hereby, reversed, it being here adjudged that all the creditors of said company residing out of the state of Tennessee must share equally and ratably in the distribution of the funds of said company *after the Tennessee creditors shall have been paid in full.*"

The cause was carried to the supreme court of Tennessee, and so far as the plaintiffs in error are concerned was heard in that court upon appeal from the court of chancery appeals, as well as upon writs of error to the chancery court.

It was adjudged by the supreme court of the state that the act of March 19th, 1877, was in all respects a valid enactment, and not in contravention of paragraph 2 of article IV. or of the Fourteenth Amendment of the Constitution of the United States, nor in contravention of any other provision of the National Constitution; that all of the holders and owners of the debenture bonds of the Embreeville Company were simple-contract creditors of the company, and stood upon the same footing with reference to the distribution of its assets as all of its other creditors who "reside out of the state of Tennessee, whether they be residents of other states or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Company" who resided in the state of Tennessee are entitled to priority of payment out of all the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the state of Tennessee, whether they be residents of other states of the United States or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Freehold Land, Iron, & Railway Company who reside out of the state of Tennessee, whether they reside in other states of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company after the residents of the state of Tennessee shall have been first paid in full.

*The plaintiffs in error contend that the [246]

judgment of the state court, based upon the statute, denies to them rights secured by the second section of the fourth article of the Constitution of the United States providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," as well as by the first section of the Fourteenth Amendment, declaring that no state shall "deprive any person of life, liberty, or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws."

We have seen that by the third section of the Tennessee statute corporations organized under the laws of other states or countries, and which complied with the provisions of the statute, were to be deemed and taken to be corporations of that state; and by the fifth section it is declared, in respect of the property of corporations doing business in Tennessee under the provisions of the statute, that creditors who are residents of that state shall have a priority in the distribution of assets, or the subjection of the same, or any part thereof, to the payment of debts, over all simple-contract creditors, being residents of any other country or countries.

The suggestion is made that as the statute refers only to "residents," there is no occasion to consider whether it is repugnant to the provision of the National Constitution relating to citizens. We cannot accede to this view. The record shows that the litigation proceeded throughout upon the theory that the plaintiffs in error, Blake and the persons composing the firm of Rogers, Brown, & Co., were citizens of Ohio, in which state they resided, transacted business and had their offices, and that the plaintiff in error, the Hull Coal & Coke Company, was a corporation of Virginia. The intervening petition of the individual plaintiffs in error, as we have seen, states that they were residents of Ohio, engaged in business in that state, their residence, offices and places of business being at the city of Cincinnati, and that they were citizens of the United States, and not citizens of Tennessee. Although these allegations might not be sufficient to show that those parties were citizens of Ohio
[247] within the meaning of the statute *regulating the jurisdiction of the circuit courts of the United States (*Robertson* v. *Cease*, 97 U. S. 646 [24: 1057]), they may be accepted as sufficient for that purpose in the present case, no question having been made in the state court that the individual plaintiffs in error were not citizens, but only residents of Ohio. Looking at the purpose and scope of the Tennessee statute, it is plain that the words "residents of this state" refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto; such residence as appertained to or inhered in citizenship. And the words. in the same statute, "residents of any other country or countries" refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other state or country. It is impossible to believe that the statute was intended to apply to creditors of whom it could be said that they were only residents of other states, but not to creditors who were citizens of such states. The state did not intend to place creditors, citizens of other states, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of, other states. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that state, whether the latter were citizens or only residents of some other state or country. Any other interpretation of the statute would defeat the object for which it was enacted. We must therefore consider whether the statute infringes rights secured to the plaintiffs in error, citizens of Ohio, by the provision of the second section of article IV. of the Constitution of the United States declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Beyond question, a state may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude citizens of other states from such distribution *until the claims of its own citizens shall [248]
have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the state in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporations because of their being citizens of other states, and not citizens of the state in which such administration occurs?

These questions are presented for our determination. Let us see how far they have been answered by the former decisions of this court.

This court has never undertaken to give any exact or comprehensive definition of the words "privileges and immunities" in article IV. of the Constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner* v. *Elliott*, 18 How. 591, 593 [15: 497, 498], said: "We do not deem it needful to attempt to define the meaning of the word 'privileges' in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters, not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief." Nevertheless, what has been said by this and other courts upon the general subject will assist us in determining the particular questions now pressed upon our attention.

One of the leading cases in which the general question has been examined is *Corfield* v. *Coryell*, decided by Mr. Justice Washington at the circuit. He said: "The inquiry is, What are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sover-
[249]eign. *What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or Constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'" 4 Wash. C. C. 371, 380.

These observations of Mr. Justice Washington were made in a case involving the validity of a statute of New Jersey regulating the taking of oysters and shells on banks or beds *within* that state and which excluded inhabitants and residents of other states from the privilege of taking or gathering clams, oysters, or shells on any of the rivers, bays, or waters *in* New Jersey, not wholly owned by some person residing in the state. The statute was sustained upon the ground that it only regulated the use of the common
[250]property* of the citizens of New Jersey, which could not be enjoyed by others without the tacit consent or the express permission of the sovereign having the power to regulate its use. The court said: "The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe."

Upon these grounds rests the decision in *McCready* v. *Virginia*, 94 U. S. 391, 395 [24: 248, 249], sustaining a statute of Virginia prohibiting the citizens of other states from planting oysters in a river in that state where the tide ebbed and flowed. Chief Justice Waite, speaking for the court in that case, said: "These [the fisheries of the state] remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes, not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship." Consequently, the decision was that the citizens of one state were not invested by the Constitution of the United States "with any interest in the common property of the citizens of another state."

In *Paul* v. *Virginia*, 8 Wall. 168 180 [19: 357, 360], the court observed that "it was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom *possessed by the citizens of [251]
those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon* v. *The People*, 20 N. Y. 607. Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

Ward v. *Maryland*, 12 Wall. 418, 430 [20: 449, 453], involved the validity of a statute of Maryland requiring all traders, not being permanent residents of the state, to take out licenses for the sale of goods, wares, or merchandise in Maryland, other than agricultural products and articles there manufac-

tured. This court said: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property, to take and hold real estate, to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. Comprehensive as the power of the states is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described
[252] in the *indictment, any goods which the permanent residents of the state might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the *Slaughter-House Cases*, 16 Wall. 36, 77 [21: 394, 409], the court, referring to what was said in *Paul* v. *Virginia*, above cited, in reference to the scope and meaning of section two of article IV. of the Constitution, said: "The constitutional provision there alluded to did not create those rights which it called privileges and immunities of citizens of the several states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In *Cole* v. *Cunningham*, 133 U. S. 107, 113, 114 [33: 538,542], this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states "a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions."

These principles have not been modified by any subsequent decision of this court.

The foundation upon which the above cases rest cannot, however, stand, if it be adjudged to be in the power of one state, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other states. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that state. It was the right of citizens of Tennessee to deal with *it, as it was [253]
their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. The state did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other states. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that state. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other states, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that state, although liability for its debts and engagements was "to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements, and contracts." But, clearly, the state could not in that mode secure exclusive privileges to its own citizens in matters of business. If a state should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that state over the claims of individual creditors citizens of other states, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other states as such, and because they were such, privileges granted to citizens of the state enacting it. Can a different principle apply, as between individual citizens of the several states, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the *power to [254]
contract with citizens residing in states other than the one in which it is located?

It is an established rule of equity that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (*Graham* v.

La Crosse & M. Railroad Co. 102 U. S. 148, 161 [26: 106, 111]),—not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens. In *Wabash, St. L. & P. Railway Co.* v. *Ham*, 114 U. S. 587, 594 [29: 235, 238], it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. In *Hollins* v. *Brierfield Coal & Iron Co.* 150 U. S. 371, 385 [37: 1113, 1117], it was observed that a private corporation, when it becomes insolvent, holds its assets subject to somewhat the same kind of equitable lien and trust in favor of its creditors that exist in favor of the creditors of a partnership after becoming insolvent, and that in such case a lien and trust will be enforced by a court of equity in favor of creditors. These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that state, without making any distinction *between them.* Yet the courts of that state are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other states to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that state.

We hold such discrimination against citizens of other states to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or
[255] impairing rights secured to citizens *of the several states by the supreme law of the land. Indeed, all the powers possessed by a state must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States.

In *Lafayette Ins. Co.* v. *French*, 18 How. 404, 407 [15: 451, 453], Mr. Justice Curtis, speaking for this court, said: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the Constitution and laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." It was accordingly adjudged in *Barron* v. *Burnside*, 121 U. S. 186, 200 [30: 915, 920, 1 Inters. Com. Rep. 295], that an Iowa statute requiring every foreign corporation named in it, as a condition of obtaining a license or permit to transact business in that state, to stipulate that it would not remove into the Federal courts suits that were removable from the state courts under the laws of the United States, was void because it made the right to do business under a license or permit dependent upon the surrender by the corporation of a privilege secured to it by the Constitution. This principle was recognized in *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 111 [42: 964, 968], in which, after referring to the constitutional and statutory provisions defining the jurisdiction of the circuit courts of the United States, this court said: "The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state. *Hyde* v. *Stone*, 20 How. 170, 175 [15: 874, 876]; *Smyth* v. *Ames*, 169 U. S. 466, 516 [42: 819, 838]. It has therefore been decided that a statute which requires all actions against a county to be brought in a county court does not prevent the circuit court of the United States from taking jurisdiction of such an action; Chief Justice Chase saying that 'no statute limitation of suability can defeat a jurisdiction given by the Constitution.' *Cowles* v. *Mercer *County*, 7 Wall, 118, 122 **[256]**
[19: 86, 88]; *Lincoln County* v. *Luning*, 133 U. S. 529 [33: 766]; *Chicot County* v. *Sherwood*, 148 U. S. 529 [37: 546]. So statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void. *Home Ins. Co.* v. *Morse*, 20 Wall. 445 [22: 365]; *Barron* v. *Burnside*, 121 U. S. 186 [30: 915, 1 Inters. Com. Rep. 295]; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202 [36: 943]." See *Ducat* v. *Chicago*, 10 Wall. 410, 415 [19: 972, 973].

We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. For instance, a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another state, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the en-

joyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of alienage when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the people of the United
[257] States, by and *for whom the government of the Union was ordained and established.

Nor must we be understood as saying that a state may not, by its courts, retain within its limits the assets of a foreign corporation, in order that justice may be done to its own citizens; nor, by appropriate action of its judicial tribunals, see to it that its own citizens are not unjustly discriminated against by reason of the administration in other states of the assets there of an insolvent corporation doing business within its limits. For instance, if the Embreeville Company had property in Virginia at the time of its insolvency, the Tennessee court administering its assets in that state could take into account what a Virginia creditor, seeking to participate in the distribution of the company's assets in Tennessee, had received or would receive from the company's assets in Virginia, and make such order touching the assets of the company in Tennessee as would protect Tennessee creditors against wrongful discrimination arising from the particular action taken in Virginia for the benefit of creditors residing in that commonwealth.

It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the state for purposes of business, to deposit with the state treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are segregated from the mass of property owned by the company, and that they cannot look to them to the prejudice of those for whose special benefit they were deposited. The present case is not one of that kind. The statute of Tennessee did not make it a condition
[258] of the right of the British corporation *to come into Tennessee for purposes of business that it should, at the outset, deposit with the state a fixed amount to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other states. It permitted that corporation to contract with citizens of other states, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other states should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid—not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the state, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but—out of whatever assets of any kind the corporation might have in that state when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other states, those citizens cannot share in its general assets upon terms of equality with citizens of that state. If such legislation does not deny to citizens of other states, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result.

We adjudge that when the general property and assets of a private corporation lawfully doing business in a state are in course of adminstration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation *of that state; and [259]
no rule in the distribution of its assets among cerditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee.

As to the plaintiff in error, the Hull Coal & Coke Company of Virginia, different considerations must govern our decision. It has long been settled that, for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the state creating such corporation (*Louisville, Cincinnati & Charleston Railroad Co.* v. *Letson*, 2 How. 497 [11: 353]; *Covington Drawbridge Co.* v. *Shepard, etc.*, 20 How. 227, 232 [15: 896, 898]; *Ohio & Mississippi R. R. Co.* v. *Wheeler*, 1 Black, 286, 296 [17: 130, 133]; *National Steamship Co.* v. *Tugman*, 106 U. S. 118, 120 [27: 87, 88]; *Barrow Steamship Co.* v. *Kane*, above cited); and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the state under whose laws it was

organized. But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *Paul* v. *Virginia,* 8 Wall. 168, 178, 179 [19: 357, 359, 360]; *Ducat* v. *Chicago,* 10 Wall. 410, 415 [19: 972, 973]; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 566, 573 [19: 1029, 1031]. The Virginia corporation, therefore, cannot invoke that provision for protection against the decree of the state court denying its right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of the British corporation in the hands of the Tennessee court.

Since, however, a corporation is a "person" within the meaning of the Fourteenth Amendment (*Santa Clara County* v. *Southern Pacific Railroad Co.* 118 U. S. 394, 396 [30: 118]; *Smyth* v. *Ames,* 169 U. S. 466, 522 [42: 819, 840]), may not the Virginia corporation invoke for its protection, the clause of the Amendment declaring that no state shall deprive any person of property without due process, nor deny to any person within its jurisdiction the equal protection of the laws?

We are of opinion that this question must
[260] receive a negative *answer. Although this court has adjudged that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities (*Ex parte Virginia,* 100 U. S. 339, 346, 347 [25: 676, 678, 679]; *Yick Wo.* v. *Hopkins,* 118 U. S. 356, 373 [30: 220, 227]; *Scott* v. *McNeal,* 154 U. S. 34, 45 [38: 896, 901]; and *Chicago, Burlington & Q. R'd Co.* v. *Chicago,* 166 U. S. 226, 233 [41: 979, 983]), it does not follow that within the meaning of that Amendment the judgment below deprived the Virginia corporation of property without due process of law, simply because its claim was subordinated to the claims of the Tennessee creditors. That corporation was not, in any legal sense, deprived of its claim, nor was its right to reach the assets of the British corporation in other states or countries disputed. It was only denied the right to participate upon terms of equality with Tennessee creditors in the distribution of particular assets of another corporation doing business in that state. It had notice of the proceedings in the state court, became a party to those proceedings, and the rights asserted by it were adjudicated. If the Virginia corporation cannot invoke the protection of the second section of article IV. of the Constitution of the United States relating to the privileges and immunities of citizens in the several states, as its coplaintiffs in error have done, it is because it is not a citizen within the meaning of that section; and if the state court erred in its decree in reference to that corporaton, the latter cannot be said to have been thereby *deprived* of its property without due process of law within the meaning of the Constitution.

It is equally clear that the Virginia corporation cannot rely upon the clause declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws." That prohibition manifestly relates only to the denial by the state of equal protection to persons "within its jurisdiction." Observe that the prohibition against the deprivation of property without due process of law is not qualified by the words "within its jurisdiction," while those words are found in the succeeding clause relating to the equal protection of the laws. The court cannot assume that those words were inserted *without any object, nor is it [261]
at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that state. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee. So far as the record discloses, its claim against the Embreeville Company was on account of coke sold and shipped from Virginia to the latter corporation at its place of business in Tennessee. It does not appear to have been doing business in Tennessee under the statute here involved, or under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the people, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of the state of Tennessee (although such private corporations may be creditors of a corporation doing business in the state under the authority of that statute), to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the laws" secured by the Fourteenth Amendment to persons within the jurisdiction of the state, however unjust such a regulation may be deemed.

What may be the effect of the judgment of this court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the court on this writ of error.

*The final judgment of the Supreme Court [262]
of Tennessee must be affirmed as to the Hull Coal & Coke Company, because it did not deny to that corporation any right, privilege, or immunity secured to it by the Constitution of the United States. (Rev. Stat. §

709.) As to the other plaintiffs in error, citizens of Ohio, the judgment must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[262] *Mr. Justice **Brewer**, with whom the Chief Justice concurred, dissenting:

I am unable to concur in the opinion of the court in this case. In my judgment it misconceives the language of the statute, the issues presented by the pleadings, and the decision of the state court. The act does not discriminate between citizens of Tennessee and those of other states. Its language is creditors "residents of this state shall have a priority . . . over all simple contract creditors being residents of any other country or countries." The allegation of the amended bill is, "your orators are all residents of the state of Tennessee, and were such at the time the various debts sued on in this cause were created," and that by virtue of the statute they are entitled to priority over the "defendant, Rogers, Brown, & Co., and all other creditors of said insolvent corporation who do not reside in the state of Tennessee, or did not so reside at the time their credits were given." The intervening petition of the plaintiffs in error, Blake and Rogers, Brown, & Co., alleges "that they are residents of the state of Ohio, and were at the times and dates hereinafter named engaged in business in said state, their residences, offices, and places of business being at the city of Cincinnati." The decree of the court of chancery appeals adjudges "that all of the creditors of said company who resided in the state of Tennessee are entitled to priority of payment out of all of the assets of the company of every kind over all of the creditors of said company who do not reside in the state of Tennessee." And the decree of the supreme court of the state is in sub-
[263] stantially the *same language, adjudging "that all of the creditors of the Embreeville Freehold Land, Iron, & Railway Company, Limited, who resided in the state of Tennessee, are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company who do not reside in the state of Tennessee, whether they be residents of other states of the United States or of the Kingdom of Great Britain." So that neither the statute, the pleadings, nor the decree raise any question of citizenship, or give any priority of right to citizens of Tennessee over citizens of other states, but only discriminate between residents, and give residents of the state a priority. I think it improper to go outside of a case to find a question which is not in the record simply because it may be discussed by counsel for one party, who apparently decline to recognize any difference between residence and citizenship. For all this record discloses, the plaintiffs in error other than the corporation may have been citizens of the state of Tennessee, temporarily residing and doing business in Ohio, and the controversy one simply between citizens of the same state. It is not necessary in this court to refer to the difference between residence and citizenship. Neither is synonymous with the other and neither includes the other. A British subject or a citizen of Ohio may be a resident of Tennessee, and entitled to the benefit of this statute. A citizen of Tennessee may, like these plaintiffs in error, be a resident of and doing business in Ohio and not entitled to its benefit. It will be time enough to consider the question discussed in the opinion when it appears that a state has attempted to discriminate between its own citizens and citizens of other states, and the courts of the state have affirmed the validity of such discrimination.

Taking the statute as it reads, and assuming that the legislature of Tennessee meant that which it said, the question is whether a state, permitting a foreign corporation which is not engaged in interstate commerce to come into its territory and there do business, has the power to protect all persons residing within its limits who may have dealings with such foreign corporation, by requiring it to give them a prior security on its *assets within the state. The principle [264]
underlying this statute is that a state, which can have no jurisdiction beyond its territorial limits, has the power in reference to foreign corporations permitted to do business therein to protect all persons within those limits, whether citizens or not, in respect to claims upon the property thereof also within those limits. That a state may keep such a corporation out of its territory is conceded; and that, in permitting it to enter, the state may impose such conditions as it sees fit, is, as a general proposition, also admitted. In *Crutcher* v. *Kentucky*, 141 U. S. 47, 59, [35: 649, 653], it was said:

"The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous. *Bank of Augusta* v. *Earle*, 13 Pet. 519 [10: 274]; *Paul* v. *Virginia*, 8 Wall. 168 [19: 357]; *Liverpool & L. L. & F. Insurance Company* v. *Massachusetts*, 10 Wall. 566 [19: 1029]; *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727 [28: 1137]; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110 [30: 342]."

Everyone dealing with a foreign corporation is bound to take notice of the statutes of the state imposing conditions upon that corporation in respect to the transaction of its business within the state, just as he must take notice of any mortgage or other encumbrance placed by the corporation upon its property there situated. A state may, and often does, provide that persons furnishing supplies to and doing work for a corporation shall have a lien upon the property of that

corporation prior to any mortgage. The validity of such legislation has always been sustained, and they who loan their money to the corporation do so with notice of the limitation, and have no constitutional right of complaint if their mortgage is thereafter postponed to simple-contract obligations. If voluntarily the corporation placed a mortgage upon all its assets within the state to secure a debt to a single creditor residing within
[265]*the state, and such mortgage was duly recorded, no one would have the hardihood to say that a resident or citizen of another state could challenge its validity or its priority over his unsecured debt simply because he was a citizen of another state, or did not, in fact, know of its existence. And that which is true in case of a mortgage to a single creditor would be equally true in case such foreign corporation placed a mortgage upon its assets to secure every creditor within the state. The number of creditors secured does not change the validity of the security or affect the matter of notice or relieve the foreign creditor from the consequences of notice. If the corporation may vountarily place a mortgage upon all its assets within the state to secure its creditors within the state, why may not the legislature require as a condition of its doing business that it give such a mortgage? Is the corporation more powerful than the state? Is a voluntarily executed mortgage more valid than a statute? If, in fact, in pursuance of such a statute a mortgage to each separate creditor was given and recorded as fast as the corporation came under obligation to him, could a nonresident creditor question the validity of the mortgage or the priority given thereby? And is the effect of the statute in controversy anything other than the imposition upon the assets of the corporation within the state of a single mortgage in favor of home creditors? If written out and recorded, who could question its validity or its priority? The statute in its spirit and effect does nothing more. That it is prospective in its operation is immaterial—statutes generally are. The validity of an after-acquired property clause in a mortgage has become settled; none the less valid is it in a statute.

It is conceded in the opinion of the court that a foreign insurance corporation might be required to make a special deposit with the state treasurer to secure local policy holders, but if it is within the constitutional power of the state to require such special deposit, and when made it becomes in fact a security to the home policy holders, I am unable to appreciate why the state may not require a general mortgage on all the assets within the state as like security. Looking
[266]at it *simply as a question of power on the part of the state, what difference can there be between a pledge of a special fund and a mortgage of the entire fund within the state? And that which is true in respect to an insurance corporation must also be true of any other corporation not engaged in interstate commerce business.

Indeed, aside from the demand made by the statutes of certain states of deposits by foreign corporations to secure home creditors, there are frequent illustrations of discrimination based upon the matter of residence. Often nonresident plaintiffs are required to give security for costs when none is demanded of resident suitors. Attachments will lie in the beginning of an action, authorizing the seizure of property upon the ground that the defendant is a nonresident, when no such seizure is permitted in case of resident defendants. These and many similar illustrations, which might be suggested, only disclose that it has been accepted as a general truth that a state may discriminate on the ground of residence, and that such discrimination is not to be condemned as one between citizens; and yet, if the doctrine of the opinion of the court in this case be correct, I cannot see how those statutes can be sustained, for surely they discriminate between nonresident and resident suitors in the matter of fundamental rights, to wit, the right of equal entrance into the courts and equal security in the possession of property.

It may not be uninteresting to notice the case of *Fritts* v. *Palmer*, 132 U. S. 282 [33: 317]. That case came from Colorado. The statutes of that state, as quoted in the opinion of the court, provided, among other things—

"Sec. 260. Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of state, . . . and no corporation doing business in the state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge, or otherwise encumber its real or personal property situated in this state, to the injury or exclusion of any citizen, citizens, or corporations of this state *who are creditors of such foreign corpora- [267]
tion, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state until all its liabilities due to any person or corporation in this state at the time of recording such mortgage have been paid and extinguished."

Commenting upon this section, and others, this court said (p. 288):

"No question is made in this case—indeed, there can be no doubt—as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 732 [28: 1137, 1138], this court said that 'the right of the people of a state to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state, has been settled by this court.' "

It will be perceived that the statute of Colorado restrained a foreign corporation from mortgaging, pledging, or otherwise encum-

bering its property situate in the state to the injury or exclusion of any citizen of the state, creditor of such corporation, and further provided that no mortgage given by such foreign corporation to secure a debt created in another state should take effect against any citizen of the state until all liabilities due to any person or corporation in the state had been paid and extinguished. But this court said, and I think correctly, that there could be no doubt of the validity of these statutory provisions. It may be said, and said truthfully, that the attention of the court was not specially directed to this particular portion of the statute, and hence that the decision cannot be taken as authority. Yet the section was spread before the court, it is quoted in its opinion, and it was so obviously constitutional that neither counsel nor court had any doubt thereof. I note this case in order to suggest the objectionable evolution of the thought that a state may not protect those persons who are within its jurisdiction in respect to property also within its jurisdiction, or im-
[268] pose conditions on *foreign corporations doing business therein, which amount to such protection. Ten years ago a statute of Colorado guaranteeing priority to citizens of the state over all other creditors, even those by mortgage, was by all parties, counsel, and by court, conceded to be free from objection, while today a statute of Tennessee, in no way discriminating between citizens, but only between residents and in respect to foreign corporations, is declared to be so plainly at variance with the Constitution of the United States that it must be adjudged void.

The doctrine of this opinion is that a state has no power to secure protection to persons within its jurisdiction, citizens or noncitizens, in respect to property also within its jurisdiction, because, forsooth, such protection may in some cases work to the disadvantage of one who is not only a nonresident but also not a citizen of the state. It seems to me that the practical working out of this doctrine will be, not that the state may not discriminate in favor of its own residents as against nonresidents, but that the state must discriminate in favor of nonresidents and against its own residents. Take this illustration: A corporation organized and having its home office in New York comes into California to do business. The state of California attempts to require that its assets within the state shall be kept as a primary security for home creditors. This court declares that such requisition is unconstitutional. The solvency or insolvency of that New York corporation will be known in New York by those who are nearer to its home office sooner than by people in California. Insolvency is impending. The creditors in New York, near the home office, and familiar therefore with its exact condition, ascertaining its approaching insolvency, send to California, where there are assets, and, availing themselves of the ordinary statutory provisions of that state, seize by attachment all the assets there situated. The insolvency is thereafter made public, and the California creditors find that all the assets of the corporation within their state have been seized by creditors outside the state, and they are driven to the state of New York, where the corporation was organized, where its home *office and home as- [269]
sets are, to see what share in the unappropriated assets they can obtain, while the New York creditors, by reason of their early information, secure full payment. Practically, the effect is to compel the state to discriminate in favor of the New York against the home creditors. The suggestion that after the New York creditors have perfected their liens upon the assets in California, the courts of that state will stay proceedings until they see that the New York courts have given full protection to the California creditors in the assets in New York, is visionary and impracticable. There may be assets in twenty states, and there is no control by the courts of one state over proceedings in the courts of other states. Of course, if the California courts can wait till the New York courts have acted, the converse is also true, and so a game of seesaw may be established between the courts of the two states. For these, among other reasons, I am constrained to dissent from this opinion and judgment.

I am authorized to state that the Chief Justice concurs in this dissent.

VILLAGE OF NORWOOD, *Appt.*,
v.
ELLEN R. BAKER.

(See S. C. Reporter's ed. 269-303.)

Due process of law—cost of public improvement—special assessment, when invalid—injunction—special benefits—taking of private property for public use, without compensation.

1. Due process of law requires compensation to be made or secured to the owner of private property when it is taken by a state, or under its authority, for public use.
2. The exaction from the owner of private property, of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.
3. A special assessment upon abutting property by the front foot, without taking special benefits into account, for the entire cost and expense of opening a street, including, not only the amount to be paid for the land, but the cost and expense of the proceedings, is a taking of private property for public use without compensation.
4. An injunction against a special assessment which is illegal because it rests upon a basis that excludes any consideration of benefits should enjoin the whole assessment, without considering whether the amount is in excess of the special benefits to the property, or not.
5. Payment or tender of the amount of benefits received from an improvement is not necessary in order to obtain an injunction

against an illegal assessment which is based on a rule or system that has no reference to special benefits.

[No. 34.]

Submitted May 3, 1898. Decided December 12, 1898.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio adjudging that a certain assessment for opening a street is in violation of the constitutional amendment forbidding deprivation of property without due process of law. *Affirmed.*

See same case below, 74 Fed. Rep. 997.

The facts are stated in the opinion.

Mr. **William E. Bundy** for appellant.

Mr. **Charles W. Baker** for appellee.

[270] *Mr. Justice **Harlan** delivered the opinion of the court:

This case arises out of the condemnation of certain lands for the purpose of opening a street in the village of Norwood, a municipal corporation in Hamilton county, Ohio.

The particular question presented for consideration involves the validity of an ordi-
[271] nance of that village, assessing upon *the appellee's land abutting on each side of the new street an amount covering, not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings.

By the final decree of the circuit court of the United States it was adjudged that the assessment complained of was in violation of the Fourteenth Amendment of the Constitution of the United States forbidding any state from depriving a person of property without due process of law; and the village was perpetually enjoined from enforcing the assessment. 74 Fed. Rep. 997.

The present appeal was prosecuted directly to this court, because the case involved the construction and application of the Constitution of the United States.

It will conduce to a clear understanding of the case to ascertain the powers of the village under the Constitution and statutes of Ohio, and to refer somewhat in detail to the proceedings instituted for the opening of the street through appellee's property.

By the Constitution of Ohio it is declared: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Const. Ohio 1851, art. 1, § 19, Bill of Rights; Bates's Anno. Ohio Stat. vol. 3, p. 3525.

Cities and villages in Ohio are by statute given power to lay off, establish, open, widen, narrow, straighten, extend, keep in order, and repair, and light streets, alleys, public grounds, and buildings, wharves, landing places, bridges, and market spaces within the corporation, and to appropriate private property for the use of the corporation. And "each city and village may appropriate, enter upon, and hold real *estate within its corpo- [272]
rate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied: 1. For opening, widening, straightening and extending streets, alleys, and avenues; also for obtaining gravel or other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation. . . ." 1 Rev. Stat. Ohio (1890) § 1692, subdiv. 18 and 33, and § 2232, pp. 429, 430, title, *Cities and Villages; Enumeration of Powers*, and p. 572, title, *Appropriation by Cities and Villages of Private Property to Public Use.*

Other provisions of the statute prescribe the steps to be taken in the appropriation by a municipal corporation of private property for public purposes. §§ 2233 to 2261 *inclusive.*

It is further provided by the statutes of Ohio (1890) title XII. *Assessments, etc.,* chap. 4, as follows:

"§ 2263. When the corporation appropriates, or otherwise acquires, lots or lands for the purpose of laying off, opening, extending, straightening, or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation.

"§ 2264. In the cases provided for in the last section, and in all cases where an improvement of any kind is made of an existing street, alley, or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvement, *or according- [273]
ing to the value of the property assessed, *or* by *the front foot of the property bounding and abutting upon the improvement,* as the council by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more instalments, and at such times as the council may prescribe. . . ." 1 Rev. Stat. Ohio, p. 581.

Section 2271 provides: "In cities of the first grade of the first class, and in corporations in counties containing a city of the first grade of the first class, the tax or assessment especially levied or assessed upon any lot or land for any improvement shall not, except as provided in § 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the cost exceeding that per centum shall be paid by the corporation out of its general revenue; . . . and whenever any street or avenue is opened, extended, straightened, or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed *only on the lots and lands bounding and abutting on such part or parts of said street or avenue* so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one half in width of any street or avenue has been dedicated for such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from lots and lands on the other side thereof, no part of the cost and expense thus increased [incurred] shall be assessed upon the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, but said special assessment shall not be in any case in excess of benefits." 1 Rev. Stat. Ohio, p. 513.

Section 2272 relates to assessments for improvements made in conformity with the petition of the owners of property.

By section 2277 it is provided that "in cases wherein it is determined to assess the whole or any part of the cost of an improvement upon the lot or lands bounding or abut-
[274]ting *upon the same, or upon any other lots or lands benefited thereby, as provided in § 2264, the council may require the board of improvements, or board of public works, as the case may be, or may appoint three disinterested freeholders of the corporation or vicinity, to report to the council an estimated assessment of such cost on the lot or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection."

Section 2284 is in these words: "The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when the same has been acquired by purchase, or the value thereof as found by the jury, where the same has been appropriated, the costs and expenses of the proceedings, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

By an ordinance approved October 19th, 1891, the village declared its intention to condemn and appropriate, and by that ordinance condemned and appropriated, the lands or grounds in question for the purpose of opening and extending Ivenhoe avenue; and in order to make such appropriation effectual, the ordinance directed the institution of the necessary proceedings in court for an inquiry and assessment of the compensation to be paid for the property to be condemned.

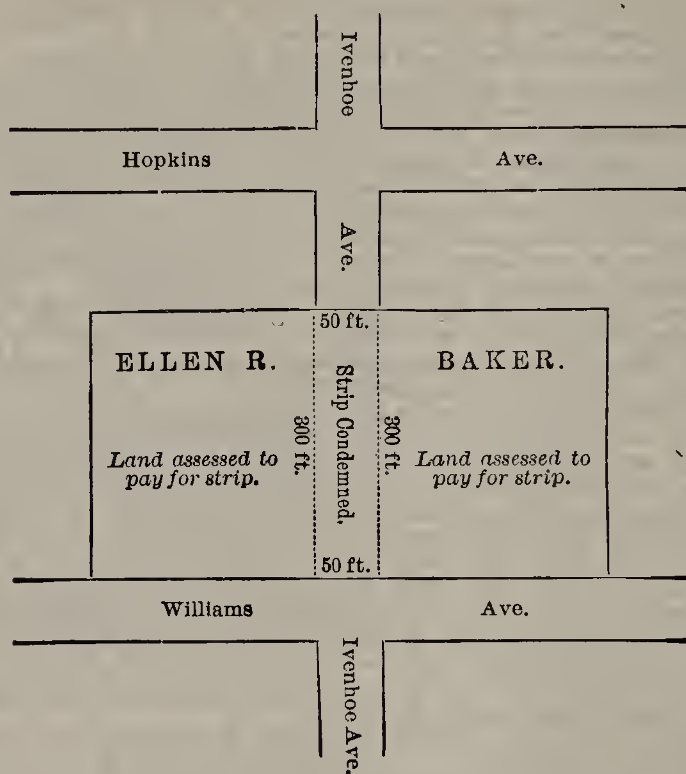
The ordinance provided that the cost and expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising and all other costs and the interest on bonds issued, if any, should be assessed "*per front foot* upon the property bounding and abutting on that part of Ivenhoe *avenue, as condemned and [275]
appropriated herein"—the assessments payable in ten annual instalments if deferred, and the same collected as prescribed by law and in the assessing ordinance thereafter to be passed.

Under that ordinance, application was made by the village to the probate court of Hamilton county for the empaneling of a jury to assess the compensation to be paid for the property to be taken. A jury was accordingly empaneled, and it assessed the plaintiff's compensation at $2,000, declaring that they made the "assessment irrespective of any benefit to the owner from any improvement proposed by said corporation."

The assessment was confirmed by the court, the amount assessed was paid to the owner, and it was ordered that the village have immediate possession and ownership of the

premises for the uses and purposes specified in the ordinance.

The property condemned is indicated by the following plat:



[276] *After the finding of the jury the village council passed an ordinance levying and assessing "*on each front foot* of the several lots of land bounding and abutting on Ivenhoe avenue, from Williams avenue to a point 300 feet north," certain sums for each of the years 1892 to 1901 inclusive, "to pay the cost and expense of condemning property for the extension of said Ivenhoe avenue between the points aforesaid [from Williams avenue to a point 300 feet north] together with the interest on the bonds issued to provide a fund to pay for said condemnation."

By the same ordinance provision was made for issuing bonds to provide for the payment of the cost and expense of the condemnation, which included the amount found by the jury as compensation for the property taken, the costs in the condemnation proceedings, solicitor and expert witness fees, advertising, etc.; in all, $2,218.58.

The present suit was brought to obtain a decree restraining the village from enforcing the assessment in question against the abutting property of the plaintiff.

It was conceded that the defendant assessed back upon the plaintiff's 300 feet of land upon either side of the strip taken (making 600 feet in all of frontage upon the strip condemned) the above sum of $2,218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum; and the village admitted that the assessment had been placed upon the tax duplicate, and sent to the county treasurer for collection, *as a lien and charge against the abutting property* owned by the plaintiff.

But the village alleged that the appropriation proceedings and consequent assessment were all in strict conformity with the laws and statutes of the state of Ohio and in pursuance of due process of law; that the opening and extension of Ivenhoe avenue constituted a public improvement for which the abutting property was liable to assessment under the laws of Ohio; that the counsel fees, witness fees, and costs included in such total assessment were a part of the legitimate expenses *of such improvement; and that at [277] any event an expense had been incurred by the municipal corporation in opening the street "equal to the full amount of the said assessment, which is a proper charge against the complainant's abutting property.

It was agreed at the hearing of the present case that the sum awarded by the verdict of the jury was paid to and received by the plaintiff, and that it was that sum, together with the costs and charges, that the village undertook to assess back upon the land upon either side of said strip of land.

The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no state shall deprive any person of property without due process of law nor deny to any person

within its jurisdiction the equal protection of the laws, as well as of the bill of rights of the Constitution of Ohio.

It has been adjudged that the due process of law prescribed by that Amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use. *Chicago, Burlington & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 241 [41: 979, 986]; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695 [41: 1165, 1168].

The taking of the plaintiff's land for the street was under the power of eminent domain —a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. *Searl* v. *Lake County School District No. 2*, 133 U. S. 553, 562 [33: 740,746]. But the assessment of the abutting property for the cost and expense incurred by the village was an exercise of the power of taxation. Except for the provision of the Constitution of Ohio above quoted, the state could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public
[278] use. But *does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the question whether the property was benefited by the opening of the street?

Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property—such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704 [26: 238, 242]; *Illinois Central Railroad Co.* v. *Decatur*, 147 U. S. 190, 202 [37: 132, 136]; *Bauman* v. *Ross*, 167 U. S. 548, 589 [42: 270, 288], and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams* v. *Eggleston*, 170 U. S. 304, 311 [42: 1047, 1050], where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: "Neither can it be doubted that, if the state Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of *what they receive by reason of such improve- [279]
ment. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

In *Illinois Central Railroad Co.* v. *Decatur*, 147 U.S. 190,202 [37: 132, 136],—where it was held that a provision in the charter of a railroad company exempting it from taxation did not exempt it from a municipal assessment imposed upon its land for grading and paving a street,—the decision rested upon the ground that a special assessment proceeds on the theory that the property charged therewith derives an increased value from the improvement, "the enhancement in value being the consideration for the charge."

*In Cooley on Taxation (2d ed. chap. 20) [280]
the author, in considering the subject of taxation by special assessment, and of estimating benefits conferred upon property by a public improvement, says that while a general levy of taxes rests upon the ground that

the citizens may be required to make contribution in that mode in return for the general benefits of government, special assessments are a peculiar species of taxation, and are made upon the assumption that "a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." Again, the author says: "There can be no justification for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property to public uses without compensation."

In *Macon* v. *Patty*, 57 Miss. 378, 386 [34 Am. Rep. 451], the supreme court of Mississippi said that a special assessment is unlike an ordinary tax, in that the proceeds of the assessment must be expended in an improvement from which "a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."

So, *In the Matter of Canal Street*, 11 Wend. 156, which related to an assessment to meet the expenses of opening a street, the court, after observing that the principle that private property shall not be taken for public use without just compensation was found in the Constitution and laws of the state, and had its foundation in those elementary principles of equity and justice which lie at the root of the social compact, said: "The cor-
[281] poration may see the extent of the *benefit of any improvement, before proceedings are commenced; but the extent of injury to be done to individuals cannot be known to them until the coming in of the report of the commissioners; they may then be satisfied that the property which is to be benefited will not be benefited to the extent of the assessment necessary to indemnify those whose property is taken from them. What are they to do? If they proceed, they deprive some persons of their property unjustly; if the report of the commissioners is correct, the amount awarded to the owners of property taken cannot be reduced without injustice to them. If the assessment is confirmed and enforced, the owners of the adjacent property must pay beyond the enhanced value of their own property, and all such excess is private property taken for public use without just compensation."

In *McCormack* v. *Patchin*, 53 Mo. 36 [14 Am. Rep. 440], the supreme court of Missouri said: "The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation." See also *Zoeller* v. *Kellogg*, 4 Mo. App. 163.

In *State, Hoboken Land & Imp. Co.*, v. *Hoboken*, 36 N. J. L. 293, which was the case of the improvement of a street and a special assessment to meet the cost,—such cost being in excess of the benefits received by the property owner,—it was held that to the extent of such excess private property was taken for public use without compensation, because that received by the landowner was not equal to that taken from him.

It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without *compensation [282]
in respect of the land taken for the street; for, by opening the street at his own cost he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property.

The views we have expressed are supported by other adjudged cases, as well as by reason and by the principles which must be recognized as essential for the protection of private property against the arbitrary action of government. The importance of the question before us renders it appropriate to refer to some of those cases.

In *State, Agens*, v. *Mayor, etc., of Newark*, 37 N. J. L. 416, 420–423, the question arose as to the validity of an assessment of the expenses incurred in repairing the roadbed of a portion of one of the streets of the city of Newark. The assessment was made in conformity to a statute that undertook to fix, at the mere will of the legislature, the ratio of expense to be put upon the owners of property along the line of the improvement. Chief Justice Beasley, speaking for the court of errors and appeals, said: "The doctrine that it is competent for the legislature to direct the expense of opening, paving, or improving a public street, or at least some part of such expense, to be put as a special burden on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the Constitution of this state that requires that all property in the state, or in any particular subdivision of the state, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities are vindicated. But while it is thus clear

that the burden of a particular tax may be placed on any political district to whose benefit such tax is to inure, it seems to me it is equally clear that, when such burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the state, we at once approach [283]the *line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the lawmaking power to concentrate the burden of a tax upon specified property, does not exist. If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed at the houses standing on the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed."

After referring to a former decision of the same court, in which it was said that special assessments could be sustained upon the theory that the party assessed was locally and peculiarly benefited above the ordinary benefit which as one of the community he received in all public improvements, the opinion proceeds: "It follows, then, that these local assessments are justifiable on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case no reason can be assigned why the tax is not general. An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universal-[284]ly condemned, *both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a landowner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when a property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I cannot distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burden; when his land is sequestered for the public use he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the power to tax."

So, in *Bogert* v. *Elizabeth*, 27 N. J. Eq. 568, 569, which involved the validity of a provision in the charter of a city directing the whole cost of special improvements to be put on the property on the line of the street opposite such improvements, the assessments to be made in a just and equitable manner by the common city council, the court said: "The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement. The direction is perfectly clear; the entire burden is to be borne by the land along the line of the improvement, and the ratio of distribution among the respective lots is left to the judgment of the common council. Such a power, according to legal rules now at rest in this state, cannot be executed. The whole clause is nugatory and void, and all proceedings under it are not mere irregularities, but are nullities."

*In *Hammett* v. *Philadelphia*, 65 Pa. 146, [285] 150–153 [3 Am. Rep. 615], the court, speaking by Judge Sharswood, said that it was a point fully settled and at rest in that state, that the legislature has the constitutional right to confer upon municipal corporations the power of assessing the costs of local improvements upon the properties benefited, and that on the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced. "These cases," the court said, "all fall strictly within the rule as originally enunciated—local taxation for local purposes—or, as it has been elsewhere expressed, taxation on the benefits conferred, and *not beyond the extent of those benefits*. . . If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if not being paid on demand he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon and *measured by, the extent of his particular benefit*, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation.

In *Barnes* v. *Dyer*, 56 Vt. 469, 471, which

involved the validity of a statute relating to the construction and repair of sidewalks in a city of Vermont, under the authority of its common council, and directing the expense to be assessed on the owners of property through which or fronting which such sidewalks should be constructed, it was said: "The act in question made no express allusion to assessment on account of benefit; neither does it limit the assessment to the amount of benefit; yet, as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land specially benefited."

In *Thomas* v. *Gain*, 35 Mich. 155, 162 [24 Am. Rep. 535], Chief Justice Cooley, speaking for the supreme court of Michigan, said:
[286] *"It is generally agreed that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses. This idea is strongly stated in *The Tide-Water Co.* v. *Coster*, 18 N.J. Eq. 519 [90 Am. Dec. 634], which has often been cited with approval in other cases. It is admitted that the legislature may prescribe the rule for the apportionment of benefits, but it is not conceded that its power in this regard is unlimited. The rule must at least be one which it is legally possible may be just and equal as between the parties assessed; if it is not conceivable that the rule prescribed is one which will apportion the burden justly, or with such proximate justice as is usually attainable in tax cases, it must fall to the ground, like any other merely arbitrary action which is supported by no principle."

In the case of *The Tide-Water Co.* v. *Coster*, 18 N. J. Eq. 527–8 [90 Am. Dec. 634], referred to by the supreme court of Michigan, it was said: "Where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has frequently been held, may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system it is not considered that the property of the individual or any part of it is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burden—when that which is received by the landowner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then *to that extent*, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate, as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these lands have a special concern in such improvements so far as particular lands will be in a pecul-
[287] iar manner benefited. *Beyond this their situation is like the rest of the community. The consideration for the excess of the cost of improvement over the enhancement of the property within the operation of the act is the public benefit. The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle that will permit the expense incurred in conferring such benefit on the public to be laid in the form of a tax on individuals."

In Dillon's Treatise on Municipal Corporations there is an extended discussion of this whole subject. In section 761 he states the general results of the cases in the several states concerning special assessments for local improvements. After stating that a local assessment or tax upon the property benefited by a local improvement may be authorized by the legislature, he says: "Special benefits to the property assessed, that is, benefits received by it in addition to those received by the community at large, is the true and only just foundation upon which local assessments can rest; and *to the extent of special benefits* it is everywhere admitted that the legislature may authorize local taxes or assessments to be made." Again, the author says: "When not restrained by the Constitution of the particular state, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied. But the adjudged cases do not agree upon the extent of legislative power." While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that "the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions and not an exercise of legislative authority." He further says: *"Whether it is [288]
competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining, not only that such property is specially benefited, but that it *is* thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions

have been made in many of the state Constitutions requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement or in the spirit of it, and perceiving that *special benefits actually received* by each parcel of contributing property *was the only principle upon which such assessments can justly rest,* and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must *upon principle be regarded as the just and reasonable doctrine,* that the cost of a local improvement can be assessed upon particular property *only to the extent that it is specially and peculiarly benefited;* and *since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.*"

It is said that the judgment below is not in accord with the decision of the supreme court of Ohio in *City of Cleveland* v. *Wick,* 18 Ohio St. 304, 310. But that is a mistake. That case only decided that the owner whose property was taken for a public improvement could not have his abutting property exempt from its due proportion of an assessment made to cover the expense incurred in making such improvement; that his liability in that regard was not affected by the fact that he was entitled to receive [289] compensation for his property actually *taken for the improvement without deduction on account of benefits to his other property. That the decision covered no other point is shown by the following extract from the opinion of the court: "The mischief which existed under the old Constitution was, that the benefits which were common to his neighbors, without charge, were deducted from the price paid to the owner of land taken. The evil might well be denominated inequality of benefits and burdens among adjoining landowners. You paid for the owner's land in privileges, and left him still liable, equally with his neighbors whose lands were untaken, to any and all local assessments that might afterwards be imposed. This was unequal, and therefore deemed unjust. Experience proved, moreover, that it led to much abuse of the power of condemnation. A full remedy is to be found for these evils in the provision in question, without at all making it to interfere with the power of assessment. Construed thus, it is in perfect accordance with the leading principle of taxation in the new Constitution—uniformity and equality of burdens. It simply guarantees to the owner of land condemned a full price. When that is paid, he stands on a perfect equality with all other owners of adjoining lands, equally liable, as he ought to be, to be taxed upon his other lands with them. He has the full price of his land in his pocket, and is an equal participant with them in benefits to adjoining lands. To throw the whole burden upon the others, in such a case, would be to do them the precise injustice which was done to him under the old Constitution. To do so, would be to avoid one evil only to run into another. It would be to avoid the evil of withholding from him a full and fair price for his lands, only to run into the equal evil of paying him two prices for it, the second price being at the expense of his neighbors."

If the principles announced by the authorities above cited be applied to the present case, the result must be an affirmance of the judgment.

We have seen that by the Revised Statutes of Ohio relating to assessments, that the village of Norwood was authorized to place the cost and expense attending the condemnation of the plaintiff's land for a public street on the general tax list of the *corporation, § [290] 2263; but if the village declined to adopt that course, it was required by section 2264 to assess such cost and expense "on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, or by *the front foot* of the property bounding and abutting upon the improvement;" while by section 2271, whenever any street or avenue was opened, extended, straightened, or widened, the special assessment for the cost and expense, or any part thereof, "shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood." It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost.

It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the *abutting property, irrespec- [291] tive of special benefit. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting

property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one.

Nor is the present case controlled by the general principle announced in many cases that a court of equity will not relieve a party against an assessment for taxation unless he tenders or offers to pay what he admits or what is seen to be due. That rule is thus stated in *German National Bank* v. *Kimball,* 103 U. S. 733 [26: 469]: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax, until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be *plainly seen he ought to pay;* that he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity; and that the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government, and cannot throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice, he must first do equity by paying so much as it is *clear he ought to pay,* and contest and delay only the remainder. *State Railroad Tax Cases,* 92 U. S. 575 [23: 669]. The same principle was announced in *Northern Pacific Railroad Co.* v. *Clark,* 153 U. S. 252, 272 [38: 706, 714, 4 Inters. Com. Rep. 641].

In *Cummings* v. *Merchants' National Bank,* 101 U. S. 153, 157 [25: 903, 905], which was the case of an injunction against the enforcement in Ohio of an illegal assessment upon the shares of stock of a national bank, this court, after observing that the
[292] bank held a trust *relation that authorized a court of equity to see that it was protected in the exercise of the duties appertaining to it, said: "But the statute of the state expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them. § 5848 of the Revised Statutes of Ohio 1880; vol. 53 Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a state created a new right or provided a new remedy, the Federal courts will enforce that right either on the common-law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* v. *Morton,* 99 U. S. 378 [25: 453]. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced, on the equity side of the court." Again: "Independently of this statute, however, we are of opinion that when a *rule* or *system of valuation* is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power." These observations are pertinent to the question of the power and duty of a court of equity to interfere for the plaintiff's relief. The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property, by the front foot, without any reference to special benefits.

Mr. High, in his Treatise on Injunctions, says that no principle is more firmly established than that requiring a taxpayer, who seeks the aid of an injunction against the enforcement or collection of a tax, first to pay or tender the amount which is conceded to be legally and properly due, or which is *plainly **[293]**
seen to be due. But he also says: "It is held, however, that the general rule requiring payment or tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed."

The present case is not one in which—as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments—it can be plainly or clearly seen, from the showing made by the pleadings, that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a *rule* of assessment that infringed upon her constitutional rights. In our judgment the circuit court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits.

It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes,

or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to [294] the special benefits accruing to *the property. By the decree rendered the court avoided the performance of functions appertaining to an assessing tribunal or body, and left the subject under the control of the local authorities designated by the state. Such a decree was more appropriate than one enjoining the assessment to such extent as, in the judgment of the circuit court, the cost of the improvement exceeded the special benefits. The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion, namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation.

It has been suggested that what has been said by us is not consistent with our decision in *Parsons* v. *District of Columbia*, 170 U. S. 45, 52, 56 [42: 943, 946, 948]. But this is an error. That was the case of a special assessment against land in the District of Columbia, belonging to the plaintiff Parsons, as a water-main tax, or assessment for laying a water main in the street on which the land abutted. The work was done under the authority of an act of Congress establishing a *comprehensive system for the District*, and regulating the supply of water and the erection and maintenance of reservoirs and water mains. This court decided that "it was competent for Congress to create a *general system* to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the creation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters. The power conferred upon the Commissioners was not to make assessments upon abutting properties, [295] nor to give notice to the property *owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and pipes, and of erecting fire plugs and hydrants, and their bona fide exercise of such power cannot be reviewed by the courts." One of the points in the case was presented by the contention that "the assessment exceeded the actual cost of the work." But that objection, the court said, overlooked "the fact that the laying of this main was part of the water system, and that the assessment prescribed was not merely to put down the pipes, *but to raise a fund to keep the system in efficient repair.* The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such *disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.* A similar objection was disposed of by the supreme judicial court of Massachusetts in the case of *Leominster* v. *Conant*, 139 Mass. 384. In that case the validity of an assessment for a sewer was denied because the amount of the assessment exceeded the cost of the sewer; but the court held that the legislation in question had created a sewer system, and that it was lawful to make assessments by a uniform rate which had been determined upon for the sewerage territory." If the cost of laying the watermains in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented.

Nor do we think that the present case is necessarily controlled by the decision in *Spencer* v. *Merchant*, 125 U. S. 345, 351, 357 [31: 763, 766, 768]. That case came here upon writ of error to the highest court of New York. It related to an assessment, by legislative enactment, upon certain isolated parcels of land, of a named aggregate amount which remained unpaid of the cost of a street improvement. In reference to the statute, the validity of which was questioned, the court said: "By the statute of 1881 a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was *ordered by the legis- [296] lature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff. The question submitted to the supreme court of the state was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment." Again: "The statute of 1881 afforded to the owners notice and hearing upon the question of equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled." The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opin-

ion and the dissenting opinion in that case.

We have considered the question presented for our determination with reference only to the provisions of the National Constitution. But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed "without deduction for benefits to any property of the owner," would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can under legislative authority be assessed, not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits.

[297] **The judgment of the Circuit Court must be affirmed*, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation.

It is so ordered.

Mr. Justice **Brewer** dissenting:

I dissent from the opinion and judgment of the court in this case, and for these reasons:

First. The taking of land for a highway or other public uses is a public improvement, the cost of which, under the Constitution of Ohio, may be charged against the property benefited. *Cleveland* v. *Wick*, 18 Ohio St. 304.

Second. Equally true is this under the Constitution of the United States. *Shoemaker* v. *United States*, 147 U. S. 282, 302 [37: 170, 186]; *Bauman* v. *Ross*, 167 U. S. 548 [42: 270].

Third. The cost of this improvement was settled in judicial proceedings to which the defendant in error was a party, and having received the amount of the award she is estopped to deny that the cost was properly ascertained.

Fourth. A public improvement having been made, it is, beyond question, a legislative function (and a common council duly authorized, as in this case, has legislative powers), to determine the area benefited by such improvements, and the legislative determination is conclusive. *Spencer* v. *Merchant*, 100 N. Y. 585, in which the court said:

"The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reasons. . . . By the act of 1881 the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne *none of the burden. [298]
In so doing, it necessarily determines two things, *viz.*, the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final."

Same case 125 U. S. 345, 355 [31: 763, 767], in which the judgment of the court of appeals of the state of New York was affirmed, and in which this court said:

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676 [20: 719]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616]; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704 [26: 238, 242]; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701 [28: 569].

Williams v. *Eggleston*, 170 U. S. 304, 311 [42: 1047, 1050], in which this court declared:

"Neither can it be doubted that, if the state Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

Parsons v. *District of Columbia*, 170 U. S. 45 [42: 943], in which this court sustained an act of Congress in respect to the District of Columbia, not only determining the area benefited by a public improvement, to wit, the ground fronting on the street in which the improvement was made, but also assessing the cost of such improvement at a specified rate, to wit, $1.25 per front foot on such area.

In this case we quoted approvingly from Dillon's Municipal *Corporations, 4th edi- [299]
tion, volume 2, section 752, in reference to this matter of assessment:

"Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency."

In the case at bar the question of apportionment is not important because the party charged owned all of the land within the area

described, all of the land abutting upon the improvement. The rule would be the same if one hundred different lots belonging to as many different parties faced on the new street.

The legislative act charging the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost. It is unnecessary to inquire how far courts might be justified in interfering in a case in which it appeared that the legislature had attempted to cast the burden of a public improvement on property remote therefrom and obviously in no way benefited thereby, for here the property charged with the burden of the improvement is that abutting upon such improvement, the property prima facie benefited thereby, and the authorities which I have cited declare that it is within the legislative power to determine the area of the property benefited and the extent to which it is benefited. It seems to me strange to suggest that an act of the legislature or an ordinance of a city casting, for instance, the cost of a sewer, or sidewalk in a street, upon all the abutting property, is invalid unless it provides for a judicial inquiry whether such abutting property is in fact benefited, and to the full cost of the improvement, or whether other property might not also be to some degree benefited, and therefore chargeable with part of the cost.

[300] *Again, it is a maxim in equity that he who seeks equity must do equity, and as applied to proceedings to restrain the collection of taxes, that the party invoking the aid of a court of equity must allege and prove payment, or an offer to pay such portion of the taxes or assessment as is properly chargeable upon the property. This proposition has been iterated and reiterated in many cases. In *State Railroad Tax Cases*, 92 U. S. 575, 617 [23: 669, 675], it was laid down "as a rule to govern the courts of the United States in their action in such cases." Further, the mere fact that tax proceedings are illegal has never been held sufficient to justify relief in equity. These propositions have been uniformly and consistently followed. See, among late cases, *Northern Pacific Railroad Co.* v. *Clark*, 153 U. S. 252, 272 [38: 706, 714, 4 Inters. Com. Rep. 641]. There is nothing in *Cummings* v. *Merchants' National Bank*, 101 U. S. 153 [25: 903], in conflict with the foregoing propositions. In that case it appeared that the local assessors of Lucas county, in which the bank was situated, agreed upon a rule of assessment by which money or invested capital was assessed at six tenths of its value, while the shares of national banks were assessed at their full cash value. It was held that an unequal rule of assessment having been adopted by the assessors, and that rule "applied, not solely to one individual, but to a large class of individuals or corporations," equity might properly interfere. But in that case the bank had paid to the county treasurer the tax which it ought to have paid as shown by the closing words of the opinion of the court: "The complainant having paid to defendant, or into the circuit court for his use, the tax which was its true share of the public burden, the decree of the circuit court enjoining the collection of the remainder is affirmed." If that creates an exception to the general equity rules in respect to tax proceedings, I am unable to perceive it.

Here the plaintiff does not allege that her property was not benefited by the improvement and to the amount of the full cost thereof; does not allege any payment or offer to pay the amount properly to be charged upon it for the benefits received, or even express a willingness to pay what the courts shall determine ought to be paid. On the contrary, *so far as the record [301]
discloses, either by the bill or her testimony, her property may have been enhanced in value ten times the cost of the condemnation. Neither is it charged that any other property was benefited in the slightest degree. It is well to quote all that is said in the bill in this respect:

"Your complainant complains of the defendant corporation that the said corporation, through its officers, its council, clerk and mayor, undertook and has undertaken to assess back upon this plaintiff's 300 feet upon either side of the said strip so taken, not only the said two thousand dollars, the amount adjudged to this plaintiff as the value of her property so taken, but also counsel fees, expenses of the suit, expenses and fees of expert witnesses, and other costs, fees, and expenses to this complainant unknown, and has proceeded to assess for opening and extending the said Ivenhoe street or avenue for the 300 feet upon each side upon her premises, making 600 feet in all of frontage upon the said strip so condemned by the defendant corporation, the sum of $2,218.58, payable in instalments, with interest at six per cent, the first instalment being $354.97 and the last or tenth instalment $235.17, lessening the same from year to year in an amount of about $13 per annum.

"That is to say, the said defendant corporation has undertaken to take 300 by 50 feet of this complainant's property, and, fixing the valuation upon it by proceedings at law now undertakes to assess upon the complainant's adjacent property, 300 feet upon each side, the said $2,000, the value of the same as adjudged by the court in the said condemnation proceedings, with all of the costs incidental thereto, including counsel and witness fees, so that in effect the property of this complainant has been taken and is sought to be taken by the defendant corporation for the uses of itself and the general public without any compensation in fact to the complainant therefor, but at an actual expense and outlay in addition,—that is to say, the corporation purposes by assessment to make this complainant not only pay for her own property taken for the benefit of the defendant, but also to pay the costs of so taking it without compensation.

. . . .

*"Wherefore she invokes her remedy given [302]

her by statute by injunction. She avers that the said seizure and taking of her said property and the pretended condemnation of the same and assessment of the same with added costs back upon her own property for the benefit of the defendant corporation and the general public is a seizure of her property without compensation; not only that, but at costs to her besides, in that the defendants have undertaken to make her pay for the taking of her property without a compensation in addition to the value of the property, and that she is without remedy and powerless unless she may have and invoke the equitable interference, as the statute authorizes her, of this honorable court."

The testimony is equally silent as to the matter of damages and benefits. There is not only no averment, but not even a suggestion, that any other property than that abutting on the proposed improvement, and belonging to plaintiff, is in the slightest degree benefited thereby. Nor is there an averment of a suggestion that her property, thus improved by the opening of a street, has not been raised in value far above the cost of improvement. So that a legislative act charging the cost of an improvement in laying out a street (and the same rule obtains if it was the grading, macadamizing, or paving the street), upon the property abutting thereon, is adjudged, not only not conclusive that such abutting property is benefited to the full cost thereof, but further, that it is not even prima facie evidence thereof, and that before such an assessment can be sustained it must be shown, not simply that the legislative body has fixed the area of the taxing district, but also, that by suitable judicial inquiry, it has been established that such taxing district is benefited to the full amount of the cost of the improvement, and also that no other property is likewise benefited. The suggestion that such an assessment be declared void because the rule of assessment is erroneous implies that it is prima facie erroneous to cast upon property abutting upon an improvement the cost thereof; that a legislative act casting upon such abutting property the full cost of an improvement is prima
[303] facie void; *that, being prima facie void, the owner of any property so abutting on the improvement may obtain a decree of a court of equity canceling *in toto* the assessment without denying that his property is benefited by the improvement, or paying, or offering to pay, or expressing a willingness to pay, any sum which may be a legitimate charge upon the property for value of the benefit to it by such improvement.

In this case no tender was made of any sum, no offer to pay the amount properly chargeable for benefits, there was no allegation or testimony that the legislative judgment as to the area benefited or the amount of the benefit was incorrect, or that other property was also benefited, and the opinion goes to the extent of holding that the legislative determination is not only not conclusive, but also is not even prima facie sufficient, and that in all cases there must be a judicial inquiry as to the area in fact benefited. We have often held the contrary, and I think should adhere to those oft-repeated rulings.

Mr. Justice **Gray** and Mr. Justice **Shiras** also dissent.

CHARLES WINSTON
v.
UNITED STATES.

WILLIAM M. STRATHER
v.
UNITED STATES.

EDWARD SMITH
v.
UNITED STATES.

(See S. C. Reporter's ed. 303–314.)

Verdict in murder case.

A verdict of guilty "without capital punishment" may be rendered in a murder case under the act of Congress of January 15, 1897, chap. 29, even if there are no mitigating or palliating circumstances.

[Nos. 431, 432, 433.]

Argued November 28, 1898. Decided January 3, 1899.

WRITS OF CERTIORARI to the Court of Appeals of the District of Columbia to review the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of that District in each of the above cases, adjudging Charles Winston, William M. Strather, and Edward Smith severally to be guilty of murder in the first degree and sentencing each of them to death. *Reversed,* and the case remanded to the Court of Appeals of said District, with directions to reverse the judgment of the Supreme Court of said District and to order a new trial.

Same case below, 13 App. D. C. 132, 155, 157.

Statement by Mr. Justice **Gray:**

*These were three cases of indictments, re- [304]
turned and tried in the supreme court of the District of Columbia, for murders committed since the passage of the act of Congress of January 15, 1897, chap. 29, by the first section of which, "in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. at L. 487.

Winston was indicted for the murder of his wife by shooting her with a pistol on December 13, 1897. At the trial, the government introduced testimony that while the

defendant and his wife were together in their bedroom about noon, with the door fastened, a pistol shot was heard, followed by a loud cry from her, and by two or three other pistol shots; that, on breaking open the door, the wife was found lying on the bed, killed by a pistol ball in the brain, and the defendant lying near her, unconscious, badly wounded by a pistol ball in the side of the head, and with a pistol near his hand; that earlier in the day he had taken a pistol from a place where he had left it; that he had previously threatened to kill her; and that he afterwards confessed that he had killed her, and said that he shot her because he was jealous of her and another man, and wanted to shoot both her and her lover, and that he afterwards shot himself. The defendant, being called as a witness in his own behalf, testified that he and his wife lived happily together, except that she was jealous of him; that he did not shoot her, and never said that he had shot her; that she shot him, and he immediately became unconscious, and so remained for a week after.

The judge instructed the jury that if they believed from the evidence that the woman
[305]took her own life, or that the *defendant did not fire the fatal shot, their verdict must be not guilty; but that if they were satisfied beyond a reasonable doubt that she met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, their verdict should be guilty as indicted, "for there would be a presumption of malice arising from the fact that her death was accomplished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any palliating or mitigating circumstances, there could be but one reasonable inference from the fact of the shooting, and that would be that the act was committed with malice aforethought."

The judge further instructed the jury as follows: "You have been told, and it is the law since the act of Congress, passed in January, 1897, that a jury is authorized, when they shall have reached the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words 'without capital punishment.'

"Counsel has endeavored to impress upon the jury the fact, not only that this right exists, but that it is the duty of the jury to so qualify their verdict in every given case; that because they have the opportunity of extending mercy, therefore the duty follows the right; that because it is your privilege or opportunity to qualify the verdict by adding the words 'without capital punishment,' it is your duty so to do. But the law was not so intended. It was intended to serve some useful purpose. There are many shades of circumstances that make up the crime of murder in different cases. In some instances, the circumstances might be such as to bring the crime within the definition of murder, and yet those circumstances might not indicate that degree of wantonness, wilfulness, and heinousness that the circumstances in other cases would indicate. I think that it was intended by Congress that in cases where the crime is clearly murder within the definition of the crime of murder, and yet there are circumstances which tend to mitigate the offense,—palliating circumstances that tend to show that the crime is
not heinous in its *character,—the jury may [306]
add the words 'without capital punishment,' and the law then makes the penalty imprisonment for life.

"That qualification cannot be added unless it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it.

"The penalty for the crime of murder has not been abrogated by Congress. The law-making power has seen fit to allow that penalty to remain; and it is only in those cases where the circumstances indicate to the jury that propriety, and the necessity, perhaps, or the duty of making such qualification, that the jury should add the qualifying words 'without capital punishment.' In all other cases, the law speaks. The jury need not qualify the penalty. It is not their duty to qualify it. It is their right and privilege in a proper case to qualify it."

"If the defendant did not commit this crime, he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted, or guilty with the qualification."

Strather was indicted for the murder with a hatchet on October 15, 1897, of a woman with whom he lived as his wife, but who was the wife of another man. At the trial, the government introduced evidence tending to prove these facts, and that for several nights before the homicide she failed to join the defendant, and he threatened to kill her. The testimony of the defendant and of other witnesses called by him tended to prove the defendant's previous reputation as a peaceful and law-abiding citizen, and the deceased's previous reputation as a quarrelsome and violent woman; that she had on previous occasions assaulted him, on one occasion throwing at him a beer mug, and on another occa-
sion cutting him with a *penknife; that she [307]
had previously threatened his life, and he knew of the threat; that immediately before the homicide there had been a quarrel between them; and that upon his arrest, immediately after the homicide, there was a bleeding wound upon his face. The defendant, in his testimony, admitted that he inflicted upon the woman the wounds which caused her death; but denied that he had ever threatened her life; and affirmed that he inflicted those wounds while under fear of his life, and during the heat and excitement of the quarrel, and while suffering pain from a blow by her on his left jaw, where there was an ulcerated sore at the time he received the blow.

At the close of the evidence, the defendant

requested the judge to give certain instructions to the jury, including this one: "In case the jury find the prisoner guilty of murder, they are instructed that they may qualify their verdict by the words 'without capital punishment,' no matter what the evidence may be." The judge declined to give that instruction, and, after defining murder and manslaughter, and the right of self-defense, instructed the jury as follows:

"If you should reach the conclusion that your verdict should be 'guilty as indicted,' it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict 'without capital punishment.' The jury have this power in any given case. The court cannot control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and, simply out of pity or sympathy or mercy, rendered a verdict of not guilty, they would violate their oaths.

"I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake
[308]it. Doubtless the intention *of the legislature was this: that if, in a case in which the jury reach the conclusion that the party on trial is guilty of murder, circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances, and say in their verdict 'without capital punishment.' If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the district attorney. Suppose a man knowing that his wife had been in improper relations with another man, and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder, a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration. But the object of this penalty, gentleman of the jury, is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict.

"If you reach the conclusion of guilt, 'guilty as indicted,' it is your duty to return that verdict; and, unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourself is this: Are the circumstances in this case such, if you reach the conclusion that the defendant is guilty as indicted, as to require you, upon your oaths, to interfere with the penalty fixed by law?"

Smith was indicted for the murder with a hatchet on November 15, 1897, of the wife of another man. At the trial, the government introduced circumstantial evidence tending to support the indictment; and also evidence that the defendant hired a room in the dwelling house of the husband and wife;
*that some time before the homicide, the two [309]
men had a quarrel about her, and both were arrested, convicted, and imprisoned on charges of assault; that the defendant at one time threatened to kill her if she ever resumed living with her husband; and that the defendant was quarreling with her just before her death.

The judge instructed the jury as follows: "Under a recent statute the jury are authorized, in returning a verdict of guilty of murder, if the evidence justifies them on their consciences in so doing, to qualify the verdict by the addition of the words 'without capital punishment.'

"The law inflicting the penalty of death for murder has not been repealed. That is the penalty which the law fixes." "The legislature probably intended that in cases where there were some mitigating or palliating circumstances, where it was apparent from the evidence that the crime was not the most heinous crime of murder, or where there was doubt whether the circumstances indicated premeditation, perhaps, that the jury might qualify their verdict by adding the words 'without capital punishment.' But it was evidently contemplated by Congress that there would be cases in which juries would not be justified in so qualifying their verdicts, and therefore the law remains, and unless the verdict is so qualified the penalty of the law is unchanged."

"If you find that the defendant is guilty, you will vindicate the law and uphold it by returning a verdict of 'guilty as indicted.' Whether you qualify it or not is a matter for you to determine. If you conclude to qualify it, it must be by the unanimous decision of the twelve jurors."

In each case, the defendant excepted to the instructions of the court concerning the act of Congress of January 15, 1897, and, after verdict of "guilty as indicted," and sentence of death, appealed to the court of appeals of the District of Columbia, which affirmed the judgment, Justice Shepard dissenting. Writs of certiorari were thereupon granted by this court under the act of Congress of March 3, 1897, chap. 390. 29 Stat. at L. 692. 171 U. S. 690.

Messrs. **George Kearney** and *Charles H. Turner* for Charles Winston.

Messrs. **Samuel D. Truitt** and *Tracy L. Jeffords* for William M. Strather.

Mr. **F. S. Key Smith** for Edward Smith.

Messrs. **Henry E. Davis**, Attorney of the

United States in and for the District of Columbia, and *James E. Boyd*, Assistant Attorney General, for the United States.

[310] *Mr. Justice **Gray,** after stating the cases, delivered the opinion of the court:

By section 5339 of the Revised Statutes, re-enacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States," "shall suffer death."

The act of January 15, 1897, chap. 29, entitled "An Act to Reduce the Cases in Which the Penalty of Death May be Inflicted," Provides, in section 1, that in all cases in which the accused is found guilty of the crime of murder under section 5339 of the Revised Statutes "the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. at L. 487.

The question presented and argued in each of the three cases now before the court is of the construction and effect of this act of Congress.

The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death. That end has been generally attained in one of two ways:

First. In some states and territories, statutes have been passed establishing degrees
[311] of the crime of murder, requiring *the degree of murder to be found by the jury, and providing that the courts shall pass sentence of death in those cases only in which the jury return a verdict of guilty of murder in the first degree, and sentence of imprisonment when the verdict is guilty of murder in the lesser degree. See *Hopt* v. *Utah*, 104 U. S. 631 [26: 873], and 110 U. S. 574 [28: 262]: *Davis* v. *Utah*, 151 U. S. 262, 267-269 [38: 153, 156].

For instance, the statutes of the territory of Utah contained the following provisions: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evincing a depraved mind regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." "Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." Compiled Laws of Utah of 1876, §§ 1919, 1920, pp. 585, 586.

In the leading case of *Hopt* v. *Utah* this court held that evidence that the accused was in a state of voluntary intoxication at the time of the killing (which would not have been competent in defense of an indictment for murder at common law) was competent for the consideration of the jury upon the question whether he was in such a condition as to be capable of deliberate premeditation, constituting murder in the first degree under the statute. 104 U. S. 631 [26: 873]. Upon a second trial of the same case, the territorial court, in charging the jury, having used this language: "That an atrocious and dastardly murder has been committed by some person is *apparent, but in your deliberations you [312]
should be careful not to be influenced by any feeling,"—the conviction was again reversed by this court, saying that this observation was naturally regarded by the jury as an instruction that the offense, by whomsoever committed, was murder in the first degree; whereas it was for the jury, having been informed as to what was murder, by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree. 110 U. S. 582 [26: 266]. And in *Calton* v. *Utah*, 130 U. S. 83 [32: 870], a sentence of death upon a conviction of murder in the first degree was reversed, because the judge had not called the attention of the jury to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death; and without a recommendation of the jury to that effect the court could impose no other punishment than death. While those decisions have no direct bearing upon the question now in judgment, they are important as illustrating the steadfastness with which the full and free exercise by the jury of powers newly conferred upon them by statute in this matter has been upheld and guarded by this court as against the possible effect of any restriction or omission in the rulings and instructions of the judge presiding at the trial.

Second. The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment. This method has been followed by Congress in the act of 1897.

The act of Congress confers this right upon the jury in broad and unlimited terms, by enacting that "in all cases in which the accused is found guilty of the crime of murder," the jury may qualify their verdict by adding thereto 'without capital punishment;'" and that, "whenever the jury shall return a verdict qualified as aforesaid," the sentence shall be to imprisonment at hard labor for life.

The right to qualify a verdict of guilty, by

[313]adding the words *"without capital punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

The decisions in the highest courts of the several states under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion. *State* v. *Shields*, 11 La. Ann. 395; *State* v. *Melvin*, 11 La. Ann. 535; *Hill* v. *State*, 72 Ga. 131; *Cyrus* v. *State* [102 Ga. 616] 29 S. E. 917; *Walton* v. *State*, 57 Miss. 533; *Spain* v. *State*, 59 Miss. 19; *People* v. *Bawden*, 90 Cal. 195; *People* v. *Kamaunu*, 110 Cal. 609.

The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words "without capital punishment," unless mitigating or palliating circumstances were proved.

This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted
[314]either by the express *words or by the apparent purpose of the statute; and therefore in each of these cases—

Judgment must be reversed, and the case remanded to the Court of Appeals with directions to reverse the judgment of the Supreme Court of the District of Columbia, and to order a new trial.

Mr. Justice **Brewer** and Mr. Justice **McKenna** dissented.

BELLINGHAM BAY & BRITISH COLUMBIA RAILROAD COMPANY, *Plff. in Err.*,

v.

CITY OF NEW WHATCOM.

(See S. C. Reporter's ed. 314–320.)

Federal question—statutory notice—due process of law.

1. An allegation in an answer, that the notice of a reassessment was insufficient, and that by reason thereof defendant's property was sought to be taken without due process of law and in conflict with the Federal Constitution, raises a Federal question.
2. Only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.
3. A notice of reassessment for a street improvement, allowing ten days only for objections, is not insufficient for due process of law because the time is so short,—especially in case of a property owner doing business in the city, and when there is nothing to suggest any injustice.

[No. 96.]

Argued December 16, 1898. Decided January 3, 1899.

IN ERROR to the Supreme Court of the State of Washington to review a decree of that court affirming the decree of the Superior court of Whatcom County in favor of the City of New Whatcom against the Bellingham Bay & British Columbia Railroad Company for the foreclosure of liens created by a reassessment. *Affirmed.*

See same case below, 16 Wash. 131.

Statement by Mr. Justice **Brewer:**

Prior to February 16, 1891, there were in the state of Washington two cities known as Whatcom and New Whatcom. On that date they were consolidated in conformity *with [315]
the general laws of the state, the consolidated city taking the title of the "City of New Whatcom." In July, 1890, and prior to the consolidation, New Whatcom ordered the improvement of Elk street, between Elk street east and North street. The contract therefor was let in August, 1890. The contract was completed and the improvement accepted by the city, and in October, 1890, an assessment was levied upon the abutting property. After the consolidation the present city of New Whatcom commenced several suits in the superior court of Whatcom county against various defendants owning lots abutting on the improvement, and sought to obtain decrees foreclosing the liens created by the assessment. On January 13, 1894,

the superior court entered decrees annulling the assessment, and these decrees were affirmed by the supreme court of the state on February 14, 1895. The ground of the decision was, as stated by the trial court in its conclusions of law, "that said assessments were not made or apportioned in accordance with the benefits received by the property, but were made upon an arbitrary rule, irrespective of the benefits." On March 9, 1893, the legislature passed a general act providing for the reassessment of the cost of local improvements in case the original assessment shall have been or may be directly or indirectly set aside, annulled, or declared void by any court. Laws Wash. 1893, p. 226.

Sections 4, 5, and 8 bear upon the matter of notice, and are as follows:

"Sec. 4. Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

[316] *"Sec. 5. At the time appointed for hearing objections to such assessment the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such reassessment and to the correctness of the amount of such reassessment, or of the amount levied on any particular lot or parcel of land; and the counsel shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm, or set aside, and to order that such assessment be made *de novo*, and such council shall pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity, and correctness of said reassessment, to the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses the hearing shall be had before a joint session, but the ordinance approving and confirming the reassessment shall be passed in the same manner as other ordinances."

"Sec. 8. Any person who has filed objections to such new assessment or reassessment, as hereinbefore provided, shall have the right to appeal to the superior court of this state and county in which such city or town may be situated."

On March 18, 1895, the city council passed an ordinance prescribing the mode of procedure for collecting the cost of a local reassessment upon the property benefited thereby. On June 10, 1895, it ordered a new assessment upon the blocks, lots, and parcels of land benefited by the improvement on Elk street, hereinbefore described, and directed the various officers of the city to take the steps required by the general ordinance of March 18. These steps were all taken in conformity to such ordinance, and on August 7, 1895, a further ordinance was passed reciting what had been done, approving it and confirming the reassessment.

The recital in that ordinance in respect to notice was as follows:

"Whereas, said city council did on the 8th day of July, 1895, order said assessment roll filed in the office of the city *clerk, and fixed [317] Monday, July 22d, 1895, at 7:30 P. M., as a time at which they would hear, consider, and determine any and all objections to the regularity of the proceedings in making such assessments, or to the amount to be assessed upon any block, lot, or tract of land for said improvements; and

"Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to wit: in the Daily Reveille, in three consecutive issues thereof, the same being the issues of July 9th, 10th, and 11th, 1895."

The Bellingham Bay & British Columbia Railroad Company was a private corporation organized under the laws of the state of California, but authorized to do business in the state of Washington, and having its principal office in the city of New Whatcom. It was the owner of certain property abutting upon the Elk street improvement, and which by the proceedings of the city council was held benefited by such improvement and charged with a portion of the cost. Failing to pay this charge, the city of New Whatcom instituted suit in the superior court of Whatcom county to foreclose the liens created by the reassessment. A decree was rendered in favor of the city, which, on appeal, was affirmed by the supreme court on December 8, 1896, 16 Wash. 131, whereupon this writ of error was sued out.

Messrs. **L. T. Michener,** *W. W. Dudley,* and *John B. Allen* for plaintiff in error.

No counsel for defendant in error.

*Mr. Justice **Brewer** delivered the opinion of the court: [317]

By its answer the defendant raised a Federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law and in conflict with the terms of the Fourteenth Amendment to the Constitution. This court, therefore, has jurisdiction of the case.

*That notice of reassessment was essential [318] is not questioned. (*Davidson* v. *New Orleans*, 96 U. S. 97, 105 [24: 616, 620]; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 701, 710 [28: 569, 573]; Cooley, Taxation, 266), and that constructive notice by publication may be sufficient is conceded (*Lent* v. *Tillson*, 140 U. S. 316, 328 [35: 419, 426]; *Paulsen* v. *Portland*, 149 U.S. 30 [37: 637]); but the contention is that the notice, which

was provided for, and which was in fact given, was insufficient, because it was only a ten days' notice. We quote from the brief of counsel:

"While we concede in the first instance to the legislature the authority to prescribe the time of the notice, we assert that this is not an absolute authority relieved from judicial review. The shortening of the time and the limiting of opportunity to be informed through constructive notice may be such as to render the notice unavailing for the purpose for which notice is designed. If that be the case it is not notice. To prescribe that within ten days after the contingency of a three days' publication the landowner is left without redress for any kind of burden that may be placed upon his property in the way of taxation amounts to a taking of property without due process of law. Under the pretense of prescribing and regulating notice, all practical notice cannot be taken away. There is a limit to legislative power in shortening the time of notice, and if that limit is transcended the courts will hold it void."

We are unable to concur in these views. It may be that the authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time. The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of
[319] what is proposed *and when and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections. Here no question is made of the form of the notice. It was published in three successive issues of the official paper of the city. So the statute required. What more appropriate way of publishing the action of a city than in its official paper? Where else would one interested more naturally look for information? And is not a repetition in three successive issues of the paper sufficient? How seldom is more than that required! Indeed, we do not understand that any challenge is made of the sufficiency of the publication. But when that is made and is sufficient, notice is given. The fact that the owner after being notified is required to appear and file his objections within ten days, is thus the sole ground of complaint. But how many days can the courts fix as a minimum? How much time can be adjudged necessary as matter of law for preparing and filing objections? How many and intricate and difficult are the questions involved? Regard must always be had to the probable necessities of ordinary cases. No hardship to a particular individual can invalidate a general rule. A reassessment implies, not merely the fact of the improvement, but also that one attempt had been made to collect the cost and failed. Inquiry had been had in the courts, and the one assessment set aside. The facts were known. Ten days' time, therefore, does not seem unreasonably short for presenting objections to a reassessment.

And there is nothing in the case of this plaintiff in error to suggest any injustice. It, though a corporation of the state of California, was doing business in the state of Washington, and having its principal office in the city of Whatcom. In other words, it was domiciled in the city in which the improvement was made. The improvement made on the street, on which its lots abutted, consisted in grading, planking, and sidewalking. It is, to say the least, highly improbable that it could have been ignorant of the fact that they were made. It must have known also that such improvements have to be paid for, and that the ordinary method of payment is by local *assessment on the prop- [320]
erty benefited—the abutting property being primarily the property benefited. A previous assessment had been made for the cost of these improvements. Litigation followed, which was carried to the supreme court of the state, and resulted adversely to the city. It is true this plaintiff in error was not a party of record in that litigation, and counsel criticise a statement in the opinion of the supreme court in this case, that "it appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed;" yet it may be that the court was advised by counsel that it had contributed to the cost of that litigation, and at any rate it is difficult to believe that it was ignorant all these years of what was going on.

In view, therefore, of the character of the improvements, the residence of the plaintiff in error, the almost certainty that it must have known of the improvements and that it would be expected to pay for them, it is impossible to hold that a ten days' notice was so short as to be absolutely void. And especially is this true when the supreme court of the state in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the supreme court of a state are stricken down in this court it must clearly appear that some one of the fundamental guaranties of right contained in the Federal Constitution has been invaded.

The judgment of the Supreme Court of the State of Washington is affirmed.

BELLINGHAM BAY IMPROVEMENT COMPANY, *Plff. in Err.*,
v.
CITY OF NEW WHATCOM.

SAME
v.
SAME.

(See S. C. Reporter's ed. 320.)

[Nos. 97, 98.]

Argued (with No. 96 ante, p. 460) December 16, 1898. Decided January 3, 1899.

Messrs. W. W. Dudley, L. T. Michener, and *John B. Allen* for plaintiff in error in both cases.

No counsel for the defendant in error.

These cases involve the same questions, and the same judgments of affirmance will be entered in them.

---

[321] UNITED STATES, *Appt.*,
v.
EDWARD P. BLISS, Executor of Donald McKay, Deceased.

(See S. C. Reporter's ed. 321-326.)

Additional compensation under government contract—res judicata—findings of fact.

1. An advance of prices during the term of the contract cannot be allowed to a claimant under an act of Congress providing for additional compensation to him for additional cost caused by changes or alterations required by the government, but declaring that no allowance for any advance in the price of labor or material shall be considered, unless such advance occurred during the prolonged term for completing the work, rendered necessary by delay resulting from the action of the government.
2. A prior judgment cannot be used as *res judicata* without pleading or proof of what was decided by the court in the case in which the judgment was rendered.
3. The findings of fact made in a case which are set up as *res judicata* cannot be changed by stipulation

[No. 394.]

Submitted December 12, 1898. Decided January 3, 1899.

APPEAL from a judgment of the Court of Claims in favor of Edward P. Bliss, Executor of Donald McKay, deceased, against the United States for the increased cost of labor and material in the construction of a gunboat. *Reversed,* and case remanded with directions.

Statement by Mr. Justice **Brewer:**

On August 22, 1863, Donald McKay contracted with the United States for the construction of the gunboat Ashuelot, the contract to be completed in eleven months from that date. On account of changes and additional work required by the government, and other details for which it was responsible,*[322] the completion of the vessel was delayed from July 22, 1864, to November 29, 1865, a period of sixteen months and seven days beyond the contract term. Full payment of the contract price was made, and also of an additional sum for changes and extra work. On August 30, 1890, Congress passed an act (26 Stat. at L. 1247) submitting to the court of claims the claims of the executors of Donald McKay for still further compensation. Such act contains this proviso:

"Provided, however, That the investigation of said claim shall be made upon the following basis:. The said court shall ascertain the additional cost which was necessarily incurred by the contractors for building the light-draught monitors Squando and Nauset and the side-wheel steamer Ashuelot in the completion of the same, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work: Provided, That such additional cost in completing the same, and such changes or alterations in the plans and specifications required, and delays in the prosecution of the work were occasioned by the government of the United States; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractors."

Under this act this suit was brought. Upon the hearing the court of claims, in addition to the facts of the contract, performance, time of completion and payment, found that—

"During the contract period of eleven months, and to some extent during the succeeding sixteen months and seven days, the government made frequent changes and alterations in the construction of the vessel and delayed in furnishing to the contractor the plans and specifications therefor, by reason of which changes and delay in furnishing plans and specifications, the contractor, without any fault or lack of diligence on his part, could not anticipate the labor, nor could he know the *kind, quality, or dimensions of ma-[323] terial which would be made necessary to be used in complying with said changes.

"While the work was so delayed during and within the period of the contract as aforesaid the price of labor and material greatly increased, which increased price thereafter continued without material change until the completion of the vessel sixteen months and seven days subsequent to the expiration of the contract period. The increased cost to the contractor as aforesaid was by reason of the delays and inaction of the government and without any fault on his part."

—And rendered judgment in favor of the petitioner for, among other things, the in-

creased cost of the labor and material furnished by him, consisting of two items of $12,608.71 and $14,815.66. From this judgment the United States appealed to this court.

Messrs. **Louis A. Pradt,** Assistant Attorney General, and **Charles C. Binney** for the appellant.

Mr. **John S. Blair** for appellee.

[323] *Mr. Justice **Brewer** delivered the opinion of the court:

No question is made except as to so much of the judgment as is for the increased cost of labor and material. The allowance for that is challenged under the clause of the act of 1890, "but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged term for completing the work rendered necessary by delay resulting from the action of the government aforesaid." The finding is that there was an advance in the price of labor and material during the contract term of eleven months, and that such increased price continued thereafter without material change during the sixteen months and seven days between the close of the contract term and the actual completion of the vessel. Of course, but for the act of August 30, 1890, no action could be maintained

[324] against the *government. The statute of limitations would have been a complete defense. The petitioner's right, therefore, is measured, not by equitable considerations, but by the language of that statute. Beyond that the court may not go. If equitably the petitioner is entitled to more compensation, it must be sought by direct appropriation of further legislation of Congress.

It seems to us clear that the court of claims was not permitted to consider any advance in the price of labor or material during the term named in the contract, to wit, eleven months. Evidently Congress thought that the contractor took the risk of such advance when he signed the contract. The contract term is one thing; the prolonged term another. If Congress intended to allow for all advances in the price of labor or material at any time between the execution of the contract and the completion of the work, the proviso quoted was unnecessary. The fact that the proviso discriminates as to the term, an advance during which entitles to allowance, is conclusive upon the question. There are no terms to be distinguished except the contract term of eleven months and the subsequent prolonged term of sixteen months and seven days. Of course, no change in the price of labor and material after the work was finished could have been considered, and if Congress intended to either permit or forbid an allowance for any advance in the price of labor and material during the entire progress of the work, it was easy to have said so. That it qualified such a general provision by limiting it to a particular term, and that term one created by the action of the government, excludes all doubt as to the meaning of the words "prolonged term." Obviously the petitioner himself understood that they refer to the period commencing at the time fixed in the contract for the completion of the work, for in his petition it is said that "during the term specified by the contract, and also through the prolonged term, there was a continuous rise in the prices of all labor and material entering into said vessel and machinery." He did not then doubt the meaning of the statute, and the only difficulty is that according to the findings of the court of claims his proof did *not establish [325]
all his allegations. We deem it unnecessary to follow the investigation made by counsel of the various proceedings before Congress to see if there cannot be disclosed some unexpressed intent on its part to authorize payment for every advance in the cost of labor and material. The language of the act is too plain to justify such investigation.

One other matter requires consideration: Attached to the record certified to us by the court of claims is a stipulation signed by the counsel for both parties, which stipulation commences in these words:

"It is hereby agreed by and between the parties to this cause that the following facts appear in the records of the court of claims, and that they may be added to the record in this cause and be treated upon the hearing with the same effect as if they had been included in the facts found by the court of claims."

This stipulation seeks to introduce into the record of this case the proceedings of the court of claims in another suit brought under the same act of 1890, by the same petitioner, to recover additional compensation for the construction of a vessel other than the one described in the present suit, and this notwithstanding that this court is, at least in other than equity cases, limited to a consideration of the facts found by the court of claims. This additional record contains the findings of facts in that case, the conclusion and judgment, which was in favor of the petitioner, and states that such judgment was not appealed from by either party. The tenth finding of fact reads as follows:

"The cost to the contractor because of the enhanced price of labor and material which occurred during the prolonged term for completing the work is $61,571.67. Said prolonged term resulted from the delays of the defendants. The exercise of ordinary prudence and diligence on the part of the contractor would not have avoided said enhanced price of material and labor."

The final clause in this stipulation of counsel seeks to explain this tenth finding in this way:

"The $61,571.67 set forth in the tenth of the final findings *in the Nauset case (see X [326]
finding above) was composed of $24,634 enhanced cost after February 10, 1864, the expiration of the contract term for the constructon of the Nauset, and the remainder, $36,937.67, was enhanced cost of labor and material furnished by Donald McKay within the contract term (June 10, 1863, to February 10, 1864), but the court did not separate the allowance in its findings."

Upon this the doctrine of *res judicata* i-

invoked to uphold the judgment. A sufficient answer is that neither by pleadings nor evidence were the proceedings in this other case brought before the court of claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court. *Southern Pacific Railroad Co.* v. *United States*, 168 U. S. 1 [42: 355], suggests nothing contrary to this, for there the prior judgment was offered in evidence, and the only question considered and decided by this court was the effect of an alleged failure to fully plead *res judicata*.

But further, not only did the petitioner fail to either plead or prove the former judgment, but also the record when produced disclosed that the court found that the advance in price was during the prolonged term. Counsel propose by stipulation to change that finding so as to make it show that part of the sum named therein was for the advance during the contract term, and the other part for the advance during the prolonged term. In other words, counsel seek without pleading or proof to use a prior judgment as *res judicata*, and also by stipulation to change the findings of fact which were made in that case. It is clear this cannot be done.

The judgment of the Court of Claims will be reversed, and the case remanded to that court with directions to enter a judgment for the claimant, less the two amounts of $12,608.71 and $14,815.66, the increased cost of labor and material.

---

[327] UNITED STATES, *Appt.*,
v.
WILLIAM F. INGRAM.

(See S. C. Reporter's ed. 327-334.)

Desert land act—recovery of money paid for entry of public lands.

1. Valid entries can be made under the desert land act, of land within the place limits of a land grant to railroad corporations.
2. One who voluntarily abandons a valid entry of public lands under the desert land act cannot recover back the money which he paid to the local land officers to initiate it.

[No. 82.]

Argued December 9, 1898. Decided January 3, 1899.

APPEAL from a judgment of the Court of Claims in favor of the claimant, William F. Ingram, for the recovery from the United States of money which he had paid to the local land officers under the desert land act to initiate his entry, the entry having been afterwards abandoned. *Reversed*, and case remanded, with directions to enter a judgment for the defendant.

See same case below, 32 Ct. Cl. 147.

Statement by Mr. Justice **Brewer:**

On August 2, 1890, the appellee, William F. Ingram, applied to the local land office at Salt Lake City, Utah, under the desert land act of March 3, 1877 (19 Stat. at L. 377, chap. 107), to reclaim and enter a tract of land containing 236.55 acres. The land so sought to be reclaimed and entered was a part of an even-numbered section of lands within the limits of the grant to the Union Pacific Railway Company. The entry was approved by the local land office; the claimant paid the sum of $118.28, being 50 cents per acre, the preliminary payment thereon, and received an ordinary certificate of entry. He failed, however, to reclaim the land by conducting water on to it, as provided by the desert land act, and abandoned his entry, which, on December 19, 1895, was canceled. Thereafter this suit was brought to recover the money which he had paid to the local land officers. The court of claims, while expressing an opinion, on a demurrer to the petition, adversely to the contention of the petitioner (32 Ct. Cl. 147), finally entered a decree in his favor, from which decree the United States appealed to this court.

Messrs. **George Hines Gorman** and *Louis A. Pradt*, Assistant Attorney General, for appellant.

Messrs. **Russell Duane**, *Harvey Spalding*, and *E. W. Spalding* for appellee.

*Mr. Justice **Brewer** delivered the opinion of the court: [328]

The contention of the appellee is that no valid entry can be made under the desert land act of land within the place limits of a land grant to railroad corporations; that therefore the attempted entry was absolutely void, and that if he had fully complied with the provisions of that act he could not have acquired a good title to the lands entered; that he was therefore justified in abandoning the entry which he had attempted to make; that the government had received money which it had no right to receive, and was under an implied obligation to return it —an obligation which could be enforced by action in the court of claims. His main reliance is on *United States* v. *Healey*, 160 U. S. 136 [40: 369], but the singular fact is that in that case a title by patent to an even-numbered section within the limits of a railroad land grant acquired under the desert land act was not questioned, and a claim of the patentee to recover the difference between $2.50 per acre, which he had paid in accordance with the statute in respect to railroad land grants, and $1.25 which he insisted was all he was required to pay under the desert land act, was rejected. Counsel for appellee pick out a sentence or two in the opinion in that case, and severing them from the balance, insist that this court decided that land within the place limits of a railroad land grant is wholly removed from

the operation of the desert land law, as much so as if it had already been conveyed to a private owner, and conclude that, being so wholly separated from the reach of that law, an attempted entry thereunder is absolutely void, and may be abandoned by the entryman at any time. It seems a little strange to have this contention pressed upon us in view of the fact that a patent for lands within a railroad land grant was not disturbed by that decision, and a claim to recover an excess payment was repudiated. Nowhere [329]in the *opinion is there an intimation that the patentee did not acquire a perfect title, no suggestion that the whole proceeding was void and the land patented still the property of the government, or even that it had the right to maintain a suit to set aside the patent as a cloud upon its title. And certainly if the title conveyed by the patent was absolutely void, then the patentee had paid, not only the half which he sought to recover, but the entire purchase money for nothing, and should at least have been allowed to recover the half which he sued for.

It may be well to refer to the several statutes of Congress. The general policy in respect to railroad grants, expressed in the many statutes making such grants, and finally carried into the Revised Statutes in section 2357, is that while the ordinary price of public lands is $1.25 an acre, "the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be $2.50 per acre." One hundred and sixty acres might be pre-empted at that price, or eighty acres homesteaded. Rev. Stat. § 2289. In other words, Congress, in no manner limiting either the right of pre-emption or homestead, simply declared that these alternate reserved lands should be considered as worth $2.50 instead of $1.25, the ordinary price of public lands. All appropriations by individuals were based upon that valuation, but the right to appropriate was in no manner changed. The reason for this addition to the price of alternate reserved sections within a railroad grant has been often stated by this court, and is referred to in the opinion in *United States* v. *Healey*, *supra*. It is that a railroad ordinarily enhances the value of contiguous lands, and when Congress granted only the odd sections to aid in the construction of one it believed that such construction would make the even and reserved sections of at least double value.

This difference in price was based, as will be perceived, solely on the matter of location, and not at all upon any distinction in the character or quality of the land, and the difference in price was the only matter that distinguished between an entry of lands [330]within and those without the place *limits of a railroad. Such being the general policy of the government in respect to public lands, Congress in 1877 passed the desert land act. This act, while limited in its operation to certain states and territories, in terms applied to "any desert land" within them. It provided for reclamation by irrigation, gave three years in which to accomplish such reclamation, and permitted the entry of not exceeding 640 acres. The only substantial advantages of an entry under the desert land act over an ordinary pre-emption were in the amount of land and the time of payment. Six hundred and forty acres could be taken under the one, and only one hundred and sixty under the other. The price was the same, but under the one only twenty-five cents per acre was payable at the time of the entry, and the balance was not required until, at the end of three years, the reclamation was complete; while under the other the entire $1.25 was payable at the time of the entry. These advantages were offered to induce reclamation of desert and arid lands.

Now, it is a well-known fact that along the lines of many land-grant railroads are large tracts of arid lands—desert lands within the very terms of the statute. Indeed, nearly every transcontinental line runs for long distances through these desert lands. Did Congress act on the supposition that no inducement was necessary to secure the reclamation of the arid public lands within the place limits of those grants? Do not the reasons for legislation in respect to lands remote from railroads have the same potency in respect to lands contiguous thereto? If Congress had intended to exclude lands within the place limits of railroads from the scope of this act would it have said "any desert land," or defined "desert lands" as broadly as it did by section 2, which reads:

"Sec. 2. That all lands, exclusive of timber lands and mineral lands, which will not, without irrigation, produce some agricultural crops, shall be deemed desert lands within the meaning of this act, which facts shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated."

*The reasons which established and justi- [331]
fied the policy of double price for the former apply as fully to lands which had to be reclaimed before they could be cultivated as to lands which needed no reclamation. Contiguity to the railroad is the same fact in each. The significance of this was recognized in the *Healey Case*. Indeed, the whole controversy in that case was as to the matter of price, and grew out of the fact that after the passage of the desert land act the Interior Department at first ruled that its effect was to reduce the price of even sections within railroad place limits, entered under it, from $2.50 to $1.25 an acre, while in 1889 a change was made in its rulings, and it was thereafter held that the act worked no such reduction. Secretary Noble, in *Tilton's Case*, decided March 25, 1889 (8 Land Dec. 368, 369), said, and his language was quoted in our opinion:

"Under such construction, section 2357 of the Revised Statutes and the desert land act do not conflict, but each has a separate and appropriate field of operation; the former, regulating the price of desert lands reserved to the United States along railway lines; and the latter, the price of other desert lands not so located. There is nothing in the na-

ture of the case which renders it proper that desert lands be made an exception to the general rule any more than lands entered under the pre-emption laws. Lands reserved to the United States along the line of railroads are made double minimum in price because of their enhanced value in consequence of the proximity of such roads. Desert lands subject to reclamation are as much liable to be increased in value by proximity to railroads as any other class of lands, and hence the reason of the law applies to them as well as to other public lands made double minimum in price. To hold desert lands an exception to the general rule regulating the price of lands reserved along the lines of railroads would be to make the laws on this subject inharmonious and inconsistent."

Other rulings of the land department were cited, in no one of which was there any denial of the right to enter lands along a railroad under the desert land law. It was after these citations that the language referred to
[332]by counsel was used. *That language must be interpreted in view of the fact that the only contention was as to the price. It means simply that the court did not consider the desert land act applicable as a whole and solidly to the reserved sections along a railroad so as to subject them to all its provisions. In other words, the desert land act did not supersede and destroy the proviso of section 2357 in reference to a double price for such reserved sections. We closed the discussion in reference to this matter in these words:

"Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and therefore did not embrace alternate sections reserved to the United States by a railroad land grant.

"It results that prior to the passage of the act of 1891 lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?" 160 U. S. 147 [40: 373].

The first of these paragraphs is one of the sentences referred to by counsel and quoted in their brief. In it we do say "that Secretaries Lamar and Noble properly decided that the act of 1877 . . . did not embrace alternate sections reserved to the United States by a railroad land grant," but the full meaning of that language is disclosed only when we replace the omitted words "did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore." And when we turn to what Secretaries Lamar and Noble decided, we find that they ruled, not that lands within the place limits of a railroad land grant could not be entered under the desert land law, but simply that they could not be entered for the price named in that law, $1.25 per acre, but were subject to the general provision of double price. The other sentence referred to by counsel is similar, and, while taken literally and disconnectedly, may give some countenance to their contentions, yet, when read in the light of the entire opinion, manifestly was intended
*to mean no more than that the desert land[333]
act was not applicable in the matter of price to the reserved sections within a railroad land grant. This conclusion appears also in the last paragraph above quoted, where we say that "lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre." Not that they could not be disposed of at all under the desert land law, but only not at the price fixed by that law.

The same conclusion appears subsequently, when, reviewing the act of 1891, it was held that it had no effect upon the price of lands entered before its date, our language being—

"We are of opinion that cases initiated under the original act of 1877, but not completed, by final proof, until after the passage of the act of 1891, were left by the latter act —at least as to the price to be paid for the lands entered—to be governed by the law in force at the time the entry was made. So far as the price of the public lands was concerned, the act of 1891 did not change, but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect of all entries initiated before the passage of that act." 160 U. S. 149 [40: 374].

We may remark in passing that the entry in this case was before the act of 1891, and therefore, under the language just quoted, it is unnecessary for us to notice any of its provisions.

It follows from these considerations that if the petitioner Ingram had fully complied with the terms of the desert land act he could, by the payment of $2.50 an acre, have acquired title to the lands he sought to enter. Voluntarily abandoning his entry, he has no cause of action for the sum which he paid to initiate it. There is nothing in *Frost* v. *Wenie*, 157 U. S. 46 [39: 614], which conflicts with this conclusion, for there the decision simply was that lands which Congress held under a trust to sell for the benefit of Indians could not be given away under the homestead law. and hence that such law
must be limited, *in its application to the[334]
Fort Dodge reservation, to such lands as were not covered by the trust.

The judgment of the Court of Claims is reversed, and the case remanded to that court, with directions to enter a judgment for the defendant.

S. H. H. CLARK *et al.*, Receivers of the Union Pacific Railway Company, *Plffs. in Err.*,

v.

CITY OF KANSAS CITY, Kansas, *et al.*

(See S. C. Reporter's ed. 334-338.)

What is not a final judgment.

The reversal of a judgment, with directions to sustain a demurrer, is not a final judgment on which a writ of error will lie to a state court

from the Supreme Court of the United States, if the lower court has power to make a new case by amendment of pleadings.

[No. 402.]

Argued December 13, 1898. Decided January 3, 1899.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court reversing the judgment of the Court of Common Pleas of Wyandotte, Kansas, and ordering that court to sustain a demurrer in an action brought by S. H. H. Clark *et al.*, receivers, etc., against the City of Kansas City. *Writ of error dismissed.*

The facts are stated in the opinion.

Messrs. **A. L. Williams**, *Winslow S. Pierce*, and *N. H. Loomis* for plaintiffs in error.

Messrs. **T. A. Pollock** and **F. D. Hutchings** for defendants in error.

[334] *Mr. Justice **McKenna** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Kansas to review a judgment of that court overruling a demurrer of the nisi prius court to the petition of plaintiffs in error for an injunction to restrain the collection of taxes, levied by the city of Kansas City, on lands brought into that city under act of the legislature of Kansas authorizing cities of the first class having a population of 30,000 or more, which shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly
[335] within any such *city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made part of the city by ordinance duly passed. There was a provision in the law as follows: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

An ordinance was passed, pursuant to the statute, extending the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway. A portion of the lands were used for right of way and other railroad purposes, and a large part of them were vacant and unoccupied, which were held by the company for its future uses.

Taxes were levied by the city upon the property, and the suit was brought to enjoin their collection. The petition presented the facts, and contained the following allegation:

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit 'A,' it is unconstitutional, null, and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States, which reads as follows: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendants, other than the township of Wyandotte and school district No. 9, filed a general demurrer to the petition, which was overruled. The defendants, the township of Wyandotte and school district No. 9, did not plead in any way. *The demurring [336]
defendants electing to stand upon their demurrer, a perpetual injunction was granted as prayed for against them. They appealed to the supreme court, where the judgment of the lower court was reversed, and an order was made directing that court to sustain the demurrer.

The question of the constitutionality of the statute was presented to the supreme court of Kansas, and that court held that it violated neither the Federal nor state Constitutions. The same question is presented here in six assignments of errors. The specific contention is that the Kansas statute violates that portion of the Fourteenth Amendment which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The defendants in error, however, object to the jurisdiction of this court, and urge that the judgment appealed from is not a final one, and is not therefore reviewable in this court.

It is further urged that the record does not show that anything was done in the lower court after decision in the supreme court, but that error is prosecuted directly to the judgment of the supreme court, and that that determined only a question of pleading, and that its direction has not yet been acted on, and that no judgment of any kind has been entered against Wyandotte township or school district No. 9.

The law of Kansas prescribing action on demurrer is as follows: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In *Bostwick* v. *Brinkerhoff*, 106 U. S. 3 [27: 73], it was decided that "the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had *already rendered,"—for the [337]
support of which many cases were cited; and further: "If the judgment is not one which

disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error;" also citing cases.

This case and those it cites have been applied many times, but we will confine our notice to instances of demurrer. *DeArmas v. United States*, 6 How. 103 [12: 361], was of this kind, but the grounds of demurrer urged there made the rule when applied to them not very disputable, and the case is not of much aid.

In *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 608 [36: 834], the demurrer was overruled with leave to answer over. Upon appeal to the supreme court the order overruling the demurrer was affirmed with costs. The rule of the supreme court provided that "upon the reversal, affirmance, or modification of any order or judgment of the District court by this court, there will be a remittitur to the district court, unless otherwise ordered." Held, that the plaintiffs in error upon the return of the case to the court could plead over, and hence judgment was not final.

In *Werner v. Charleston*, 151 U. S. 360 [38: 192], the announcement by the Chief Justice was: "The writ of error is dismissed. *Meagher v. Minnesota Thresher Co.* 145 U. S. 608 [36: 834]; *Rice v. Sanger*, 144 U. S. 197 [36: 403]; *Hume v. Bowie*, 148 U. S. 245 [37: 438]."

The statement of the case shows that it was analogous to the case at bar. The motion to dismiss stated that—

"The judgment brought here by writ of error for review is a judgment of the supreme court of the state of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is therefore an interlocutory judgment, and is in no sense a final decree.

"To this the plaintiff in error replied: 'The judgment brought here by writ of error for review is the judgment of the supreme court of the state of South Carolina, holding that a certain act of the general assembly of the state of South Carolina, entitled, "An Act
[338] to Authorize the City Council *of Charleston to Fill up Low Lots and Grounds in the City of Charleston in Certain Cases and for Other Purposes," approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial court and so ending the constitutional defense interposed by the plaintiff in error.'

"An examination of the record will show that the main ground of the demurrer, interposed in the court below by the plaintiff in error, was the unconstitutionality of the act of 1830. It was claimed both there and in the court above, as well as in this court, to be in violation of due process of law."

Rice v. Sanger and *Hume v. Bowie*, cited by the Chief Justice, were not rulings on demurrer, and we have confined our notice to cases of that kind, not because they are separable in principle from the other cases decided, but to observe and explain the rule in its special application. That rule is in its utmost generality that no judgment is final which does not terminate the litigation between the parties to the suit. If anything substantial remain to be done to this end, the judgment is not final. The law of the case upon the pleadings, and hence as presented by the demurrer, may be settled, but if power remain to make a new case, either by the direction of the supreme court or in the absence of such direction by the statutes of the state, the judgment is not final.

The statute of Kansas permitted such amendment, and the order of the supreme court did not take it away. Its order proceeds no further than a direction to sustain the demurrer to the petition. That done, the lower court had and has all of its power under the statute, and may exercise it at the invocation of plaintiffs in error. What they may be advised to do we cannot know. We can only consider their right and the power of the court. These existing, if we should affirm the judgment of the supreme court, that court, and maybe this court, may be called upon to determine other issues between the parties.

It follows from these views that the judgment of the supreme court is not final, and the *writ of error must be dismissed*, and it is so ordered.

UNITED STATES, *Petitioner*, [339]
v.
BUFFALO NATURAL GAS FUEL COMPANY.

(See S. C. Reporter's ed. 339-343.)

Natural gas free from duty under the tariff act of 1890.

Natural gas imported for use as fuel and for illuminating purposes is free from duty under ¶ 496 (p. 604) of the tariff act of October 1, 1890, as crude bitumen, or under ¶ 651 (p. 607) as crude mineral.

[No. 64.]

Submitted December 2, 1898. Decided January 3, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that court affirming the decision of the Circuit Court of the United States for the Northern District of New York which affirmed the decision of the Board of General Appraisers that natural gas was exempt from duty under the tariff act of 1890. *Affirmed.*

See same case below, 45 U. S. App. 345.

The facts are stated in the opinion.

Messrs. **Henry M. Hoyt**, Assistant Attorney General, for the United States, petitioner.

Mr. **Herbert P. Bissell** for the Buffalo Natural Gas Fuel Company, respondent.

[339] *Mr. Justice **Peckham** delivered the opinion of the court:

The defendant gas company, doing business at Buffalo, in the state of New York, imports natural gas from the Dominion of Canada, for the purpose of supplying its customers with that article. The gas is brought in pipes under the Niagara river, and is used for consumption as fuel and for illuminating purposes.

In 1893 the gas imported by the company was assessed for duty by the collector of the port of Buffalo as a nonenumerated unmanufactured article at ten per cent, under section 4 of the tariff act of October 1, 1890. 26 Stat. at L. 567, at page 613.

The importers claimed that the gas was entitled to free entry under section 2 of the above act, providing for a free list, either under paragraph 496 (page 604), as crude bitumen, or under paragraph 651 (page 607), as a crude mineral, not advanced in value or condition by refining or grinding, or by any other process of manufacture, not specially
[340] provided for *in the act. The importers made proper protest, and obtained a review of the decision of the collector by the board of general appraisers. That board, on a second hearing, after testimony had been given as to the character of the gas, decided that natural gas was a crude mineral, and the board on that ground sustained the claim that it was exempt from duty under paragraph 651 of the tariff act of 1890.

The circuit court affirmed that decision, and upon a review by the circuit court of appeals for the second circuit (45 U. S. App. 345), the decision was again affirmed. The latter court, by Circuit Judge Lacombe, said: "We do not undertake in this case to decide whether or not natural gas is a 'crude bitumen.' If it be such, the provisions of paragraph 496 would control its classification, being more specific than those of paragraph 651. Both paragraphs are in the free list, and since natural gas comes fairly within the general provision for crude minerals, and is therefore free, it is unnecessary now to inquire whether it is also within the more specific description 'crude bitumen,' which is also free. The board of general appraisers properly reversed the collector's assessment of the article for duty; it is not a 'raw or unmanufactured article not enumerated.'"

Circuit Judge Wallace, while concurring in the affirmance of the decision of the circuit court, was of the opinion that the importation in controversy ought to be classified under paragraph 496 as crude bitumen, and exempt from duty on that ground.

The decision having been duly entered, this court upon the petition of the government issued a writ of certiorari, and the case has been brought here for review.

We are of opinion that the circuit court of appeals was right in its disposition of the case. The substance that is taken from the bosom of the earth and which burns brightly without any further labor put upon it, is popularly designated as natural gas. This name is not contained in the tariff act, but there are two paragraphs thereof which it is claimed do properly and sufficiently characterize and embrace natural gas, and they are in the free list, and are known as paragraphs 496 and 651. *The language used in [341]
each, when taken in its popular and commonly received sense, or according to the sense in which it is used commercially, would cover and include the substance generally spoken of and loosely described as natural gas. The fact that it is not thus named in the act compelled the collector to assess it as a raw or unmanufactured article not enumerated, a description which does not fit nearly so well as that which is contained in each of the paragraphs mentioned above. We think the evidence shows that natural gas is included in the language of one or both those paragraphs.

The rule is familiar that in the interpretation of laws relating to the revenues the words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word. *Two Hundred Chests of Tea, Smith, Claimant,* 9 Wheat. 430 [6: 128].

Mr. Justice Story, in that case, in delivering the opinion of the court, said: "The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." See also *Lutz* v. *Magone,* 153 U. S. 105 [38: 651], and cases there cited.

Prior to 1890 natural gas had not been imported, although its existence in this country and in foreign countries was well known. After the passage of the tariff act of 1890, this corporation commenced its importation from Canada as stated. It appeared in the evidence that an analysis of the gas thus imported had been made by competent chemists, and it was found to contain methane, or marsh gas, to the extent of 95.6 per cent, the balance being made up principally of hydrocarbons other than methane.

In the opinion of some of the witnesses the natural gas thus *examined was a crude bitu- [342]
men. It was stated "that bitumens are mixtures of hydrocarbons of various kinds, mixed with other materials in varying proportions; a crude bitumen as found in nature is mixed with other materials." It was also testified that this natural gas contains 97.2 per cent of natural hydrocarbon, and the balance of 2.8 per cent is composed of substances usually found with the hydrocarbons in crude bitumen; that the term "bitumen" does not refer to any substance of definite chemical composition, but is distinctively a generic term applied to a large number of natural substances which consist largely or chiefly of hydrocarbons. These substances may be gaseous, as natural gas or marsh gas; fluid,

as petroleum or naphtha; viscous, as the semifluid asphaltum; elastic, as elaterite, found in Utah, and elsewhere; solid, as some forms of asphaltum, bituminous or anthracite coal; that the common compositions of crude bitumen are naturally classified as above stated. The deposits of bitumen occur in various portions of the earth's crust; they differ naturally in appearance, in consistency, in various physical and chemical properties; but they are everywhere found to consist essentially of hydrocarbons, and they are correctly designated as crude bitumens. That natural gas should be designated as a crude bitumen was the opinion of some of the witnesses.

Evidence on the part of the government was given by witnesses who were connected with the Government Geological Survey, and their evidence would tend to show that the word "minerals" in the mineralogical sense of the word almost invariably refers to solids; that in the mineralogical definition gases would not be included, but that there was a wider definition, which, according to some authorities, includes all the constituents of the earth's crust, and that would include gases. It was also stated that if a scientific man wants to be precise he confines his use of the term "mineral" to a certain homogeneous substance, a chemical entity, having a definite composition, just as the mineralogist does. But nevertheless minerals are both solids and liquid, according to most definitions, and that some authorities include gases among minerals and others exclude them.

[343] *One witness for the government said if you exclude from the mineral kingdom the gases included in the atmosphere, you must set up some fourth class of substances; the division being, generally, the vegetable kingdom, the animal kingdom, and the mineral kingdom; but no such fourth division is ordinarily designated, and the constituents of the atmosphere are not vegetable and they are not animal, and ordinarily they are included in the mineral kingdom.

We think the evidence in this case shows that, within the language of paragraph 651 of the act of Congress, interpreting that language in accordance with the rule above mentioned, natural gas would fairly come under the head of a crude mineral, if there were no more limited classification in the act; but that the classification as crude bitumen is more limited, and we are of opinion that, upon the evidence, natural gas is properly thus described. If it be within the more specific classification, it would be controlled thereby. It is not important in this case to conclusively decide which classification covers it, because both are on the free list. As the gas is described in one or both of the paragraphs, it cannot come under section 4 of the act, which provides for the levy, collection, and payment on the importation of all raw or unmanufactured articles, not enumerated or provided for in the act, a duty of ten per centum ad valorem.

The judgment of the Circuit Court of the United States for the Northern District of New York was right, and should be affirmed.

HENRY W. SCOTT, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 343-351.)

Testimony in criminal action—decoy letter.

1. Testimony of the persons named by the accused as his enemies, that they have no ill will against him, is not collateral to the main issue, or a contradiction of what the prosecution has brought out, where the accused on his direct examination said that enemies had placed in his pocket stolen money that was found there, and their names were brought out on cross-examination.
2. The fact that a letter stolen from the mails was a decoy addressed to a fictitious person is not a defense to an indictment under U. S. Rev. Stat. § 5467, when the letter had been delivered into the jurisdiction of the post-office department by dropping it into a letter box.

[No. 80.]

Submitted December 5, 1898. Decided January 3, 1899.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment of that court convicting Henry W. Scott of stealing a letter and its contents from the mail, under U. S. Rev. Stat. § 5467. *Affirmed.*

The facts are stated in the opinion.

Mr. **T. C. Campbell** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

*Mr. Justice **Peckham** delivered the opin- [344]
ion of the court:

Henry W. Scott, the plaintiff in error, was indicted under section 5467, Revised Statutes, for stealing a letter and its contents from the mail, and the indictment alleged that he unlawfully and wilfully secreted and embezzled a certain letter intended to be conveyed by mail and directed to Miss Mary Campbell, Cottonwood, Yavapai county, Arizona, he being a letter carrier in the city of New York and the letter having been intrusted to him and having come into his possession in his capacity as such carrier. The letter contained $3.50 in two silver certificates of the United States, each of the denomination of one dollar, and a United States Treasury note of the denomination of one dollar, and a fifty-cent piece of the silver coinage of the United States. The evidence showed that the letter was what is termed a decoy letter; that the money was placed therein by one of the inspectors of the Post-office Department; that it was sealed, stamped, and addressed as above mentioned, and deposited about 2:30 o'clock P. M. in one of the street letter boxes in the city of New York, in the district from which the defendant collected such letters. Within a few moments after it was deposited in the letter box by the inspector, he saw the defendant come to the box, unlock *it, take out its con- [345]
tents, put them in his bag and continue on

his route. The carrier returned to the branch postoffice, station E, where he was employed, a little after three o'clock, turned the contents of his bag upon the proper table for distribution, and hung the bag and also his coat on a peg, and left the room and was gone about half an hour. One of the clerks of the department had been told before the defendant's arrival with his letter bag to look out for a letter addressed as above described, and withdraw it from the mail, and in obedience to such instructions and during the defendant's absence he looked through the letters thus taken from his bag, and the letter was not to be found. Upon the defendant's return to the distributing room, he took his coat and bag and started on his route for another collection of letters, and while on the street he was met by the officers of the government about five minutes after four o'clock P. M., and was then arrested and brought to the station. He was charged with having the letter, and was asked to show what he had in his pockets. The letter was not found, but the defendant took from his right-hand trousers pocket, among other things, the three bills which had been placed in the letter. The fifty-cent piece was found loose among other coins in another pocket. The officers identified the bills by marks which had been placed on them, and also by reason of the numbers of the bills, a memorandum of which had been taken. The coin had been marked and was identified by the officers.

In relation to the letter, it appears that it was prepared by the inspector of the department, who addressed the same to Miss Mary Campbell. The inspector wrote the body of the original letter. He did not know Mary Campbell, and never saw her; it was addressed to her at Cottonwood, Arizona, at which place there is a postoffice, but there was no one of the name of Miss Mary Campbell residing at Cottonwood, Arizona, to his knowledge. The address on the letter was to a fictitious person; the money placed in the letter was the money of Mr. Morris, one of the inspectors.

Upon the trial the defendant was sworn in his own behalf, and upon his direct exam-
[346] ination testified that when he was *arrested and the money found upon him, he said to the inspectors, "Somebody has done me a dirty trick;" to which one of the inspectors replied. "Do you think I am concerned in that?" The defendant says that he answered him, "I did not think or did not know whether he was; but if he was not, some enemy of mine in that office was." He denied on the witness stand, that he abstracted, or took from the collection table, or at all, any letter such as is described in the indictment, or any money belonging to any other person in the world.

Upon cross-examination the district attorney endeavored to obtain a fuller statement from the defendant as to what he meant when he said on his direct examination that somebody had done him a dirty trick, and that some enemy of his in the office was concerned in it, and to that end the district attorney asked him: "Have you any enemies among the employees at that station?" and the defendant answered that he had one by the name of Augustus Weisner and another named John D. Silsbee, his former superintendent; that he was an enemy of his and so was Weisner, and that those two were all that he regarded as enemies in that office, both being employed in the same branch office as the defendant, and he said that for a month before he was arrested he was not on speaking terms with Weisner.

The court asked the defendant: "What is the trick that you mean to suggest to the jury that was played upon you?" and the defendant answered: "The only solution that I can give of it is that that two dollars had been abstracted from my pocket and these marked three dollars put in the place of it. Three dollars and a half placed there; fifty cents in with this change." The witness had just previously stated that he left two one-dollar bills belonging to himself in his coat pocket at the time he hung his coat upon the peg in the sorting room and left it there to go down stairs, and from which room he was absent about twenty-five minutes.

When the defendant rested the government called as witnesses John D. Silsbee and Augustus Weisner, the two men named by the defendant as his enemies, both of whom tes-
tified *under the objection and exception of [347]
defendant's counsel, that they had no ill-will whatever towards the defendant, and that they had never had any quarrels with him, and Weisner said, on the contrary, that he had liked the man. The counsel for the defendant objected to this testimony on the ground that the evidence of defendant upon this subject was collateral, brought out by the government on his cross-examination, and that the government was bound by his answers.

After the evidence was all in the counsel for the defendant requested the court to charge, "that a letter intended to be conveyed by mail, under the statute, must be addressed to an existing person, at an existing place, or to a real and genuine address." The court refused so to charge, and the defendant excepted.

The defendant's counsel further requested the court to charge, "that a letter with an impossible address, which can never be delivered and which the sender, acting conjointly with postoffice officials, determined should be intercepted in the mail, is not such a letter as was, in the meaning of the statute, 'intended to be conveyed by mail.'" This was also refused, and an exception to such refusal taken by defendant's counsel.

The jury having convicted the defendant, he has brought the case here by writ of error.

Regarding the objections taken by the defendant to the evidence of Silsbee and Weisner, above alluded to, we think they were properly overruled. The evidence objected to was not irrelevant, and the government was not bound by the answers of the defendant as to Silsbee and Weisner being his en-

emies. When arrested the defendant had upon his person the three bills and the fifty-cent piece which had been marked by the postoffice inspectors and placed in the letter and deposited in the letter box, addressed as stated. Appreciating his position, the defendant endeavored then and there to account for his possession of the money, and he accounted for it by saying that someone, some enemy of his at the office, had done him a dirty trick, by which, as he testified, he meant to say that someone had deposited that money
[348] in *his coat pocket while his coat hung up in the sorting room, and while he was absent from that room. This evidence of defendant was an attempt to raise a suspicion, at least, that some enemy of his in the building had placed this money in his coat, and thereby to relieve himself from the suspicion of having stolen it and to show his own innocence. It was an attempt at an explanation showing an honest possession of the money. It was therefore admissible, upon cross-examination, for the purpose of showing the improbability of the explanation, to obtain from the witness all the circumstances which might throw light upon the subject. For that purpose he was asked if he had any enemies in the department, and he said that he had, naming two employees at this particular station, one the superintendent and the other a fellow letter carrier.

If this were true, it might have been argued to the jury that the explanation of defendant was strengthened, and the inference that one or both of these enemies had done this trick might for that reason have been maintained with more plausibility. To show that no such inference could properly be drawn, the government proved that the men the defendant named as enemies were not such in fact. The evidence was not collateral to the main issue of guilt or innocence, nor was the subject first drawn out by the government. The district attorney on the cross-examination simply obtained the names of those upon whom the defendant attempted to cast a suspicion by his statement in chief. He could not escape from the possibility of being contradicted, by the failure to name the enemies on his direct examination. That examination suggested an explanation which, if believed, showed an innocent possession, and however improbable it was, the government had the right to pursue the subject and to show that it was unfounded. The objection to the evidence cannot therefore be sustained.

We think the court below was also right in its refusal to charge as above requested regarding the decoy letter. The correctness of the ruling has in substance been already upheld in this court.

[349] *In *Montgomery* v. *United States*, 162 U. S. 410 [40: 1020], we not only decided that, upon an indictment against a letter carrier, charged with secreting, etc., a letter containing money in United States currency, the fact that the letter was a decoy was no defense, but it was also held that the further fact that the decoy letters (mentioned in the case) and the moneys inclosed therein, although belonging to the inspectors who mailed them and by whom they were to be intercepted and to be withdrawn from the mails before they reached the persons to whom they were addressed, was no defense, and that such letters were in reality intended to be conveyed by mail within the meaning of the statute on that subject. In that case the court, speaking through Mr. Justice Shiras, said:

"Error was likewise assigned to the refusal of the court to charge that there was a fatal variance between the indictment and proof in respect to the description of the letters, for the stealing or embezzling of which the defendant was indicted.

"In the indictment it was averred that the letters in question had come into the defendant's possession as a railway postal clerk, *to be conveyed by mail*, and to be delivered to the persons addressed. It was disclosed by the evidence that the letters and money thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached the persons to whom they were addressed.

"There is no merit in this assignment. The letters put in evidence corresponded, in address and contents, to the letters described in the indictment, and it made no difference, with respect to the duty of the carrier, whether the letters were genuine or decoys with a fictitious address. Substantially this question was ruled in the case of *Goode* v. *United States*, above cited."

In the last-cited case, which is reported in 159 U. S. 663 [40: 297], the court said, at page 671 [40: 301], speaking through Mr. Justice Brown:

"It makes no difference, with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession, as such carrier it
*is his duty to treat it for what it appears to [350]
be on its face—a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be—in other words, it is not for him to judge of its genuineness."

In this case the letter was addressed although to a fictitious personage, yet to a postoffice within the territory of Arizona. It was properly stamped, and it was placed and came within the jurisdiction and authority of the Postoffice Department by being dropped into a United States street letter box, in the city of New York. The duty of the defendant was, as above stated precisely the same in regard to that as to any and all other letters that came into his possession from these various letter boxes. The intention to convey by mail is sufficiently

proved in such a case as this, by evidence of the delivery of a letter into the jurisdiction of the Postoffice Department by dropping it in a letter box as described herein.

Section 5468, Revised Statutes, provides that the fact that any letter has been deposited in any postoffice, or branch postoffice, or in any authorized depository for mail matter, etc., shall be evidence that it was intended to be conveyed by mail, within the meaning of the two preceding sections. This prima facie evidence is not contradicted or modified by proof, as in this case, that the letter was a decoy and addressed to a fictitious person. It was deposited in a proper letter box, and it was intended that it should be taken and conveyed by defendant, a mail carrier, and his duty as such carrier was to convey it to the station postoffice, and while so being carried it was being conveyed by mail, and was under the protection of the Postoffice Department, and its safety provided for by the statute under consideration.
[351] An intention to have the *letter thus conveyed by the carrier is, within the statute, an intention to have it conveyed by mail. The difficulties of detecting this kind of crime are very great, and the statute ought not to be so construed as to substantially prevent a conviction under it. A decoy letter is not subject to the criticism frequently properly made in regard to other measures sometimes resorted to, that it is placing temptation before a man and endeavoring to make him commit a crime. There is no temptation by a decoy letter. It is the same as all other letters to outward appearance, and the duty of the carrier who takes it is the same.

The fact that it is to a fictitious person is in all probability entirely unknown to the carrier, and even if known is immaterial. Indeed, if suspected by the carrier, the suspicion would cause him to exercise particular care to insure its safety, under the belief that it was a decoy.

The other objections taken upon the trial we have examined and are of opinion they are without merit, *and the judgment is therefore affirmed.*

MISSOURI, KANSAS, & TEXAS TRUST COMPANY, *Petitioner,*

v.

THEODORE M. KRUMSEIG and Louise Krumseig.

(See S. C. Reporter's ed. 351-361.)

Contract void for usury—when there need not be an offer to repay—public policy of a state obligatory on Federal courts—right given by state statute.

1. A contract under which $1,970 is actually received by a borrower who gives ten notes of $360 each, payable in monthly instalments of $30 each, with a proviso that in case of his death all the debt remaining unpaid shall be released if he is not then in default,—is a scheme or colorable device to cover usury.
2. A plaintiff suing to cancel a Minnesota contract for usury need not offer to repay the money loaned, under Minn. Gen. Stat. 1894, § 2217, providing that such contract shall be canceled and given up.
3. The public policy of a state with respect to contracts made within the state and sought to be enforced therein is obligatory on the Federal courts, whether acting in equity or at law.
4. The right given by a state statute to have a contract canceled for usury without repaying the money loaned can be enforced in a Federal court.

[No. 66.]

Argued December 2, 1898. Decided January 3, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that court in an action brought by Theodore M. Krumseig *et al.* against the Missouri, Kansas, & Texas Trust Company, affirming the decree of the Circuit Court of the United States for the District of Minnesota declaring a certain mortgage and notes to be void and enjoining their enforcement. *Affirmed.*

See same case below, 71 Fed. Rep. 350.

Statement by Mr. Justice **Shiras:**

*In May, 1894, Theodore M. Krumseig and [352]
Louise Krumseig filed in the district court of the eleventh judicial district of Minnesota a bill of complaint against the Missouri, Kansas, & Texas Trust Company, a corporation of the state of Missouri, praying that, for reasons alleged in the bill, a certain mortgage made by complainants on the 5th day of September, 1890, and delivered to the defendant, and by it recorded, and certain notes therein mentioned, might be canceled, and the defendant be permanently enjoined from enforcing the same. The defendant thereupon, by due proceedings removed the cause to the circuit court of the United States for the district of Minnesota, where the Union Trust Company of Philadelphia was made a codefendant, and the case was so proceeded in that, on October 22, 1895, a final decree was entered, granting the prayers of the complainants, declaring the said mortgage and notes to be void, and enjoining the defendants from ever taking any action or proceeding for their enforcement. 71 Fed. Rep. 350.

From this decree an appeal was taken to the circuit court of appeals for the eighth circuit, where, on November 5, 1896, the decree of the circuit court was affirmed. On March 20, 1897, on petition of the Missouri, Kansas, & Texas Trust Company, a writ of certiorari was awarded whereby the record and proceedings in said cause were brought for review into this court.

Mr. **William C. White** for petitioner.
Mr. **J. B. Richards** for respondents.

*Mr. Justice **Shiras** delivered the opinion [352]
of the court:

The bill of complaint alleged that on July 27, 1890, Theodore M. Krumseig, one of the complainants, made a written *application to [353]
defendant, a corporation of the state of Mis-

souri, for a loan of $2,000, to be secured upon real estate in the city of Duluth, Minnesota, and among the conditions in the said application was the following:

"In consideration of the above premises, I agree to execute and deliver to the said company ten promissory notes, each of the sum of $360, payable in monthly instalments of $30, commencing at date of signing contract. The said notes aver principal sum loaned, interest and cost of guaranty to cancel debt in case of death, and shall be secured by good and sufficient deed of trust or mortgage executed by myself and wife on said ground and improvements. The contract hereafter to be entered into, if my application shall be accepted and contract entered into in writing between myself and said company, shall provide that the mortgage or deed of trust given to secure the above notes shall contain a clause guaranteeing in case of my death before payment of any unpaid instalments, a release of unpaid portion of debt, if I shall have promptly paid previous instalments and kept other conditions. As part of foregoing condition I agree, before acceptance of this application and the execution of said contract, to pass such medical examination as may be required by said company, and to pay said company the usual $3 fee therefor, and to pay all fees for recording deed of trust or mortgage."

The bill further alleged that thereupon Krumseig passed the medical examination required, paid the fee demanded, and complainants then executed ten certain promissory notes, each for the sum of $360, dated September 5, 1890, payable in monthly instalments of $30, with interest at ten per cent after due, forty-one of which instalments, amounting to $1,230, have been paid; on the same day, in order to secure these notes, they executed and delivered to the defendant a mortgage on the premises, with the usual covenants of warranty and defeasance, reciting the indebtedness of $3,600, in manner and form aforesaid, and containing the following clause:

"And it is further understood and agreed by and between the said parties of the first part, their executors, administrators, or assigns, and the said party of the second part,
[354] the Missouri, *Kansas, & Texas Trust Company, that in case the said Theodore M. Krumseig, one of the parties of the first part, should die after the execution and delivery of the said notes and this mortgage, and within ten years thereafter, each and every of the said notes remaining unpaid at the said date shall be surrendered to the executors or administrators of the said Theodore M. Krumseig, one of the parties of the first part, and this mortgage shall be canceled and satisfied; provided, however, that said parties of the first part shall have promptly paid each monthly instalment that shall have become due prior to his death according to the terms of the notes hereinbefore mentioned, and that he has not committed suicide within two years, and has not without written consent of the party of the second part visited the torrid zone, or personally engaged in the business of blasting, mining, or submarine operations, or in the manufacture, handling, or transportation of explosives, or entered into the service of any railroad train, or on a steam or sailing vessel for two years."

The bill further alleged that the sole consideration for the notes and mortgage was: 1st, the sum of $1,970, together with the interest thereon from date until maturity of the instalment notes; and, 2d, the clause in the mortgage last referred to, which latter was in fact an arrangement between the respondent and the Prudential Life Insurance Company of Newark, N. J., to save the former harmless from any loss that might occur to it in case of the death of the complainant, Theodore M. Krumseig, during the term covered by the mortgage. It was also alleged that the defendant company had not complied with the laws of the state of Minnesota governing life insurance companies, and that the contract was therefore void. The bill prayed that the mortgage be canceled of record and the remaining notes should be delivered up to them.

The answer denied that the contract was usurious, and alleged that the sum of $1,970, received by complainants, with the legal in- [355]
terest thereon and the cost of the guaranty of defendant to cancel the loan in case of the death of Theodore M. Krumseig during the continuance of the contract, constituted *a full and ample consideration for the notes and mortgage in question, and that the same was so understood and agreed to by complainants at the time of the execution of the contract.

The circuit court did not consider it necessary to pass upon the question whether the contract was one of life insurance, and hence void, for the admitted fact that the defendant company had not complied with the laws of Minnesota respecting life insurance companies; but regarded the contract as one for the security and payment of borrowed money, and, under the facts, as usurious and void under the statute of Minnesota; and granted the relief prayed for in the bill. 71 Fed. Rep. 350.

The circuit court of appeals affirmed the decree of the circuit court. Two of the judges concurred in holding that the contract was usurious, and that the complainants were therefore entitled to the relief prayed for. One of the two judges so holding construed the contract as one of life insurance, and hence also void under the Minnesota laws. The third judge, while apparently concurring in the view that the contract was usurious, thought that the complainants were not entitled to a remedy for a reason which we shall presently consider. 40 U. S. App. 620.

Usury is, of course, merely a statutory offense, and Federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts. *De Wolf* v. *Johnson*, 10 Wheat. 367 [6: 343]; *Scudder* v. *Union National Bank*, 91 U. S. 406 [23: 245].

Section 2212, General Statutes of Minnesota of 1894, provides that upon the loan of

noney any charge above ten per cent shall be usurious; and section 2217 provides that "whenever it satisfactorily appears to a court that any bond, will, note, assurance, pledge, conveyance, contract, security, or evidence of debt has been taken or received in violation of the provisions of this act, the court shall declare the same to be void, and enjoin any proceedings thereon, and shall order the same to be canceled and given up."

As was said in *De Wolf* v. *Johnson*, above
[356] cited, it does not, *in general, comport with a negotiation for a loan of money that anything should enter into the views of the parties, but money, or those substitutes which, from their approximation to money, circulate with corresponding, if not equal, facility. Still, however, like every other case, it is open to explanation, and the question always is whether it was or was not a subterfuge to evade the laws against usury. The books contain many cases where artful contrivances have been resorted to, whereby the lender is to receive some other advantage or thing of value beyond the repayment of the loan with legal interest. Sometimes the agreement has taken the form of the purchase of an annuity. More frequently there is a collateral agreement whereby the borrower is to purchase an article of property and to pay therefor more than its intrinsic value. It has been frequently held that to constitute usury, where the contract is fair on its face, there must be an intention knowingly to contract for or to take usurious interest, but mere ignorance of the law will not protect a party from the penalties of usury. *Lloyd* v. *Scott*, 4 Pet. 205 [7: 833].

The precise character of the contract between the present parties is not clear. It has some of the features of a loan of money; in other respects it resembles a contract of life insurance. But our examination of its various provisions and of their legal import has led us to accept the conclusion of courts below, that the scheme embodied in the application, notes, and mortgage was merely a colorable device to cover usury. The supreme court of Minnesota has more than once had occasion to consider this very question. In the case of *Missouri, Kansas, & Texas Trust Co.* v. *McLachlan*, 59 Minn. 468, that court said:

"The peculiar and unusual provisions of this contract themselves constitute intrinsic evidence sufficient to justify the finding of the existence of every essential element of usury, *viz.*, that there was a loan; that the money was to be returned at all events, and that more than lawful interest was stipulated to be paid for the use of it. The only one of these which could be seriously claimed to be lacking was that the money was not to be paid back at all events, but only upon a
[357] contingency, *to wit, the continuance of the life of McLachlan; but the facts warrant the inference that this contingency was not bona fide, but was itself a mere contrivance to cover usury. The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury."

Similar views were expressed in the subsequent case of *Mathews* v. *Missouri, Kansas, & Texas Trust Co.* [69 Minn. 318], 72 N. W. 121, where the supreme court of Minnesota again reached the conclusion that the notes and mortgage, forming a contract between the same trust company and one Mathews, were usurious and void.

The next question for our consideration is one not free from difficulty. Can a borrower of money upon usurious interest successfully seek the aid of a court of equity in canceling the debt without making an offer to repay the loan with lawful interest?

Undoubtedly the general rule is that courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest. Nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. *Tiffany* v. *Boatman's Sav. Inst.* 18 Wall. 375 [22: 868].

But what, in such a case, is held to be the law by the courts of the state of Minnesota? Under the statutory provision already cited, that whenever it satisfactorily appears to a court that any bond, bill, note, assurance, pledge, conveyance, security or evidence of debt has been taken or received in violation of the provisions of this act the court shall declare the same to be void, and enjoin any proceeding thereon, and shall order the same to be canceled and given up, the supreme court of Minnesota has repeatedly held that a plaintiff suing to cancel a Minnesota contract for usury need not offer to repay the money loaned. *Scott* v. *Austin*, 36 Minn. 460; *Exley* v. *Berryhill*, 37 Minn. 182; *Mathews* v. *Missouri, Kansas, & Texas Trust Co.* [69 Minn. 318] 72 N. W. 121.

*Under statutes providing that, in cases of [358] usury, the borrower is entitled to relief without being required to pay any part of the usurious debt or interest as a condition thereof, it has been held by the courts of New York and of Arkansas that courts of equity are constrained by the statutes, and must grant the relief provided for therein without applying the general rule that a bill or other proceeding in equity, to set aside or affect a usurious contract, cannot be maintained without paying or offering to pay the amount actually owed. *Williams* v. *Fitzhugh*, 37 N. Y. 444; *Lowe* v. *Loomis*, 53 Ark. 454.

But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the states or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the

duty to enforce and apply the established principle of equity jurisprudence to this case, that he who seeks equity must do equity, and to require the appellees to pay to the appellant what they justly owe for principal and lawful interest as a condition of granting the relief they ask.

We think it a satisfactory reply to such a proposition that the complainants in the present case were not seeking equity, but to avail themselves of a substantive right under the statutory law of the state. It seems to be conceded, or, if not conceded, it is plainly evident, that if the cause had remained in the state court where it was originally brought, the complainant would have been entitled, under the public policy of the state of Minnesota, manifested by its statutes as construed by its courts, to have this usurious contract canceled and surrendered without tendering payment of the whole or any part of the original indebtedness. The defendant company could not, by removing the case to the Federal court, on the ground that it was a citizen of another state, deprive the complainants of such a substantive
[359] right. With the policy of the state *legislation the Federal courts have nothing to do. If the states, whether New York, Arkansas, Minnesota, or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and canceled by the courts, such a view of public policy, in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the supreme court of the state, furnishes the rule of decision.

In *Clark et al.* v. *Smith*, 13 Pet. 195 [10: 123], it was said that "when the legislature declares certain instruments illegal and void, there is inherent in the courts of equity a jurisdiction to order them to be delivered up, and thereby give effect to the policy of the legislature; that the state legislatures have, certainly, no authority to prescribe the forms or modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the state courts; and that the undoubted truth is that when investigating and decreeing on titles in this country the court must deal with them in practice as it finds them, and accommodate the modes of proceeding to the nature of the case, and to the character of the equities involved in the controversy, so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery."

The question in *Brine* v. *Hartford F. Insurance Co.* 96 U. S. 627 [24: 858], was whether a state statute which allowed to the mortgagor twelve months to redeem, after a sale under a decree of foreclosure, and to his creditor three months after that, conferred a substantial right; and it was so held, and that such right of redemption after sale was as obligatory on the Federal courts *sitting in equity as on the state [360]
courts; and that their rules of practice must be made to conform to the law of the state so far as may be necessary to give full effect to the right. The opinion of the court was delivered by Mr. Justice Miller, who said:

"It is denied that these statutes of Illinois (giving the right to redeem) are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English chancery court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale on the rights acquired by the purchaser and those of the mortgagor and his subsequent grantees are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred, whether by deed, by will, or by judicial proceedings, are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract. And that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned *are sound; and if they are in [361]
conflict with the general doctrine of the exemption from state control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that where substantial rights, resting upon a statute which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it molds its decrees so as to give

appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form." See also, to the same effect, the case of *Holland* v. *Challen*, 110 U. S. 15 [28: 52].

Of course, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal. Nor has it been found necessary to consider whether the agreement between these parties was, as a contract of life insurance, void because the defendant had not complied with the statutes of Minnesota.

The decree of the Circuit Court of Appeals, affirming that of the Circuit Court, is accordingly affirmed.

WASHINGTON MARKET COMPANY, *Appt.*,
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 361-371.)

Rules of Washington Market Company—power to incur pecuniary liabilities—statute of frauds.

1. The power to establish rules and regulations with respect to the Washington Market Company, incorporated by the act of Congress of May 20, 1870, is given by § 16 to the city government, and not to the market company.
2. The governor, either with or without the sanction of the board of public works of the District of Columbia, had no authority under the organic act of February 21, 1871, to incur a pecuniary liability with respect to the improvement of the market grounds, the erection of market buildings, and the operation of the market, which were within the province of the legislative assembly.
3. A court of equity will not release an individual from the operation of the statute of frauds, which requires that interest in lands be created by an instrument in writing, and impose an equitable lien upon land in favor of one who makes improvements thereon, knowing that the title is in another,—especially where the money is expended under an express understanding with reference thereto, had with the owner,—but will leave the party to the remedies, if any, which a court of law provides.

[No. 83.]

Argued December 9, 12, 1898. Decided January 3, 1899.

ON APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of said District dismissing a suit in equity brought by the Washington Market Company against the District of Columbia, seeking a decree against the District for losses occasioned by it to the market company by the abolition of tolls, etc., and to restrain the District from prescribing regulations for such market, etc. *Affirmed.*

See same case below, 6 App. D. C. 34.

Statement by Mr. Justice **White:**

*The Washington Market Company was in- [362]
corporated by act of Congress approved May 20, 1870 (16 Stat. at L. 124, chap. 108). Authority was conferred upon the company to construct suitable buildings and operate a public market on the site of the "Center Market Space," situated in the northwest section of the city of Washington, between Seventh and Ninth streets and B street and Pennsylvania and Louisiana avenues. With the exception of the sixteenth section, the provisions of the statute related solely to the public market thus authorized, and the operation and duration of the franchise.

The sixteenth section is as follows:

"Sec. 16. *And be it further enacted,* That the city government of Washington shall have the right to hold and use, under such rules and regulations as the said corporation may prescribe, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets, as a market for the purchase and sale of the following articles: to wit, hay, straw, oats, corn, corn meal, seed of all kinds, wood for sale from the wagon, cattle on the hoof, swine on the hoof, country produce sold in quantities from the wagon, and such other bulky and coarse articles as the said corporation may designate. And from and after sixty days from the passage of this act marketing of the products named herein shall be excluded from Pennsylvania and Louisiana avenues and the sidewalks and pavements thereon."

The present litigation was begun on January 17, 1892, by the filing, on behalf of the Washington Market Company, of a bill in the supreme court of the District, the defendant *named therein being the District of [363]
Columbia. The bill averred that the complainant was vested by the section above quoted with authority to establish the rules and regulations therein referred to for the government of the wholesale market authorized to be established. It was also averred that, under authority of what was claimed to be a contract arising from correspondence had with the District, complainant, in 1871, entered into possession of a part of the open market space referred to in said section 16, and, in 1886, of the entire space. The correspondence relied on is set out in the margin.† It *was alleged that the complain- [364]

---

†Washington Market Company,
November 8, 1871.
Hon. Henry D. Cooke, Governor of the District of Columbia.

Sir: In section 16 of the charter of this company of May 20, 1870, the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets is assigned as a market for cattle and bulky and coarse articles to be sold in quantities from the wagon, and the marketing of such products in Pennsylvania and Louisiana avenues is prohibited.

Notwithstanding this prohibition dealers are continuing to occupy Louisiana avenue in de-

ant graded the grounds and made valuable structures thereon; that it had operated and was still operating a wholesale market thereon, and that it had received and was receiv- [365]ing the sources of revenue mentioned *in the alleged contract, except as to certain charges which, it was averred, defendant had wrongfully abolished.

It was charged that, not only by the abolition of tolls, above referred to, but by other acts of interference by the District and also by recent public assertions of an exclusive right to possess and regulate said market, the receipts from the operation of the same had been greatly diminished, so that the expenses of maintaining the market had been largely in excess of the sum received from its operation. It was prayed that an account might be taken and the District decreed to pay the losses occasioned by it; that the

---

fiance of law and to the great injury of property holders on that avenue. This company has been unable to enforce the prohibition because the open space above referred to has not been properly prepared to enable dealers to occupy the grounds for market purposes as provided in the law.

By the act of Congress the Washington Market Company is entitled to establish the rules and regulations which shall govern the market upon the open space, but it is a question whether or not it was the intention of Congress that this company should derive any income therefrom.

Under these circumstances, to meet a pressing public necessity, this company proposes, with your permission, properly to grade the grounds and to place thereon suitable platforms of inexpensive construction, which will enable the marketmen to do business on the open space as contemplated by the act, charging them for the use of their stands such sums as you and the District authorities may prescribe, not to exceed the interest on the actual outlay and the actual expenditures for keeping the market in order.

There can be no possible objection to this course of action, and we trust you will give it your approval at once, as there is a necessity for immediate action.

We have the honor to be, very respectfully,
T. C. Connelly,
Hallett Kilbourn,
Adole Cluss,
Wm. E. Chandler,
Committee of the Washington Market Company.

Approved, subject to such regulations as the legislative assembly may hereafter prescribe.
H. D. Cooke, Governor.

Washington Market Company,
April 8, 1872.

To the Governor and Board of Public Works of the District of Columbia:

The Washington Market Company is now in possession of the open space at the intersection of Ohio and Louisiana avenues with Tenth and Twelfth streets, in accordance with the sixteenth section of the act of Congress of May 20, 1870, and the arrangement made with the governor of the District, as per agreement of November 8, 1871, as follows.

(Here follows a copy of the letter and approval printed above.)

Since taking possession of the open space thus assigned for a wholesale market the company have purchased from the District authorities the buildings thereon belonging to the city of Washington, have suitably graded the surface, and have also commenced the erection of structures thereon necessary for wholesale market purposes, having already completed an open market or platform shed on the north side of B street over 200 feet long; also an open platform shed 200 feet long on the north side of the grounds, with eating-house and storehouses, and have in addition made arrangements to erect a large open building for loads of hay, grain, and wood, and suitable stables, pens, and cattle yards, as soon as the concrete paving company, now occupying the western portion of said ground, shall vacate the same; all to be done to the satisfaction of the District authorities, and in such manner as to furnish creditable accommodations for a wholesale market.

In order to more effectually carry out the foregoing arrangement, entered into November 8, 1871, the company now propose to the governor and to the board of public works, which by law has control of the streets and avenues of the District, that the said company shall be allowed to collect of dealers in said wholesale market the following sums:

	Amount per day.
Each one-horse team	$0.10
Each two-horse team	15
Each three-horse team	20
Each four-horse team	25
Each head of neat cattle	20
Each cow and calf	25
Each swine	05
Each sheep	05

The market company also to charge such reasonable rent for storage as may be agreed upon with the parties using their buildings.

The company will also keep an office open at all hours of the day and night for the accommodation of dealers, where produce can be measured and weighed, and will furnish suitable watchmen to take charge of the market and collect the revenues thereof.

From the revenues collected the market company will retain sufficient to pay all expenses of managing and keeping in repair and good condition the buildings and grounds, with ten per cent annually on the cost of improvements (which are to be made at the company's charge), and the company shall pay over to the District authorities the residue or balance of the revenue by them collected.

If by authority of Congress the company should at any time be dispossessed of the use and occupancy of the market grounds, it shall be entitled to receive a fair compensation for its buildings and improvements thereon.

Washington Market Company,
By M. G. Emery, President.

Board of Public Works, District of Columbia,
Washington, April 26, 1874.

The Washington Market Company:

In reply to your communication of April 8, 1872, I have to inform you that the board have this day passed the following vote: "To approve the arrangement with the Washington Market Company proposed in the company's letter of April 8, 1872, relative to the open space at the intersection of Ohio and Louisiana avenues and Tenth and Twelfth streets, used as a wholesale market: this arrangement not to prejudice any lawful future action of the board, of the legislative assembly, or of Congress."

Very respectfully,
Alex. R. Shepherd,
Vice President.

District might also be restrained from prescribing or attempting to prescribe rules and regulations for said market, from interfering with the sources of revenue mentioned in the contract, and from forcibly ousting or resort-
[366]ing to legal proceedings to obtain *possession of the premises. General relief was also prayed.

The answer of the District asserted the invalidity of the alleged contract; averred that the District alone was entitled to occupy said market space and to establish rules and regulations respecting the conduct of the market; and further averred the legality of any action taken by or on its behalf respecting said market space and the tolls imposed in the operation of the market.

The court entered a decree dismissing the bill; and, on appeal, its action was affirmed by the court of appeals of the District. 6 App. D. C. 34. An appeal was then taken to this court.

Mr. **William Birney** for appellant.

Messrs. **S. T. Thomas** and *A. B. Duvall* for appellee.

[366] *Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court:

It is difficult to determine precisely the theory upon which appellant predicates its right to relief at the hands of a court of equity. In the bill what is termed a "title to possession" of the market grounds is asserted to be in complainant, and its right not only to prescribe rules and regulations with respect to the market is averred, but also a right to the sources of revenue mentioned in the alleged contract. Despite, however, the position thus taken in the pleadings, and the fact that the complainant demanded that the District be compelled to account for the losses which, it is alleged, the complainant had sustained by claimed wrongful interferences of the District, counsel, in the argument at bar, bases the right to relief solely upon the prayer for general relief contained in the bill. In consequence of this abandonment of the specific grounds stated in the bill, the argument at bar is that while the market company, under the
[367]section above referred to, had not *obtained a general power to regulate and control the market, it was by said section vested with the power to locate and assign stands therein, and that the facts averred and shown by the proofs established an implied contract by which the District constituted the company an agent to manage and control the market and collect and disburse the revenues therefrom. And it is then argued that from these facts such a situation resulted as that it would be inequitable to permit the District to interfere in any wise with the possession, control, and management of the market without antecedently "reimbursing appellant for moneys expended as its agent in the administration of the wholesale market of Washington city."

Disregarding the fact that the claims asserted in the pleadings on the one hand and at bar on the other are divergent, we shall examine the contentions urged in the order in which they have been made.

As to the claim that the market company is the corporation empowered by section 16 of the charter to establish rules and regulations with respect to the market therein authorized.

We do not find in the text of the statute anything justifying a construction of the words "rules and regulations" as employed in section 16, which would attach to them a less broad signification than is given to the word "regulations" in the second section, in which section, with reference to the public market authorized to be constructed and maintained by the Washington Market Company, it was provided that "the municipal government of said city shall at all times have the power to make and enforce such regulations with regard to said market and the management thereof as in their judgment the convenience, health, and safety of the community may require." The fact that the power to establish and enforce regulations with respect to the market to be erected by the market company was vested in the municipality, and the further fact that a voice in the establishment of the amount of rent to be paid for stalls in the market of the company was expressly conferred upon the District authorities, prevents the inference that, with reference to the market which the city itself was "to hold and use," the city
was deprived *of the power to make rules and [368]
regulations, or that a broad and comprehensive authority to establish such rules and regulations was vested in the market company. The grammatical structure of the sentence also supports the view that the corporation referred to in the sixteenth section was the city government, for the nearest antecedent to the word "corporation" is the city government of Washington, the market company not being named at all in the section.

As respects the alleged contract stated in the bill to have been initiated in 1871 and perfected in 1874.

By the written proposal concerning the use and occupancy of the open market space, bearing date November 8, 1871, addressed to the governor of the District, the Washington Market Company stated: "This company proposes, with your permission, properly to grade the grounds and to place thereon suitable platforms of inexpensive construction, which will enable the marketmen to do business on the open space as contemplated by the act, charging them for the use of their stands such sums as you and the District authorities may prescribe, not to exceed the interest on the actual outlay and the actual expenditures for keeping the market in order." And it was added: "There can be no possible objection to this course." Upon this letter was placed the following indorsement: "Approved, subject to such regulations as the legislative assembly may hereafter prescribe. H. D. Cooke, governor."

Irrespective of what may have been the power possessed by the governor concerning the market grounds or market, it is clear that there is nothing in this proposal of the market company, or in the qualified approval of

the governor, importing a surrender by the legislative assembly of any rights which by law were vested in it, such as the power to establish and alter at pleasure the rules and regulations with respect to the manner of occupancy and the tolls to be exacted for the use of stands. Certainly no easement was attempted to be created in favor of the market company in the land; at most, there was a mere revocable license to hold and use the grounds. So, also, the language of the com-
[369]munication was carefully *framed to permit no inference that the District would incur any pecuniary liability for the cost of grading or the erection of the "inexpensive" platforms. The market company was evidently interested in the placing of the grounds in suitable condition for occupancy by dealers, and was willing to assume the risk of making expenditures, in reliance upon fair treatment and good faith on the part of the District authorities.

The communication of April 8, 1872, evidenced the fact that the market company had gone into possession of the grounds, had graded the surface, and erected two platforms, one of which contained an eatinghouse and storehouses. The company solicited authority to collect certain tolls and charges, including storage fees, and agreed to keep an office upon the grounds and furnish suitable watchmen, and after applying the revenues to the expenses of management and keeping in repair and good condition the grounds, with ten per cent annually on the cost of improvements, promised to pay over the balance of revenue, if any, to the District. That the company did not consider itself in the light of an agent or employee of the city in making improvements on the grounds is shown in the communication. Thus, the buildings for the use of which it solicited authority to charge storage rent are referred to as "their" buildings. It is expressly stated in connection with the stipulation that the company might retain from the revenue ten per cent annually on the cost of improvements, that such improvements were "to be made at the company's charge;" and it is also stated that the company should be entitled to receive a fair compensation for "its" buildings and improvements on the market grounds, if by authority of Congress the company should at any time be dispossessed of the use and occupancy of the grounds. While this latter arrangement is said to have been orally acquiesced in, it was not until April 6, 1874, that formal official action was taken approving the same, with the proviso, however, that the arrangement was "not to prejudice any lawful future action of the board, of the legislative assembly, or of Congress."

Assuming that authority was vested in the
[370]governor and *board of public works to enter into the arrangement suggested in the second proposition of the company, it is clear that thereby no easement was created in the land in favor of the market company, and the company recognized the fact that Congress might lawfully dispossess the market company from the use and occupancy of the grounds. The qualified acceptance of the proposal at most only constituted an implied assurance on the part of the governor and board of public works that the company, so far as those officials had the power, would not be disturbed in its possession without just cause. There was no agreement that a source of revenue would be supplied adequate to meet the expenditures, or that the District assumed liability for any deficit in the revenue. If, however, the correspondence and action taken thereon could be construed as importing an agreement to impose a pecuniary liability on the District, an inspection of the terms of the organic act of February 21, 1871 (16 Stat. at L.419, chap.62), providing a government for the District of Columbia, clearly establishes that it was without the power of the officials undertaking to enter into the arrangement. The making of regulations with respect to the use of the market grounds and the establishment of a tariff of charges, with the power to subsequently alter or abolish the same, and the authority to incur a pecuniary liability with respect to the improvement of the market grounds, the erection of market buildings, and the operation of the market, were, beyond question, within the province of the legislative assembly; and any assumption on the part of the governor, either with or without the sanction of the board of public works, of authority to conclude the legislative assembly in such matters, would have been purely *ultra vires*.

There was nothing in the conduct of the District subsequent to 1874, which, if it possessed the power, could be construed as a ratification of the alleged contract or as importing binding efficacy upon the District. There was certainly no recognition of the market company as a mere employee making expenditures and disbursing revenues solely as the agent of a principal, and the District authorities were never notified that the *market company would look to it for repay- [371]
ment of any deficit in revenues. So long as the company was willing to care for the grounds and to operate the market, while the annual revenues were less than the ordinary expenses of management, as appears to have been the case, without calling upon the District to assume the responsibility for a deficit, there was no occasion for the District to take decisive action. The furnishing of accounts, beginning with 1888, possesses no weight, as manifestly the District was interested in the ascertainment of the fact whether or not there was any surplus revenue to which it was entitled.

The facts in the case at bar bear no analogy to those which were present in the cases referred to in Pomeroy's Equity Jurisprudence (vol. 1, § 390), to which our attention has been directed by counsel for the appellant. There individuals, acting on the supposition that they had a title to or interest in lands, expended money in erecting buildings or other improvements thereon, while the real owner stood by and made no protest. No ground exists for the pretense that such was the case here. A court of equity will not relieve an individual from the operation of the statute of frauds, which requires that interest in lands be created by an instrument of writing, and impose an equitable lien up-

on land in favor of one who makes improvements thereon, knowing that the title is in another,—especially where the money is expended under an express understanding with reference thereto had with the owner, but will leave the party to the remedies, if any, which a court of law provides.

These views dispose of the case and require an affirmance of the decree of the Court of Appeals of the District of Columbia. *Decree affirmed.*

---

[372]JAMES E. SIMPSON, James E. Simpson, Jr., Alfred H. Simpson, and Willie E. Simpson, Copartners under the Firm Name of J. E. Simpson & Co., *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 372-383.)

Guaranty, when not implied in a written contract.

A guaranty of the nature of the soil under the site of a proposed dock is not implied in a written contract to construct for the United States a dock according to specifications, within a designated time, for an agreed price, upon an "available" site to be selected by the United States, where the bidder knows that a test of the soil has been made, but does not require a warranty that the ground selected shall be of a defined character.

[No. 51.]

Argued October 19, 20, 1898. Decided January 3, 1899.

APPEAL from a judgment of the Court of Claims rejecting a claim of James E. Simpson *et al.* for extra services rendered and material furnished in the construction of a dry dock for the United States. *Affirmed.*

See same case below, 31 Ct. Cl. 217.

Statement by Mr. Justice **White:**

This appeal presents for review the action of the lower court rejecting a claim of the appellants. (31 Ct. Cl. 217.)

The essential facts as found by the court below are summarized as follows: Pursuant to an act of Congress appropriating a stated sum for building two "timber dry docks to be located at such navy yards as the Secretary of the Navy may indicate" (24 Stat. at L. 484). the Navy Department on April 19, 1887, advertised for proposals for the building of two dry docks to be located, one at the Brooklyn and the other at the Norfolk Navy Yard. The advertisement, whilst pointing out the general nature of the structures and their dimensions, contained no de-
[373]tailed plan of *the contemplated work, but announced that "dry-dock builders are invited to submit plans and specifications with proposals for the entire construction and their completion in all respects," and, moreover, it was said "bidders will make their plans and specifications full and clear, describing the kinds and qualities of the materials proposed to be used." Besides, the advertisement stated that "for information in regard to the location and site of the docks bidders are referred to the commandants of the Brooklyn and Norfolk Navy Yards." On May the 23d, pending the publication, the Navy Department addressed to the commandant of the Brooklyn Navy Yard the following letter:

"To enable the dry-dock builders who may apply at the yard under your command for information concerning the proposed new timber dry dock, particularly regarding the foundation of the site selected for the dock, I am instructed by the chief of the bureau to request you to direct the civil engineer of the yard to have the necessary borings made at once with a view of ascertaining the nature of the soil to be excavated for the pit or basin of the dock, as well as to what depth if any, below the line of water mark it will be necessary to have the piling driven to secure a proper foundation for the structure."

Conforming to these instructions, Mr. Asserson, a civil engineer attached to the Navy Department, made an examination of the soil, making borings to a depth of from thirty-nine to forty-six feet at a distance of fifty feet along a certain length in the middle of a portion of the ground of the navy yard. The result of these borings was delineated on a profile plan purporting to show the character of the underlying soil. It may be conceded that this plan indicated that the soil at the point referred to was stable and contained no quicksand. Simpson & Co., who were experienced dock builders, applied for information as to the proposed site, and a copy of the plan was handed to the firm. Simpson & Co. never knew of the above letter until after this suit was brought, and they did not intimate to anyone that the bid which they proposed to submit for doing the work was to be conditioned on the existence *in the soil of the site to be [374]
selected of the characteristics indicated by the profile plan. It is true, however, that Simpson & Co. in making up their estimate and in preparing their specifications took into view the presumed condition of the soil, and that the amount of their bid was made up upon the assumption that the soil underlying the dock would prove to be like that indicated by the plan.

In June, 1887, Simpson & Co. bid for the construction of the docks. The first two sentences of their proposal were as follows:

"The undersigned, J. E. Simpson & Co., contractors and builders of Simpson's patent timber dry docks, of the city of New York, in the state of New York, hereby offers to furnish, under your advertisement, dated April 19, 1887, and subject to all the requirements of the same, and of the specifications, instructions, and plans to which it refers, two timber dry docks of like dimensions, to be built in accordance with plans and specifications herewith submitted. One of said dry docks to be located at the United States navy yard, Brooklyn, in the port of New York, and the other at the United States navy yard, Portsmouth, in the port of Norfolk, Va., upon available sites to be provid-

ed by the government, for the sum of one million and sixty-one thousand six hundred ($1,061,600) dollars, United States currency."

The price asked for the two docks was very near the sum authorized by Congress to be expended for the purpose.

The specifications referred to were prepared by the firm, and contained the following recital:

"Location.—These dry docks shall be located as follows: One at the United States navy yard, Brooklyn, in the port of New York, and the other at the United States navy yard, Portsmouth, in the port of Norfolk, Va., upon available sites to be provided by the government. The length of each dry dock, respectively, shall be five hundred (500) feet inside of head to outer gate sill."

Such other portions of the specifications as are material to be noticed are contained in the subdivision headed "General Construction," and are as follows:

[375] *"Piles.—All foundation, brace, and cross-cap piles shall be of sound spruce or pine, not less than twelve inches diameter at butt and six inches at top, and of such length as may be required for the purpose, and well driven to a firm bearing.

"Sheet piling for cut-offs shall be of sound spruce, pine, or other suitable material, four inches and five inches in thickness, as shown on plans, dressed to a uniform thickness, grooved and fitted with white-pine tongues, driven close and to such depths as may be found necessary to make good work, and closely fitted to square piles at intersections.

. . . .

"Should the character of the bottom be found such as to warrant a modification of the pile system of floor construction, a concrete bed of not less than six feet in thickness may be substituted for the foundation piles, and the floor stringers and cross timbers imbedded therein and firmly secured thereto with iron bolts and anchors."

The bid was accepted and a written contract was executed. In this contract recital was made of the advertisement for proposals, the making of the bid with accompanying specifications and the acceptance thereof, and these documents thus referred to were annexed and made a part of the contract.

The contract contained in its first clause the following:

"The contractors will, within twenty days after they shall have been placed in possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction, and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractors by the party of the second part, commence, and within twenty-four calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, New York, as shall be designated by the party of the second part; and will, at their own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description—all of which shall be of the best kind and quality adapted for the work as described in the specifications—necessary *or [376]
requisite in and about the construction of said dry dock."

The seventh clause of the contract is stated in the margin.†

In addition, penalties were stipulated for delay in the performance of the work, and a discretion was vested in the Secretary of the Navy to allow an extension of time for any failure to complete the dock within the contract period.

The work was to be paid for in instalments upon proper estimate, as it progressed, and ten per cent was to be retained by the government until its final completion.

The construction was commenced in November, 1887, and *after considerable labor [377]
had been expended and material used, "about August 31, 1888, it first became apparent that a portion of the dry dock structure had sunk and moved inward towards the exca-

†The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereunto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractors, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect when the cost of such change shall exceed five hundred dollars, except upon the written order of the Secretary or acting Secretary of the Navy; and if changes are thus made the actual cost thereof, and the damage caused thereby, shall be ascertained, estimated, and determined by a board of naval officers appointed by the Secretary of the Navy, and the contractors shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation, which they (the contractors) shall be entitled to receive, if any, in consequence of such change or changes; it being further expressly understood and agreed that such working plans and drawings, and such additional detailed plans and specifications as may be necessary, shall be furnished by and at the expense of the contractors, subject to the approval of the chief of the Bureau of Yards and Docks, and that if during the prosecution of the work it shall be found advantageous or necessary to make any change or modification in the aforesaid plans and specifications, such change or modification must be agreed upon in writing by the contractors and by the officer in charge of the work, the agreement to set forth fully the reasons for such change and the nature thereof, and to be subject to the approval of the party of the second part.

vation, and had thereby sustained damage, and that this damage was caused by encountering a stratum of water-bourne sand, in the excavation, which flowed from beneath and undermined the banks forming the side of the dock excavation." Thereupon it was ascertained that the "sand stratum hereinbefore described underlay the entire area of the site of the dock, and beginning at a depth of from twenty-six to thirty feet below the grade of the side extended to a depth of seventy feet below the same. . . . Between August, 1888, and October, 1889, portions of the dry-dock structure completed by the plaintiffs during that period continued to settle and move inward towards the excavation. . . . This was caused by the presence of the said sand stratum which continued to undermine the side of the dry-dock excavation; hence, portions of the dry-dock structures were destroyed or greatly damaged. . . During the period aforesaid the sand flowed into the excavation made for the dry dock, delaying the completion thereof, and increased the cost of the dock. The character of the soil underlying said site was not as it appeared in the profile plan in the report of the said Asserson, in so far as the said sand stratum is concerned, and both parties were surprised in encountering the difficulty and expense caused by the presence of the said sand stratum. After the discovery of the said sand stratum, as aforesaid, Commodore Harmony, Chief of the Bureau of Yards and Docks, inspected the work upon the site of the dry dock, and directed the plaintiffs to complete the dock. By reason of the presence of the said stratum of sand and the difficulties caused thereby the completion of the dock was delayed seven months."

Simpson & Co. in the meanwhile addressed a letter to the Navy Department, stating that, owing to "circumstances beyond our control," the existence of the quicksand, they had been unable to complete the dock within the time fixed by the contract, and requesting an extension of four months. This request was granted.

[378] *"During the entire period in which the plaintiffs were engaged in the construction of the work they did not at any time give notice of any claim or claim or demand any sum of money on account of any extra work or materials furnished by them in or about the construction of the said dry dock; nor was any officer or agent of the government apprised of such a claim until the receipt of the letter of Messrs. Goodrich, Deady, & Goodrich, attorneys for the assignees of the plaintiffs, dated April 11, 1893."

As the work progressed estimates thereof were made as required by the contract, and the amount, less the ten per centum reserved, was regularly paid to the contractors. Moreover, additional piling being required, a supplementary estimate thereof was made, the price for the same fixed, and the amount was paid to the contractors.

The dock was completed May, 1890, and a board was appointed to inspect it, and upon a favorable report the dock was finally received by the United States, and a claim for ten per cent, which had been retained on the amount of the whole work, was presented by the contractors, was audited and paid, and a full and final receipt was given on June 17, 1890. The relations between the contracting parties in reference to the dock then terminated, and no question was raised between them as to any extra claim or allowance until nearly three years after the final settlement, that is, on April 11, 1893, when the attorneys of the Simpson Dry Dock Company, as assignees of the claim of J. E. Simpson & Co., addressed a letter to the Secretary of the Navy, claiming for extra services rendered and material furnished in the construction of the dry dock. This claim was based upon the theory that the site of the dry dock was not "available, owing to the unfavorable and unstable character of the soil," and hence that the government was liable to the contractors in the sum of $174,322. This demand not having been complied with, the present suit was brought, the claim being for a much larger sum than that stated in the letter of the attorneys, and being made on behalf of the members of the firm of J. E. Simpson & Co., as owners thereof.

Messrs. **James H. Hayden** and *Joseph K. McCammon* for appellants.

Messrs. **George Hines Gorman** and *Louis A. Pradt,* Assistant Attorney General, for appellee.

*Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court: [379]

Considering the facts above stated, it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation. The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement. The principle was clearly announced in *Brawley* v. *United States,* 96 U. S. 173 [24: 624], where it was said:

"All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

Before measuring the claim by the contract, it is essential to clearly define the exact predicate upon which the demand necessarily rests. Reducing all the contentions of [380] the claimant *to their ultimate conception, they amount simply to the proposition that the United States by the written contract guaranteed the nature of the soil under the site of the proposed dock, and assumed the entire burden which might arise in case it should be ascertained, during the progress of constructing the dock, that the soil under the selected site differed to the detriment of the contractor from that delineated upon the profile plan which had been made by an officer of the United States. Considering the contract itself, it is clear that there is nothing in its terms which supports, even by remote implication, the premise upon which the claimant must rest their hope of recovery. The contract imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time for an agreed price upon a site to be selected by the United States. We look in vain for any statement or agreement or even intimation that any warranty, express or implied, in favor of the contractor was entered into concerning the character of the underlying soil. The only word which it is claimed supports the contention that a warranty was undertaken by the United States as to the condition of the soil is the statement found in the opening portions of the specifications, that the dock was to be built in the navy yard upon a site which was "available," and great stress was laid in the argument at bar upon this word. But the word "available" intrinsically has no such meaning as that sought to be given it. It certainly cannot be said that the site selected for the dock was not available for the purpose, since one has been actually erected thereon. It is conceded in argument that the word "available" has not naturally the meaning which must be attributed to it in order to support the contention that there was a warranty as to the condition of the soil. But it is said the word should be construed as having such signification, because bidders were referred to the commandants of the navy yards for information as to the sites of the docks, and the plan showing the result of the examination made upon a portion of the yard was submitted to them. In other words, whilst admitting the rule that the contract is the law of the case, [381] and *that the rights and obligations of the parties are to be alone determined from its context, the argument invokes a departure from that rule, and asks that the contract be so construed as to create a right in favor of one of the parties in conflict with the natural significance of the language of the contract, because of antecedent negotiations which took place between the parties.

Aside from the contradiction which this contention involves, the meaning now claimed for the word "available" cannot be adopted without departing from the intention of the parties as manifested by the terms of the contract, and the documents forming part of it, and such meaning cannot moreover be sanctioned without doing violence to the context of the contract. The advertisement for bids was made in April, 1887. The bid and specifications which accompanied it were drawn by the firm, and were submitted in June, 1887. The advertisement to which they were an answer called for a full and explicit statement of what was proposed to be done by the contractor and what were the requirements upon which they expected to rely. The contractors were experienced and competent dock builders. If it had been their intention to only undertake to build the dock for the price stipulated, provided a guaranty was afforded them by the United States that the soil upon which the dock was to be constructed was to be of a particular nature conforming to a plan then existing, a purpose so important, so vital, would necessarily have found direct and positive expression in the bid and specifications, and would not have been left to be evolved by a forced and latitudinarian construction of the word "available," used only in the nature of a recital in the specifications, and not in the contract. The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States without any express stipulation that there was a warranty in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the government in the absence of a full and clear expression *to [382] that effect, or at least an unavoidable implication. This is made clearer by other portions of the contract and specifications.

The seventh paragraph of the contract contained a stipulation that "the construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid." Now, the recital in the specifications as to an "available" site is only contained in the opening clause thereof, and naturally suggests only that it relates solely to some place in the yard which should be selected in the discretion of the government suitable for the erection of a dry dock. So, also, in the specifications as to the materials to be furnished, which follow the recital as to the location of the dock, there is not contained a word implying that a particular piece of ground in the navy yard, having soil of a specially stable character, was to be the site on which the dock was to be placed. The contrary, however, is clearly implied from the provisions as to foundation and other piling which were to be used in supporting and enclosing the structure. The foundation, brace and cross-cap piles, it was stipulated, were to be "of such length as may be required for the purpose, and well driven to a firm bearing," while it was stipulated that the sheet piling should be "driven close and to such depth as may be found necessary to make good work;" and these provisions were followed by a clause reciting that "should the character of the bottom be found such as to warrant a modification of the pile system of floor construction, a concrete bed of not less

than six feet in thickness may be substituted for the foundation piles."

Light is thrown upon the plain meaning of the contract by the conduct of the parties in the execution of the work. It is not pretended that when the character of the subsoil was discovered that the slightest claim was preferred that this fact gave rise to an extra allowance. The fact is that the contractors proceeded with the work, obtained delay for its completion, made their final settlements and received their last payment without ever asserting that any of the rights which they now claim were vested in them. Without
[383]deciding that such conduct *would be decisive if the claim was supported by the contract, it is nevertheless clear that it affords a just means of adding forceful significance to the unambiguous letter of the contract and the self-evident intention of the parties in entering into it.

Judgment affirmed.

HOME FOR INCURABLES, *Appt.*,
v.
MARY SPENCER NOBLE *et al.*

EMELINE COLVILLE, *Appt.*,
v.
AMERICAN SECURITY & TRUST COMPANY.

(See S. C. Reporter's ed. 383-400.)

Codicil, when effective—construction of codicil and will.

1. A codicil which makes the testator's intent reasonably clear may be given effect, though it is not so free from ambiguity as the provisions of the will which are affected by it.
2. A codicil revoking a "bequest" to a home for incurables, and bequeathing to a friend "the $5,000 (heretofore in my will bequeathed to said Home for Incurables)," does not revoke the provision in the will by which all the residue and remainder of the estate. of whatever kind, is given (using words "devise and bequeath") to the Home for Incurables, but does revoke a bequest of $5,000 to a certain hospital, which is the only bequest of that amount in the will, both those gifts being declared to be for the establishment of beds in memory of a son of the testatrix.

[Nos. 57, 61.]

Argued and Submitted November 9 & 10, 1898. Decided January 3, 1899.

APPEALS from a decree of the Court of Appeals of the District of Columbia holding that the effect of the codicil to a will was to revoke the bequest and devise of the residue of the estate, and that after paying the legacies, such residue should be distributed among the heirs at law, and reversing a decree of the Supreme Court of that District holding that the codicil substituted the legatee to a bequest made in favor of the hospital of the University of Pennsylvania. *Decree of the Court of Appeals of said District reversed,* and cause remanded to that court, with directions to affirm the decree of the Supreme Court of the District.

See same case below, 10 App. D. C. 56.

Statement by Mr. Justice **White:**

Mary E. Ruth died on the 16th of June, 1892, having on the first day of the same month and year executed both a will *and a [384]
codicil. After revoking all previous wills and codicils, and directing the payment of debts and funeral expenses, the will bequeathed all the real, personal, or mixed property to the American Security & Trust Company for the benefit of a granddaughter, Sophia Yuengling Huston, during her natural life. On the death of the granddaughter the will provided that the trust should end, and that it should be the duty of the trustee to pay over to the Hospital of the University of Pennsylvania the sum of five thousand dollars for purposes stated, and to deliver all the "residue and remainder of the estate of whatever kind" to the Home for Incurables, to which corporation such residue was bestowed for a stated object. The codicil unquestionably gave to Emeline Colville a bequest of five thousand dollars. The will and codicil are printed in full in the margin.†

---

†I, Mary Eleanor Ruth, residing in the city of Washington and the District of Columbia, being of sound and disposing mind and memory, do make and publish and declare this to be my last will and testament, hereby revoking and making null and void any and all former wills and codicils by me at any time made.

First. I direct my executor hereinafter named to first pay out of my estate my funeral expenses and all just debts.

Second. I give, devise, and bequeath all of my estate, real, personal, or mixed, whether in possession, reversion, or remainder, now acquired or hereafter to be acquired, and wheresoever situate, to the "American Security & Trust Company" of Washington City, District of Columbia, its successors and assigns, in trust nevertheless for the following uses and purposes only, that is to say—

To invest and to reinvest the proceeds of my said estate in its discretion from time to time in any of the following classes of securities; that is, either in United States bonds, or in municipal or state bonds, or in first-mortgage bonds of dividend-paying railroads, or in loans secured by first trusts upon real estate in the District of Columbia, said loans not to exceed three-fourths market value of said real estate; and to pay over so much of the annual income from said investments and reinvestments to the guardian or guardians of my granddaughter Sophia Yuengling Huston as may be sufficient to provide for her maintenance, education, and support until she becomes of the full age of twenty-one years; after which period the entire income so annually received from said investments and reinvestments shall be paid over by said trustee to my said granddaughter for her sole use and benefit for and during the period of her natural life. Provided, however, that the income thus provided for my said granddaughter for and during the term of her natural life shall sooner cease and determine at any time when it is ascertained by my said trustee that any part of my said income shall have been given by said granddaughter, or in anywise expended by or through her for the use or benefit of Robert J. Huston, from whom her mother,

[385] *In October, 1895, the American Security & Trust Company, alleging the death of the granddaughter and the termination of the trust, filed a bill to obtain a construction of the will and codicil, to the end that it might be enabled to distribute the estate, and thus
[386] be legally discharged from all *obligations in the premises. The bill charged that, considering the will and codicil together, there was uncertainty whether the five thousand dollars given by the codicil to Mrs. Colville revoked the bequest in favor of the University of Pennsylvania, or substituted Mrs. Colville, in whole or only in part, in the place and stead of the Home for Incurables, as to the gift in the will to that institution.

The Hospital of the University of Pennsylvania, the Home for Incurables, Emeline Colville, and the heirs at law of the decedent, were made parties to the bill. The Hospital of the University of Pennsylvania by its answer denied that there was any ambiguity in the will in regard to the bequest made to it, and averred that such bequest was in no wise impaired by the codicil. The Home for Incurables, although conceding by its answer that there was an ambiguity arising from the will and codicil considered in juxtaposition, yet alleged that the codicil did not in any respect diminish the bequest and devise of the residuum made to it by the will, or, if it did, operated to do so only to the amount of five thousand dollars. Emeline Colville, by her answer, while admitting that there was ambiguity in the will and codicil considered together, averred that such ambiguity was patent and was resolvable by settled rules of construction. She averred that, applying such rules, it was clear that the codicil operated to revoke the bequest and devise of the residuum of the estate made in favor of the Home for Incurables; and *had substituted Mrs. Colville as [387]
the residuary devisee after the payment of the amount of the bequest in favor of the Pennsylvania institution. The heirs at law by their answer, while admitting that the codicil gave Emeline Colville five thousand dollars, also asserted that the gift of the residue made by the will, in favor of the Home for Incurables, was revoked by the codicil, and therefore that, after payment of the legacy of five thousand dollars given to the Hospital of the University of Pennsylvania, and a like amount due to Mrs. Colville under the codicil, the remainder of the estate passed to them, since as to such remainder the decedent was intestate.

The trial court found that the codicil gave Emeline Colville five thousand dollars, and substituted her to the bequest made in favor of the Hospital of the University of Pennsylvania; hence, it decreed Mrs. Colville entitled to the five thousand dollars, and that the Pennsylvania corporation took nothing. It further decreed that the other provision of the will—that is, the disposition of the residuary estate in favor of the Home for Incurables—was unaffected by the codicil.

The court of appeals, to which the controversy was taken, while agreeing that the codicil gave Mrs. Colville five thousand dollars, and that she was entitled to this sum, held (the Chief Justice dissenting) that the

---

my daughter, obtained a divorce with custody of said Sophia Yuengling Huston given absolutely to her said mother. In case the income shall so cease and determine before the death of my said granddaughter, then said income, and all accumulations thereof, and the entire principal of said trust estate, shall be disposed of as provided in the next succeeding item of this my last will and testament.

I further authorize my aforesaid trustee to sell any portion of the estate herein conveyed to it in trust as aforesaid, and to invest and reinvest the proceeds as hereinbefore provided, giving to purchasers good and sufficient deeds or other evidences of title, without obligation upon the part of said purchasers to see to the application of the purchase money.

Third. In the event of the death of my said granddaughter Sophia Yuengling Huston, or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the American Security & Trust Company shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security & Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

All the residue and remainder of my said estate, of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise, and bequeath to the "Home for Incurables" at Fordham, New York city, in the state of New York, its successors and assigns, forever to be used by said Home for Incurables to endow and forever maintain one or more beds in said home, in the name and memory of my beloved son Malancthon Love Ruth.

Fourth. I nominate and appoint Mary Robinson Wright, wife of J. Hood Wright, of New York city, and Mary Robinson Markle, wife of John Markle, of Hazleton, Pennsylvania, and the survivors of them, to be the guardians or guardian of the property and the person of my said granddaughter Sophia Yuengling Huston, they and each of them being my valued friends and having consented to act in that behalf.

Fifth. I hereby nominate and appoint the American Security & Trust Company of Washington city, District of Columbia, to be the sole executor of my estate.

I, Mary Eleanor Ruth, being of sound and disposing mind and memory and understanding, do make and publish this codicil to my last will and testament—I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the state of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will.

effect of the codicil was to revoke the bequest and devise of the residuum in favor of the Home for Incurables, and therefore that Mrs. Ruth, as to the entire remainder of her estate, after paying the legacies to the University of Pennsylvania and Mrs. Colville, had died intestate, consequently that the residue of the estate should be distributed among the heirs at law. 10 App. D. C. 56.

Messrs. **George H. Yeaman, J. Spalding Flannery,** and *George C. Kobbe* for the Home for Incurables.

Mr. **Henry P. Blair** for the Hospital of the University of Pennsylvania.

Messrs. **Henry Tompson** and *Edwin Sutherland* for Emeline Colville.

Messrs. **Henry Randall Webb** and **John Sidney Webb** for Mary Spencer Noble *et al.*

Mr. **William A. McKenney** for American Security & Trust Company.

[388] *Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court:

It will subserve clearness of understanding to accurately define at the outset the real contentions which underlie the issues presented.

It is not gainsaid by either of the beneficiaries under the will that the plain intention of the testatrix expressed in the codicil was to give Mrs. Colville the sum of five thousand dollars. Indeed, assertion that there was doubt on this subject could not reasonably be made in view of the explicit terms of the codicil. The uncertainty which, it is alleged, exists in the codicil, is solely as to which one of the beneficiaries named in the will is to be affected by the payment of the sum given by the codicil. Each of those benefited by the will in substance asserts that the codicil is certain in so far as it manifests the intention of the testatrix to give, and that it is equally certain as to the fund from which the payment is to be made, provided such fund is found to be the provision made by the will in favor of the other. The arguments hence at once resolve themselves into the single assertion that, although the gift made by the codicil is certain, its enforcement may or may not be possible, depending on the particular fountain from which it may be concluded the testatrix intended the stream of her benefaction should flow. And, although differing in form of statement, the contentions upon which the legal heirs and Mrs. Colville base their claim of right to the residuary estate substantially conduce to a like, although more aggravated, result. The first (the legal heirs) concede the certainty of the intention of the testatrix as expressed in the codicil to give a specific sum to Mrs. Colville, but claim that in the execution of this defined purpose the
[389] testatrix *brought about uncertainty as to the entire residuum of her estate, since intestacy, it is claimed, was created in that regard. The second (Mrs. Colville) while equally granting the clear purpose of the testatrix, by the codicil, to give her only the sum of five thousand dollars, yet argues that this purpose has been so expressed as not only to give the sum intended, but the entire remainder of the estate besides.

Before approaching the text of the will and codicil we will notice an erroneous statement of the rule of law by which it is claimed the assertion that the codicil is uncertain is to be tested, and will also state the general scope of the power which courts of equity will exert to correct mistakes in wills, and the cardinal rule of construction which they adopt in so doing.

It is strenuously argued that, unless it be found that the codicil takes away from one of the beneficiaries named in the will the whole or a portion of what the will gives, by language as clear and as free from ambiguity as that contained in the will, the codicil is void for uncertainty and the provisions of the will remain unaffected. This broad proposition is unsound, and the authority by which it is apparently supported has been explained or qualified. Thus in *Randfield* v. *Randfield,* 8 H. L. Cas. 225, Lord Campbell (p. 235) stated the rule as follows:

"The *ratio decidendi,* upon which it is said that the vice chancellor held that no operation is to be given to the limitation over on the death of the son without issue, 'If you have a clear gift it shall not be cut down by anything subsequent, unless it is equally clear,' appears to me to be insufficient. If there be a clear gift, it is not to be cut down by anything subsequent which does not with reasonable certainty indicate the intention of the testator to cut it down, but the maxim cannot mean that you are to institute a comparison between the two clauses as to lucidity."

And in the same case, Lord Wensleydale, at page 238, said:

"The gift, being in terms absolute, cannot be cut down unless there is a sufficiently clear indication of an interest (intent?) to defeat it by the subsequent clause. I quite agree with the Lord Chancellor in the construction of those words * to which he referred, [390]
that you need not have a clause equally clear but it must be reasonably clear, and the clause to which that effect is attributed by the respondents is capable of a construction confining its effect to the real estates only."

And this rule of reasonableness is applicable, with peculiar potency, to a case like the one now before us, where the effect of defeating the codicil for uncertainty will confessedly frustrate the clear intention of the testatrix. In this connection the language of Lord Brougham, concurred in by the House of Lords in *Doe, Winter,* v. *Perratt,* 6 Mann. & G. 314, 359, is pertinent:

"We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole. It is true the heir at law shall only be disinherited by clear intention; but if there be ever so

little reason in favor of one construction of a devise rather than any other, we are, at least, sure that this is nearer the intention of the testator than that the whole should be void and the heir let in. The cases where courts have refused to give a devise any effect, on the ground of uncertainty, are those where it was quite impossible to say *what* was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested, and seemed equally entitled to the preference. . . . On this head, it may further be observed that the difficulty of arriving at a conclusion, even the grave doubt which may hang around it, certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great that there is not even an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have
[391] we any right to *regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty."

No less clearly marked out is the conceded authority of a court of equity to correct mistakes in wills and to enforce the real intention of the testator by giving that construction which accomplishes such purpose. Story (1 Eq. Jur. 12th ed. p. 174) says:

"Sec. 179. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the statute of frauds, which requires wills to be in writing (whatever may have been the case before the statute), parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.

"Sec. 180. But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So, if there is a mistake in a name, or description, or number of the legatees intended to take, or in the property intended to be bequeathed, equity will correct it."

In *Hardenbergh* v. *Ray*, 151 U. S. 112, at page 126 [38: 93, 97], the court, through Mr. Justice Jackson, thus stated the doctrine:

"The cardinal rule for the construction of wills, to which all other rules must bend, as stated by Chief Justice Marshall in *Smith* v. *Bell*, 6 Pet. 68, 75 [8: 322, 325], is, that 'the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law.' This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is *defined to be 'the legal declaration [392]
of a man's intentions, which he wills to be performed after his death.' These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law." See also *Colton* v. *Colton*, 127 U. S. 300 [32: 138].

We come, then, to the text of the will and codicil, in order to consider, first, whether the bequest and devise of the remainder, which the will makes, is in whole or in part affected by the codicil; and, second, if not, whether the codicil substitutes Mrs. Colville to the bequest in favor of the Hospital of the University of Pennsylvania, thereby revoking the gift of five thousand dollars made to the said hospital and conferring that sum upon Mrs. Colville.

The language of that portion of the will with which we are now concerned is as follows:

"Third. In the event of the death of my said granddaughter Sophia Yuengling Huston, or of the occurrence of the prior contingency for the determination of said trust hereinbefore provided in item two, then the trust hereinbefore created and vested in the American Security & Trust Company shall cease and be determined, and so much of my said estate shall thereupon be conveyed and delivered over by said American Security & Trust Company to the Hospital of the University of Pennsylvania as amounts to five thousand dollars, said five thousand dollars to be used by said hospital to endow and forever maintain a first-class perpetual bed in said hospital, in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth.

"All the residue and remainder of my said estate of whatever kind, after the payment of said five thousand dollars for the establishment of said perpetual bed in said hospital, I give, devise, and bequeath to the Home for Incurables at Fordham, New York city, in the state of New York, its successors and assigns forever, to be used by said Home for Incurables, to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth."

The codicil says:

*"I, Mary Eleanor Ruth, being of sound and [393]
disposing mind and memory and understanding, do make and publish this codicil to my last will and testament—I hereby revoke and annul the bequest therein made by me to the Home for Incurables at Fordham, New York city, in the state of New York and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville, the widow of Samuel Colville, now living in New York city, said bequest being on account of her kindness to my son and myself during his and my illness and my distress.

"In witness whereof I have hereto affixed my name this first day of June, in the year of our Lord eighteen hundred and ninety-two, and I in all other things ratify and affirm my said will."

It is apparent that the portions of the will which are in question contain but two provisions. First, a bequest of five thousand dollars to the Hospital of the University of Pennsylvania, and, second, a bequest and devise of the entire remainder of the estate to the Home for Incurables. This is so self-evident as to require nothing but statement. The codicil, it is obvious, makes one bequest only,—that is, five thousand dollars to Mrs. Colville. It points out the source whence this sum is to be taken, by designating the particular fund created by the will from which the same is to be obtained. This designation is made in a twofold way: First, by naming the person in whose favor the will gives a right, thereby pointing out that it is the fund given to such person which is to be drawn on in order to execute the gift in favor of Mrs. Colville. Second, it also designates the source whence the five thousand dollars is to be taken, by describing the character of the bequest in the will which is to be used to pay the legacy created by the codicil. As a result the codicil revokes the bequest in the will upon which it operates, and substitutes the beneficiary named in the codicil for the beneficiary under the will. The controversy arises from the fact that there is conflict between the two designations made by the codicil, the name on the one hand and the character of the thing given on the other.
[394]*This conflict plainly appears from a consideration of the text of the codicil: "I hereby revoke and annul the bequest therein" (that is, in the will) "made by me to the Home for Incurables at Fordham, New York city, in the state of New York, and I hereby give and bequeath the five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend Emeline Colville." That these words show a change of purpose as to a gift of five thousand dollars found in the will, and a substitution of the new beneficiary for the one mentioned in the will, is beyond reasonable doubt demonstrated by the text. The revocation made by the codicil is but consequent on the gift to the new legatee of "the" sum "heretofore in my will bequeathed," and thus makes it patent that the revocation and the gift are truly one and the same act of volition, and that they arise from and depend one on the other. Which, then, of the two designations in the codicil contained is the controlling one, or, otherwise stated, which was mistakenly used by the testatrix?

The language revoking and annulling in the codicil is "the bequest therein (that is in the will) made by me." The gift by the codicil is a bequest of "the five thousand dollars heretofore in my will bequeathed." Now the only clause in the will to which this description can possibly apply is the single and only specific bequest found in the will, that is, the five thousand dollars given by the will to the Hospital of the University of Pennsylvania. It follows that the only possible subject to which the codicil can apply is the only one found in the will to which the description can possibly relate, and which it defines with certainty and clearness. To adopt the designation which the codicil gives when it states the name of the beneficiary of the provision in the will would absolutely destroy the description of the character of the thing stated in the codicil, since there is nothing given by the will to the Home for Incurables which comes under or can possibly be embraced within the specific description contained in the codicil of the object of gift to be affected. Now, as it is manifest from the codicil that the purpose of the testatrix was but, in making the codicil, to change the benefit by her *conferred under the will only to [395]
the extent of the bequest found in the will of five thousand dollars, and that her sole intent was to confer this gift on a new person, it would follow, if the mention by the codicil of the name of the supposed recipient of the gift were allowed to control, that the thing revoked would be dominated by the mere name, the representative would be greater than the thing it stood for, and the plain intent and purpose of the testatrix, apparent on the face of the codicil, would be frustrated. Moreover, a yet more serious departure from the words and intention of the testatrix would result. It is plain from the will that the fixed design of the testatrix was to provide for the disposition of her entire estate; that is, that she assiduously sought to avoid intestacy as to any portion thereof. But if the name mentioned in the codicil be allowed to destroy the accurate description of the nature of the thing upon which the codicil operates, intestacy as to the remainder of the estate would arise, since such result must flow from the assumption that the revocation made by the codicil relates to the devise of the remainder of the estate made by the will. To hold that the name in the codicil controlled the description would be tantamount to saying that, although the testatrix intended, and had stated such intention in clear language, to dispose of all her estate, yet by writing the codicil she had become intestate to the full limit of all the remainder. Besides, to thus construe the will would be to declare that the greater portion of the codicil was wholly unnecessary and meaningless, for if the intention had been that the sum given should be paid by diminishing the remainder, then all reference to the particular gift which was to be operated upon was superfluous.

The intention of the testatrix as shown by the entire codicil is greatly fortified by considering that the context of the will and codicil establish, beyond cavil, that they were written by one familiar with the technical legal terms, and hence that the provisions found in both instruments were carefully made to conform to legal phraseology. Now, the thing revoked is called in the codicil "the bequest" made in the will, which contradistinguishes it from the bequest and devise of "all *the residue and remainder" of the es- [396]
tate of the testatrix "of whatever kind," which the will contains.

The reasoning by which it is contended

that the designation by name found in the codicil must be held as dominant, and must be construed as obliterating the clear and legally precise indication of the thing intended to be revoked, which the codicil itself affords, does not commend itself to our approval. That reasoning thus proceeds: The codicil contains a revocation and a gift. The two are wholly distinct, the one from the other. As, therefore, the revocation refers by name to the bequest made to the Home for Incurables, and revokes it, therefore the provision made by the will for testacy as to the entire remainder is destroyed, even although the gift made by the codicil is only of five thousand dollars, and despite the fact that it plainly, by its terms, refers solely to a bequest of that amount made in the will. But to adopt this view compels a distortion of the language of the codicil, a mutilation of its context, and a division of its provisions into two distinct and substantive matters, when in fact on the face of the codicil it contains but one provision, a revocation and a gift, the one dependent upon the other, the one caused by the other; that is to say, a revocation made in order to give and a gift made solely of the thing revoked. Indeed, to support the view that because the name of the Home for Incurables is stated in the codicil, that instrument had reference to the bequest and devise of the remainder of the estate made by the will, requires not only the arbitrary division of a single sentence in the codicil into two parts, although they are indissolubly connected, but also necessitates a misconstruction of another portion of the will. This follows from the fact that even although the revoking part of the sentence be alone taken into view, dissevered from that with which it is connected in the codicil by a union of thoughts and of words which cannot be disassociated, the codicil cannot be said to apply to the gift of the remainder without destroying the signification of its language. The thing annulled and revoked by the codicil is not the bequest and devise of the remainder, but *the bequest* by the will made. The language of the codicil
[397]*is: "I hereby revoke and annul the bequest therein made by me." But only one "bequest," that is, the one for five thousand dollars, existed in the will. To cause the word "bequest" to refer to the remainder is to enlarge its scope and significance beyond its legal import. True, to justify the construction that the word "bequest" is synonymous with a bequest and devise of the remainder, it is said that the testatrix by her will "directed" the trustee to sell the real property and to convert all the estate into personal property, and therefore that it might well have been contemplated by her that when the time arrived for a distribution of the estate that the remainder would consist solely of personal property, and therefore, in mental contemplation, the testatrix may naturally have assumed that the transmission of the remainder would be but a bequest exclusively of personal property. This overlooks the fact that the will and codicil were written on the same day; that the period when the life estate was to cease and the gifts made by the will were to become operative was necessarily wholly uncertain, and, that the terms of the will and codicil evidently relate to the condition of the estate at the time that they were made, and not to that which might exist at a subsequent and uncertain period. The reasoning, moreover, must rest on a self-evident disregard of the terms of the will, which does not, as is expressly asserted to be the case, "*direct*" the trustee to convert the real estate into personal property, but simply "*authorized*" it to so do.

And this analysis, which demonstrates that the terms of the codicil do not apply to the bequest and devise of the remainder so as to bring about intestacy, also with equal conclusiveness shows that the codicil cannot be construed as reducing the bequest and devise of the remainder to the extent of the five thousand dollars which the codicil gives. To so construe would be to obliterate the words "the five thousand dollars heretofore in my will bequeathed." It would be to assume that a revocation of a gift in the will had been made by the codicil when there was no necessity for so doing, for if the testatrix had intended simply to give five thousand dollars out of the residue, the mere expression of an intention to give *five thousand [398]
dollars would have been entirely sufficient in law to effect such purpose without the slightest necessity of any revocatory clause whatever. This is but to state in another form the abounding reason we have already mentioned, that the express result of the words of the codicil was not alone to revoke a provision of the will, but to do so solely to the extent and for the purpose of executing the new intention conceived by the testatrix by dedicating a particular and named bequest made by the will to the new purpose, and, hence, that the thing selected for revocation and substitution was accurately described in the codicil, omitting the name of the beneficiary thereof, as "*the* bequest" . . . "of five thousand dollars heretofore in my will bequeathed." Considered in its ultimate aspect, the proposition that the codicil gave five thousand dollars to the legatee named therein out of the remainder necessarily affirms that the codicil relates to the remainder, and therefore asserts that the testatrix intended, not simply to revoke in order to substitute the new beneficiary to the specific sum revoked, but to create an independent provision wholly disconnected from the bequest made by the will. But this cannot be maintained without striking out the major part of the codicil, and thus frustrating the plain intention of the testatrix unambiguously expressed in the letter and obviously within the spirit of the instrument.

As, then, the codicil does not, in whole or in part, refer to the bequest and devise of all the residue and remainder made by the will in favor of the Home for Incurables, it remains only to consider whether it operates upon the bequest of five thousand dollars made by the will in favor of the Hospital of the University of Pennsylvania. If it does, it substituted the legatee named in the codi-

cil for the institution in question. If it does not, the codicil is void for uncertainty, since there is no other source from which the sum to execute the gift which it makes can be taken. Conversely it results that all the reasoning by which it has become manifest that the codicil did not apply either to the gift or the remainder, establishes that it does so apply to the gift made by the will in favor of the Hospital of the University of Pennsyl-
[399]vania. In *the first place, the gift to that corporation is the only specific bequest found in the will, and, in the second place, it is of the same amount as that named in the codicil. It is therefore embraced within the strictest letter of the description given by that instrument, "the bequest therein (in the will) made by me," and "the five thousand dollars heretofore in my will bequeathed." And a consideration of the whole scope of the will strengthens the force of the language of the codicil. The bequest of five thousand dollars given by the will to the Hospital of the University of Pennsylvania was to be used by it "to endow and forever maintain a first-class perpetual bed in said hospital in the city of Philadelphia, said bed to be in the name and memory of my beloved son Malancthon Love Ruth." The bequest and devise of "all the residue and remainder of my said estate of whatever kind" in favor of the Home for Incurables was "to endow and forever maintain one or more beds in said home in the name and memory of my beloved son Malancthon Love Ruth." The purpose, then, of both gifts was the same. Now, the declared motive generating the making of the codicil in favor of Mrs. Colville was "on account of her kindness to my son and myself during his and my illness and my distress." The natural interpretation of the intention upon which the three provisions rest is reasonably as follows: Having provided for the perpetuation of the memory of the son by the execution of works of charity of substantially the same nature by two different institutions, the one by the use of five thousand dollars to support one bed, and the other and more important by the application of all the residue and remainder of the estate to support one or more beds, when the mind of the testatrix came to the conclusion that her tenderness to the memory of her son should be manifested by a gift to one who had befriended him, the means of executing this thought which she selected was this, not the revocation or impairment of the greater provision made by the will for honoring the memory of the son, but the transfer of the previous and lesser provision of five thousand dollars to the new legatee. By this means the general plan expressed by the will
[400]was unaltered, *despite the execution of the conception which the codicil embodied. It may, in consonance with reason, be considered that the testatrix, whose mind, as the codicil shows, was charged with the recollection of the purposes expressed in her will, should have inadvertently used a wrong name, especially as each of the beneficiaries under the will was to apply the thing given to a like good work. It cannot, however, without denying the reason of things, be successfully asserted that although the testatrix specifically pointed out the clause in her will which she revoked, nevertheless by the mere mistaken use of the name of the person she destroyed or intended to destroy the plain and specific description which she vividly embodied in the very sentence where the name was inadvertently stated.

From the foregoing it results that the use of the name Home for Incurables, in the codicil, was but a mere mistaken designation, dominated and controlled by the description of the character of thing to be affected by the codicil stated therein. Guided by the principles enunciated in the authorities to which reference at the outset was made, such mere mistake may be corrected, in construing the will, by disregarding the error and following the full and accurate description which will then be contained in the instrument; and hence that the effect of the codicil was to revoke the bequest of five thousand dollars made by the will in favor of the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil.

The decree of the Court of Appeals of the District of Columbia must be reversed, and the cause remanded to that court, with directions to affirm the decree of the Supreme Court of the District, the costs of all parties to be paid out of the estate. And it is so ordered.

Mr. Justice **Gray**, not having heard the argument, took no part in the decision of this case.

JACOB SONNENTHEIL, *Plff. in Err.*, [401]
v.
CHRISTIAN MOERLEIN BREWING COMPANY *et al.*

(See S. C. Reporter's ed. 401-416.)

Suit against a United States marshal—suit against him and attachment creditors—acceptance of deed of trust by creditors, when question for the jury—knowledge of fraud—declarations of grantors, when evidence.

1. A suit against a marshal of the United States for acts done in his official capacity is a suit arising under the laws of the United States.
2. A suit against a marshal of the United States and his sureties, and also attachment creditors for whom he has seized goods, is not one in which the judgment of the circuit court of appeals is final, under the act of Congress of March 3, 1891, § 6, as the jurisdiction does not depend entirely upon citizenship, although a separate suit against the attachment creditors would have come within that section.
3. Under the laws of Texas the question of the acceptance of a deed of trust by creditors may be left to the jury, notwithstanding their positive oral testimony to the acceptance, where this question is closely connected with a question of their participation with the debtor in defrauding other creditors.

4. The knowledge of local creditors who have accepted a deed of trust, that it is fraudulent, may be left to the jury, where the debtors are shown to have remained in practical control of the business, obtained credit on false representations to commercial agencies, and made large purchases of goods on credit just before an assignment, and where the rumors of their insolvency could hardly have escaped the ears of such creditors.

5. Declarations by persons who have made a deed of trust, which are not mere admissions of prior facts, but are propositions for a continuance of their business after settlement with their creditors, are admissible against them,—at least in an action attacking the deed as a fraud upon creditors, in which there is other evidence of a common purpose of the vendors and vendee to defraud, when the rights of the secured creditors are carefully guarded in the charge to the jury.

[No. 45.]

Argued October 18, 19, 1898. Decided January 3, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming a judgment of the Circuit Court of the United States for the Eastern District of Texas in favor of the defendants the Christian Moerlein Brewing Company *et al.* in an action brought by Jacob Sonnentheil to recover the value of a stock of goods seized by the marshal of said district, under writs of attachment in favor of the Brewing Company. Judgment of the Circuit Court of Appeals *affirmed.*

See same case below, 41 U. S. App. 491, 75 Fed. Rep. 350.

Statement by Mr. Justice **Brown:**

This was an action at law, brought by Sonnentheil, trustee under a deed of trust executed December 16, 1892, by Freiberg, Klein, & Co., of Galveston, Texas, against the Christian Moerlein Brewing Company, an attaching creditor, and one Dickerson, whose Christian name is unknown, marshal of the United States for the eastern district of Texas, to recover the value of a stock of goods seized by the marshal under writs of attachment in favor of the brewing company.

Prior to December 16, 1892, Moses Freiberg, Sam Klein, and Joseph Seinsheimer were under the firm name of Freiberg, Klein, & Co., conducting a wholesale liquor and cigar business at Galveston, Texas. Having become embarrassed and unable to meet their liabilities upon the date above named, they conveyed by deed of trust to the plaintiff Sonnentheil their stock of goods, together with their other property and the debts due them, authorizing him to take immediate possession thereof, to sell the property and collect the debts, and apply the proceeds to the payment of certain creditors named in the deed of trust. This deed was filed as a
[402] *chattel mortgage with the county clerk of Galveston county, Texas, on the day it was executed, and the plaintiff in error as trustee took immediate possession of the property therein conveyed.

Another deed of trust, dated December 17, was executed by the same parties to the same trustee to secure the same debts. This deed differed from the first only in inserting some words which had been erased from the first deed, in giving the trustee the power to compromise or sell the debts due the firm, and in binding the grantors, and each of them, in the name of the firm, to make such further assurances as to the property conveyed as would speed the execution of the trust.

Sonnentheil was holding the property in question under both of these deeds when, on December 23, 1892, a United States deputy marshal seized and took it from his possession against his protest. This seizure and dispossession were made by virtue of a writ of attachment from the circuit court for the eastern district of Texas, in a suit for debt by the brewing company against Freiberg, Klein, & Co., and the seizure was directed by an agent of the company. The brewing company was not secured in the deeds of trust. This suit was brought by Sonnentheil, the trustee, against the marshal and the brewing company to recover the value of the goods thus seized and taken from him.

The defendant demurred to the jurisdiction of the court; pleaded a general denial, and attacked the deeds of trust as void on their face, and as not having been accepted by the trustee or preferred creditors, and as having been made with the intent to defraud the unpreferred creditors of the firm, of which fraud they alleged the trustee and preferred creditors had knowledge. The specific objections urged to the deeds were that a provision allowing the trustee to compound and compromise doubtful debts due the makers was erased from the first deed before filing, as well as one authorizing each of the makers to make further assurances of title and transfer with the same effect as if made by each in person. That the makers of the first deed had, a short time prior to its execution, represented to two commercial agencies that *they were solvent, and had thereby [403]
deceived the defendant company into selling them a large amount of goods on credit; that the deeds conveyed property exceeding in value the debts secured; that the claims provided for in the deeds were also secured by solvent indorsers; that the makers had, not long before the execution of the first deed, conveyed to L. Fellman a large amount of real estate for a feigned consideration and in secret trust for themselves, and for the purpose of removing the same from the reach of their creditors, and had conveyed to others a large amount of assets to hold for their benefit; that they had made to H. Kempner a deed of trust to secure a pretended debt; that the makers of the deeds had long prior to their execution, and whilst insolvent, entered into a conspiracy with L. Fellman, who was indorser on a large amount of Freiberg, Klein & Co.'s paper, and, with other persons, to remove the then present embarrassments of the firm and to continue business; and then, after enlarging their stock by purchases to a sufficient amount, to fail and secure Fellman and other home creditors, and

that the deeds of trust were the result of this conspiracy.

The plaintiff replied, denying the allegations of the answer, and alleging acceptance of the deed of trust before levy of the attachment. Upon the trial it was shown that the deeds of trust under which Sonnentheil claimed were duly executed; that the first was duly filed for record, and that Sonnentheil was in possession of the property as trustee at the time the second deed was executed; that the debts preferred in the deeds amounted to about $140,000, all of which, except $10,000, were secured by the accommodation indorsement of Fellman & Grumbach, and none were secured otherwise; that several of the creditors had accepted the deed of trust before the levy of the attachment, and some of the secured debts were paid thereafter.

The jury returned a verdict for the defendants, whereupon the case was taken by the plaintiff to the circuit court of appeals, and the judgment of the court below was there affirmed. [41 U. S. App. 491], 75 Fed. Rep. 350. Thereupon the plaintiff sued out a writ of error from this court.

Messrs, **A. H. Willie** and **J. M. Wilson** for plaintiff in error.

Mr. **F. Charles Hume** for defendants in error.

[404] *Mr. Justice **Brown** delivered the opinion of the court:

1. At the last term of this court motion was made to dismiss the writ of error upon the ground that under section 6 of the act of Congress of March 3, 1891, establishing the circuit courts of appeals, the judgment of the court of appeals affirming the judgment of the circuit court was final. By this section the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction depends entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states. In this case the plaintiff Sonnentheil was a citizen of the state of Texas; the defendant brewing company was a corporation created by the laws of Ohio, and a citizen of that state, and Dickerson a citizen of the state of Texas; but it also appears upon the face of the original petition that Dickerson was marshal of the United States for the eastern district of Texas, and that he made the seizure of the goods in question through his deputy, John H. Whalen, and under a writ of attachment sued out by the brewing company against Freiberg, Klein, & Co. as defendants. It thus appears that the jurisdiction of the circuit court did not depend entirely upon diversity of citizenship between the plaintiff and the brewing company, but upon the fact that one of the defendants was marshal of the United States, and was acting in that capacity when he seized the goods in question.

Had the action been brought against the marshal alone there can be no doubt that the circuit court would have had jurisdiction of the case as one arising under the Constitution and laws of the United States. *Feibelmann* v. *Packard,* 109 U. S. 421 [27: 984]; *Bachrack* v. *Norton,* 132 U. S. 337 [33: 377]. It is true that in these cases the action was against the marshal and *the sureties upon [405] his bond, but there is no difference in principle. The right of action in both cases is given by the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character. *Bock* v. *Perkins,* 139 U. S. 628 [35: 314]; *Buck* v. *Colbath,* 3 Wall. 334 [18: 257]; *Texas & P. R. Co.* v. *Cox,* 145 U. S. 593 [36: 829]. If suits against a bank or railways chartered by Congress are suits arising under the laws of the United States, as was held in *Osborn* v. *The Bank of U. S.* 9 Wheat. 738 [6: 204], and *The Pacific Railway Removal Cases,* 115 U. S. 1 [29: 319], with even greater reason must it be considered that a suit against a marshal of the United States for acts done in his official capacity falls within the same category.

The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one,* and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different states. Had two suits been brought, one of them would undoubtedly have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendants in a single action, jurisdiction of that action was not *wholly* dependent upon either consideration. Had the jurisdiction of the circuit court been originally invoked solely upon the ground of diversity of citizenship as applied to the brewing company, the case would have fallen within the *Colorado Central Consol. Mining Company* v. *Turck,* 150 U. S. 138 [37: 1030], but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application.

The record contains twenty-three assignments of error, most of which it will be unnecessary to consider separately. For the purposes of this decision they are reducible to three.

2. Several of these assignments are based upon an alleged error of the court in submitting to the jury the question whether the deed of trust was accepted by any of the preferred creditors before the levy of the attachment.

*Under the laws of Texas it is conceded that [406] the instruments in question were deeds of trust, in the nature of chattel mortgages, under which the proceeds of the property sold were, after paying expenses, to be appropriated to the payment of the debts enumerated in the deeds, and any surplus remaining to be turned over to the makers of the instrument, and that such a deed of trust must be accepted by some bona fide creditor secured therein in order to give it effect.

In this connection the plaintiff requested the court to charge that "the deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to

have been, at the time of its execution, bona fide debts of the makers, Freiberg, Klein, & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company, and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent."

This the court refused, and in lieu thereof charged that the deed, upon its face, was a legal instrument; that it differed under the laws of Texas from an assignment in the fact that an assignment presumes that "all the creditors named accepted it. In order to make a deed of trust operative it is necessary that the parties for whose benefit it is made should accept it. It is not necessary that the acceptance should be in writing, nor is there any particular form of acceptance. By the term 'acceptance' it is simply meant that when they understand what has been done, they consent to it; they agree to it, no matter in what form that may be done. Anything that shows that after being informed of what has been done, that with a knowledge of these facts, they assent to it, or they agree to it, constitutes and is, in fact, an acceptance. . . . I hold as a matter of law that if you find as a matter of fact that if *any creditor* accepted the terms of this instrument before the levy of the attachment, and you do not find that debt to be infected with fraud, as I shall hereafter instruct you, in that event you are instructed that the entire
[407] property named in this deed *passed to the trustee, and in this action he may recover for whatever it is shown the property was worth at the time and place it was taken."

To the charge as thus given exception was taken upon the ground that it left the question of the acceptance of the deed of trust by the beneficiaries to the determination of the jury, when such acceptance was a question of law which should have been determined by the court; that the entire and uncontradicted proof showed that before the levy of the attachment, the deed of trust had been accepted by a portion of the beneficiaries named therein, and also by the trustee, and that there was no question of fact for the jury to determine.

The evidence upon this point was that the deed was made on December 16, 1892, and filed in the county clerk's office the same night, and that the goods were seized by the marshal under the attachment of the brewing company on December 23; that one Fry was one of the creditors secured in the deed; that he was informed of the deed of trust the night it was executed, and that he was secured in it. He answered that it was all right, and repeated the same thing next day.

Of the firm of Adoue & Lobit, who were also bona fide creditors secured by the deed, Adoue testified as follows: "The assignee, Sonnentheil, came to our office in the morning before twelve o'clock and told me that we were one of the secured creditors in the trust deed, and he would expect me to give him my assistance in the management of the business. I said I would, and for that purpose he would call a meeting later on. That was my notice of the failure. I answered him in a few words. Cannot exactly recall them. I said it was all right; very glad he was assignee; hoped we would get our money back. I attended two or three meetings. . . . I did more than indicate my acceptance of the security that was given me by the deed of trust. We acted there as if it were our own property. We were discussing how it was best to dispose of it so as to get our money out of it; that was my idea."

Lobit, his partner, testified as follows: "When I learned of the failure I also learned that the notes which we held were secured by the deed of trust. This I also learned from the *newspaper. I also talked with Moses Freiberg a few days after the deed of trust was made. He regretted the failure and was sorry. I told him that I was satisfied, inasmuch as they had protected us in the deed of trust, and that I supposed they had done the best they could, and we were satisfied with it."

One Marx, the Galveston agent of S. A. Walker, a creditor of the firm, also testified: "I learned of it next morning after it occurred. [408]
Did not know of it before. I talked to Fellman about the deed of trust. He was indorser of Walker's paper; did not talk particularly to any member of the firm of Freiberg, Klein, & Co.; I accepted under the deed of trust, probably the next day, I think to Joe Seinsheimer. I assented to the deed of trust securing Walker. I was authorized to do so for Walker."

Of course, if the acceptance had been in writing, the construction of such writing would have been a question for the court. With reference to parol understandings, the rule is that if there be any conflict as to the words used, or if the words themselves be ambiguous, the question of intent must be left to the jury. Notwithstanding the testimony of these witnesses was so positive to the effect that they accepted the trust, we are of opinion that it was not improper to submit the question to the jury. In its charge the court instructed the jury that the creditors who accepted the deed of trust must themselves be free from the taint of fraud, and the question of fraud was so connected with that of acceptance that it was possible for the jury to have found that the accepting creditors had knowledge of the fraud at the time of their acceptance. They were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses (*Lomer* v. *Meeker*, 25 N. Y. 361, 363; *Elwood* v. *Western U. Teleg. Co.* 45 N. Y. 549, 553 [6 Am. Rep. 140]), the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.
Munoz v. Wilson, 111 N. Y. 295, 300; *Dean* [409]
v. *Metropolitan Elev. R. Co.* 119 N. Y 540, 550; *Canajoharie Nat. Bank* v. *Diefendorf*,

123 N. Y. 191, 200 [10 L. R. A. 676]; *Volkmar* v. *Manhattan R. Co.* 134 N. Y. 418, 422; *Rumsey* v. *Boutwell*, 61 Hun, 165, 168; *Roseberry* v. *Nixon*, 58 Hun, 121; *Posthoff* v. *Schreiber*, 47 Hun, 593, 598.

3. Upon the trial it was insisted that the deeds were void upon their face, but the court held them to be valid, and we see no reason to question the correctness of its conclusion. Upon the question of actual fraud, which was the main issue in the case, the court charged the jury as follows: "If you find from the evidence that any one creditor had accepted the deed of trust before the levy of attachment, and that such creditor was not guilty of fraud himself and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff; but, on the other hand, if you find that the creditor or creditors had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find for the defendant."

This instruction was excepted to by the plaintiff upon the ground that it left to the jury the fact whether any of the creditors had knowledg of the fraudulent intent—if any there were—in the making of the deed of trust, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of any such fraudulent intent—if it existed—or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence; but, on the contrary, the uncontradicted evidence was that they had no knowledge of any such fraud, if any there was, or of any fact that would have put them upon inquiry with reference to the same.

With regard to the question of fraud in fact there was considerable testimony, but it
[410]was insisted by the plaintiff that, *so far as concerned the creditors who accepted the deed of trust, there was not a scintilla of evidence tending to show either direct knowledge of the fraud, or such information as would put a reasonably prudent person upon inquiry as to the existence of such fraud.

It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. So much depends upon the character of the business transacted by the insolvent firm, the circumstances under which the deeds are executed, the relation of the parties to one another and to the preferred creditors, the manner in which the business is subsequently conducted, the opportunities the preferred creditors had of informing themselves of the facts, that it is rarely safe to withdraw the question from the jury. Parties contemplating a fraud frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their unsecured creditors, that the fraud becomes impossible to detect, unless the door be swung wide open for the admission of all testimony having any possible bearing upon the question. Facts which to the court might seem of no pertinence and be rejected as having no legal tendency to show knowledge of the fraud, might be considered by the jury as significant and indicative of a guilty participation. Even negative evidence may sometimes have a positive value.

The testimony in this case indicates that as early as February, 1891, it had been discovered by Freiberg that the firm had lost considerable sums of money through Seinsheimer, one of the partners, and was in an embarrassed condition; and arrangements were made with the principal creditor of the firm, a kinsman of Freiberg, by which it was hoped to extricate themselves. This proving ineffectual, a meeting was called at the residence of one Fellman, in Galveston, which was attended by the members of the firm and by Fellman, Kempner, and Grumbach, indorsers for the firm. Seinsheimer and Grumbach married sisters and were sons-in-law of Fellman; Kempner was a brother-in-law of Seinsheimer. At the time of this meeting Fellman and Grumbach, who were
partners *in the dry-goods business were in-[411]
dorsers for Freiberg, Klein, & Co. to the extent of $135,000. At this and other meetings which were held, the question of the solvency of the firm, and the means which should be used to protect it from failure, were considered, and arrangements were made to reduce their debts so that they could continue business. After these meetings the firm continued business as before, buying and selling goods for cash and upon credit. At these meetings it was determined that the firm should endeavor to carry on their business, but if it had to fail that Fellman should be protected at all hazards. There was also evidence to the effect that a short time prior to the failure Fellman promised to buy out their goods and let them carry on the business in his name. The testimony also tended to show that before making the deeds, a conveyance of land for something less than its value was made by the firm to Fellman for cash paid by him. Also that Seinsheimer, one of said firm, had kept from the trustee some of the bills receivable by the firm, but that the trustee, upon finding this out, had made him turn the bills over to him.

In March, 1891, a request for a report of the financial condition of the firm by a commercial agency was answered by a statement, made under the direction of Seinsheimer, showing that the assets of the firm exceeded its liabilities by $200,000, when in truth the firm was insolvent. The business of the firm was continued by the purchase and sale of goods, and the Fellman indorsements were continued by extensions and renewals.

In February, 1892, it was discovered that the firm was hopelessly insolvent, but another call from the commercial agencies for an annual report was again met by a false statement, showing assets in excess of liabilities of more than $200,000. Fellman, Grumbach, and Kempner had full notice from members of the firm of all these matters.

In the summer of 1892 the failure of the

firm became evident, and goods were purchased and placed in stock, with a knowledge that they could not be paid for. The credits of the firm were restricted; in some instances entirely cut off, and rumors of its insolvency
[412] circulated throughout the community. *The dangerous condition of the firm became a matter of discussion among business men in Galveston, and inquiries continued to be made from abroad of the local commercial agencies as to their solvency. A demand was again made by a commercial agency in September, 1892, at the instance of the defendant brewing company, and was answered by another statement, showing an excess of $200,000 over all liabilities; and the brewing company was thereby induced to extend a further credit to the firm.

Notwithstanding the apparently desperate condition of the firm, during the months of September, October, and November and up to the 16th day of December, 1892, the day of its failure, the firm made large purchases upon credit, and, early in December, Fellman, who was then in New York, was called home to participate in and direct the business. He came immediately and assumed the practical superintendence of affairs. Upon consultation with attorneys, he had the original purpose of the firm to transfer its property directly to him changed to a trust deed in favor of the creditors whose paper he had indorsed. At his request Sonnentheil, a relative of his wife, was employed as trustee, at a salary of $150 per month. He had been a business man in Galveston, but was without knowledge or experience in the particular business for which he was selected. A deed of trust was thereupon executed to Sonnentheil, as trustee, to secure home creditors and two who were not home creditors, already secured, save in a few and relatively unimportant instances, by the indorsements of Fellman and Grumbach. The property covered by the deed of trust, which exceeded in value the secured debts by about $75,000, was turned over to the trustee in pursuance of an arrangement between the firm and Fellman that the business should be continued either in Fellman's name or in the name of someone else, until a settlement could be obtained, when it was to revert to the firm.

The possession of the trustee consisted in his having the key to the storehouse in which the goods were situated, and in attending at the store some hours every day. He signed all the letters and checks, and kept control of
[413] the general* cash. The three members of the firm were each employed at a salary of $300 per month, Seinsheimer as correspondent. He also had the keeping of the daily cash receipts. The other two acted as collectors. All the employees of the firm, including the drummers, were retained in their respective positions, and at their former salaries. The firm's sign, prominently displayed over the door of the storehouse, was not removed. The business (exclusive of the purchase of goods) was conducted, with the consent of the beneficiaries, in the usual way, by selling in small parcels, sometimes on credit and sometimes for cash, to the regular customers of the firm. Such customers consisted largely of barrooms throughout the state of Texas, and the purpose of the trustee was in accordance with the wish of the beneficiaries to keep these barrooms going in the usual way by selling them goods on time, so as not to interrupt their usual business, and gradually collect what they owed.

The books of the firm, the trustee claimed, were in his charge, but he admitted that all entries made in the books after the date of the failure were made therein by Seinsheimer, and not under his (the trustee's) direction, but in his capacity as a member of the firm. In fact, he claimed to be ignorant of such entries, although they showed that the books had been regularly kept just as though no change had been made in the ownership of the property.

While there is nothing in all this which proves either direct knowledge of the fraud to the accepting creditors, or positive knowledge of facts which necessarily put them upon inquiry, there is a strong probability that these creditors, who were all business men resident in Galveston, were possessed of the same information that others had regarding the failing condition of the firm. As one of the witnesses stated: "Rumors were afloat that they were slow in payments, owing largely to banks and individuals; credit refused them in some quarters, and generally that their business was not healthful. Inquiries as to the financial standing of the firm came from northern and eastern cities, local banks, and firms. There were rumors in Galveston, general in their character and discussed* among brokers, banks, and [414]
merchants." It is scarcely possible that these rumors could have escaped the ears of their local creditors. It is not improbable that the peculiar relationship of the firm to Fellman was known to these creditors, as well as the fact that the assignment was intended primarily to protect Fellman, and secondarily to secure a settlement with the creditors upon terms favorable to the firm, and the subsequent return of the property to them. It is by no means impossible that they knew that the firm were making large purchases of goods on credit just before their assignment; that false representations had been made to commercial agencies of their financial standing; that the debts secured by the deed of trust were already secured by Fellman's indorsement; that the firm still remained in open possession of the stock and practically retained direction of the business, and that to the public at large there was no apparent change in its conduct or headship. Under the peculiar circumstances of this case it was not error to submit this question to the jury; and there is no criticism to make of the charge of the court in that particular. Indeed, in another case arising out of the same failure the supreme court of Texas held that the question of fraud was properly left to the jury. *Sonnentheil* v. *Texas Guaranty & T. Co.* [10 Tex. Civ. App. 274], 30 S. W. 945.

4. Error is also assigned in admitting the statement of one Werner as to interviews had between him and Freiberg and Seins-

heimer subsequent to the execution of the deeds of trust, in which Freiberg is said to have asked Werner, as agent of the Moerlein Brewing Company, to give him, Freiberg, the agency for the sale of the beer, saying that "after they got a settlement they would go right ahead; the beer would not change hands at all; go to the same customers; and that the firm was in such a shape that they had to fail." This evidence was objected to upon the ground that it related to statements made by the firm after the execution of the deeds of trust, and was not known or assented to by the trustee or the beneficiaries of the trust deed, and was incompetent to affect their interests.

Werner, the witness, was agent for the
[415]brewing company,* living in Cincinnati. Hearing of the failure, he left home and reached Galveston three or four days after the assignment. He went immediately to the office, and met Seinsheimer and Freiberg. At this interview Freiberg made the statement in question. There is no doubt of the general proposition laid down by this court in *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161 [29: 591], that in an action by the vendee of personal property against an officer attaching it as the property of the vendor, declarations of the vendor to a third party, made after the delivery of the property, are inadmissible to show fraud or conspiracy to defraud in the sale, unless the alleged collusion be established by independent evidence, and the declarations fairly form part of the *res gestæ*.

The same question was again considered in *Jones* v. *Simpson*, 116 U. S. 609 [29: 742], in which declarations of the vendor made after delivery of the property to the vendee, but on the same day and fairly part of the *res gestæ*, were held to be admissible to show intent to defraud the vendor's creditors by the sale, it being also shown by independent evidence that the vendee shared the intent to defraud with the vendor.

In the case under consideration there was independent evidence that the vendors, Freiberg, Klein, & Co., and the vendee, Sonnentheil, were engaged in a common purpose to defraud the creditors of the vendors, and the declarations in question were not mere admissions of what had already taken place, but were propositions for a further continuance of business with the brewing company, upon a basis which indicated that after they had obtained a settlement with their creditors, they would assume their ownership, and charge of the stock, and continue business as they had done before. While the propriety of admitting these declarations as against the plaintiff Sonnentheil and the secured creditors may be open to some doubt, it is entirely clear that they were admissible against Freiberg, Klein, & Co., and the rights of the secured creditors were so carefully guarded in the charge to the jury that we think no harm could have resulted from allowing the jury to consider them.

We have examined the remaining assign-
[416]ments of error, of* which there are a large number, but the disposition we have made of the others renders it unnecessary to consider them. While the propriety of some of the rulings may admit of doubt, the objections made were extremely technical in their character, and the majority of the court are of opinion that no error was committed prejudicial to the plaintiff and to the secured creditors, and that *the judgment of the Circuit Court of Appeals must therefore be affirmed.*

JAMES L. UTTER *et al.*, *Appts.*,
v.
BENJAMIN J. FRANKLIN *et al.*

(See S. C. Reporter's ed. 416-425.)

Void bonds, when may be made valid—judgment, when not res judicata.

1. Bonds issued by a county in a territory, which were void because not authorized by act of Congress, may be made valid by a subsequent act of Congress.
2. A judgment holding bonds invalid is not *res judicata* as to their validity after a subsequent statute has cured their defect.

[No. 94.]

Argued and Submitted December 12, 1898. Decided January 3, 1899.

APPEAL from an order of the Supreme Court of the Territory of Arizona denying a petition for a writ of mandamus to compel the defendants, Benjamin J. Franklin, Governor of said Territory, *et al.*, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of a railroad company. *Reversed*, and case remanded for further proceedings.

Statement by Mr. Justice **Brown:**

This was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor, and secretary of the territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

The petition set forth that plaintiffs were the bona fide holders for value of certain seven per cent bonds and coupons issued in July, 1883, in compliance with an act of the territory "to promote the construction of a certain railroad," approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs* had been declared, [417]
both by the supreme court of the territory and by this court, to be void, and therefore the petition of the relators should be dismissed.

The petition being denied by the supreme court of Arizona, the relators appealed to this court. No opinion was filed in the supreme court of the territory.

Messrs. **John F. Dillon**, *Harry Hubbard, John M. Dillon,* and *William H. Barnes* for appellants.

Mr. **C. W. Wright** for appellees.

[417] *Mr. Justice **Brown** delivered the opinion of the court:

The bonds now held by the relators were declared to be invalid by this court in *Lewis* v. *Pima County,* 155 U. S. 54 [39: 67], upon the ground that bonds issued in aid of railways could not be considered debts or obligations "necessary to the administration of the internal affairs" of the county, within the meaning of the act of June 8, 1878. 20 Stat. at L. 101, chap. 168.

Whether the loan commissioners of the territory can be required to refund these obligations, and issue new bonds to the holders thereof, depends upon the effect given to certain legislation upon this subject, both by congressional and territorial statutes. These statutes were enacted both before and after the decision in *Lewis* v. *Pima County, supra.*

It seems that doubts were entertained as to the validity of bonds issued in aid of railroads, in view of the fact above stated, that under the congressional act of 1878 the power of municipalities to incur debts or obligations was limited to such as were necessary to the administration of their internal affairs. To put this question at rest, Congress on July 30, 1886, passed an act to limit territorial indebtedness (24 Stat. at L. 170) in the second section of which it was declared "that no territory of the United States now or hereafter to be organized, or any political or municipal corporation, or subdivision of any such territory, shall hereafter make any subscrip-
[418]tion *to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association." This section was undoubtedly designed to put a stop to the practice, which had grown quite common in the territories, of incurring debts in aid of railway and other corporations.

The fourth section provided for a limit of municipal indebtedness, and then declared "that nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any territory as to any bonds heretofore issued or contracted to be issued." This section evidently left the law where it stood before. It did not assume to pass upon the validity of any territorial act previously enacted, or of any obligations thereunder incurred; nor preclude the issue of bonds already contracted for under express provisions of law, leaving the courts to determine the validity of such acts and obligations and the further question whether such bonds had been contracted for *in pursuance of express provisions of law.* It simply withheld its assent to, as well as its negative upon, such transactions, and declined to commit itself one way or the other. Nor did it assume to prevent the territorial legislature from legalizing the acts of any subordinate municipality as to bonds theretofore issued or contracted to be issued, leaving it to the territorial legislature to determine whether they should attempt to legalize such issues, and to the courts to pass upon the question whether this could be lawfully done. The bonds theretofore issued were left precisely where they stood before, and no attempt was made either to legalize or avoid them. Congress merely stayed its hand, and left the matter open for future consideration.

In this state of affairs the legislature of Arizona, on March 10, 1897, passed *an act [419]
(Rev. Stat. Arizona, p. 361), constituting the governor, auditor, and secretary of the territory loan commissioners of the territory, with the duty of providing "for the payment of the existing territorial indebtedness, due and to become due, and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest, or either, of the existing or subsisting territorial legal indebtedness," with power to issue negotiable bonds therefor. This power, however, was limited to the *legal* indebtedness of the *territory,* and apparently had no bearing upon the indebtedness of its municipalities, certainly not upon indebtedness which had been illegally contracted. Indeed, the act is only pertinent as showing the authority under which the loan commissioners were appointed.

On June 25, 1890 (26 Stat. at L. 175), Congress passed an act approving with amendments this funding act of Arizona, "subject to future territorial legislation," the second section of which declared it to be the duty of the loan commissioners "to provide for the payment of the existing territorial indebtedness due, and to become due, or that is or may be hereafter authorized by law, and for the purpose of paying, redeeming, and refunding . . . the existing and subsisting territorial indebtedness, etc." The tenth section of this act provided that the boards of supervisors of the counties, and the municipal and school authorities, should report to the loan commissioners of the territory their bonded and outstanding indebtedness, and that said loan commissioners should "provide for the redeeming or refunding of the county, municipal, and school district indebtedness, *upon the official demand of said authorities,* in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may hereafter be allowed by law to said county, municipality, or school district, upon official demand by said authorities."

In compliance with the permit thus given by Congress for future territorial legislation, the legislature of Arizona on March 18, 1891 (Laws of 1891, p. 120), enacted a new fund-

ing act, only the following sections of which are material:

[420] *"Sec. 1. That the act of Congress entitled 'An Act Approving with Amendments the Funding Act of Arizona,' approved June 25, 1890, be, and the same is hereby, now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress the loan commissioners of the territory of Arizona shall provide for the liquidation, funding, and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the territory, the counties, municipalities, and school districts within said territory, by the issuance of bonds of said territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

"Sec. 7. Any person holding bonds, warrants, or other evidence of indebtedness of the territory or any county, municipality, or school district within the territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

It seems, however, that the existing legislation upon the subject was not deemed adequate by the territorial legislature, since in 1895 it adopted a memorial (Laws of 1895, p. 148), to the effect that, under various acts of the assembly, the counties were authorized to, and did, issue railroad aid bonds, which were sold in the open market at their face value, and were then held at home and abroad by bona fide purchasers; that the validity of these bonds, though questioned, was acknowledged by the payment of interest thereon; that a repudiation of the same would work a great hardship to the holders and affect the credit of the territory, and therefore the general assembly urged upon Congress the propriety of passing such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from

[421] *the disastrous effects of repudiation. The memorial is printed in full in the margin,† and in construing the act of Congress passed in response thereto it may properly be considered as* bearing upon the intention of [422]

Congress and the exigencies the act was designed to meet.

In compliance with this memorial Congress on June 6, 1896 (29 Stat. at L. 262), passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1892 (not here in question), the first section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants, and other evidences of indebtedness of the territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactments of said territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25, 1890, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

"Sec. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act provided until January 1, 1897: *Provided*, That nothing in this act shall be so construed as to *make the government of the United [423]

States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded."

This is the act upon which the relators

†MEMORIAL.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your memorialists, the legislative assembly of the territory of Arizona, beg leave to submit to your honorable bodies; that—

Whereas, under various acts of the legislative assembly of the territory of Arizona, certain of the counties of the territory were authorized to issue in aid of railroads and other quasi public improvements and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons who in good faith invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are holders of the same; and

Whereas, the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and.

Whereas, there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the territory, which had led to a movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and

Whereas, we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the

place their chief reliance. Its evident purpose was to authorize the funding of *all outstanding bonds* of the territory, and its municipalities, which had been *authorized by legislative enactments,* whether lawful or not, provided such bonds had been "sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized." The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved, and validated, and might be funded until January 1, 1897.

We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the territories, as full as that which a state legislature has over its municipal corporations. *American Ins. Co.* v. [*356 Bales of Cotton*] *Canter,* 1 Pet. 511 [7: 242]; *National Bank* v. *County of Yankton,* 101 U. S. 129 [25: 1046].

Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank* v. *County of Yankton, supra,* this court sustained an act of Congress nullifying a legislative act of the territory of Dakota authorizing the issue of railway bonds, but validating action theretofore taken by the county voting subscription to a certain railroad company, holding it to be "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." In *Thompson* v. *Perrine,*
[424] 103 U. S. 806 [26: 612], we* also sustained a similar act of the state of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Read* v. *Plattsmouth,* 107 U. S. 568 [27: 414], a similar ruling was made with regard to an act of the legislature of Nebraska validating an issue of bonds by the city of Plattsmouth for the purpose of raising money to construct a high-school building. See also *New Orleans* v. *Clark,* 95 U. S. 644 [24: 521]; *Grenada County Supervisors* v. *Brogden,* 112 U. S. 261 [28: 704]; *Otoe County* v. *Baldwin,* 111 U. S. 1 [28: 331]; 1 Dillon, Municipal Corporations, § 544; Cooley, Const. Lim. 6th ed. 456; *Bolles* v. *Brimfield,* 120 U. S. 759 [30: 786]; *Anderson* v. *Santa Anna,* 116 U. S. 356 [29: 633]; *Dentzel* v. *Woldie,* 30 Cal. 138, 145.

The fact that this court had held the original Pima county bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res judicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing.

Nor was the act intended to be confined to the outstanding *legal* indebtedness of the county. The first section of the act *requires* the funding of all outstanding obligations of said territory and its municipalities, and all outstanding bonds, etc., of the territory and its municipalities, "heretofore authorized by legislative enactments of said territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 5, 1890," which said bonds, etc., "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized;" and the second section confirms, approves, and validates all bonds and other evidences of indebtedness theretofore issued under the authority of the legislature, and authorized to be funded by the first section, and declares that they "may be funded, as in this act provided, until January 1, 1897." Construing this in the light of the surrounding circumstances, and, particularly, in view of the memorial, it *is entirely clear that it was in- **[425]**
tended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and to put the matter still further beyond question, they are expressly declared to be legal and valid. It is true that, by the tenth section of the act of Congress of June 25, 1890, the loan commissioners were authorized to refund municipal bonds "upon the official demand of

---

credit and standing of our people for honesty and fair dealing and bring us into disrepute:

Wherefore, we most strongly urge upon your most honorable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the territory, and that you may so further legislate as to validate all acts of the legislative assembly of the territory which have held out inducements for the investment of capital within the territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the territory, and thus relieve the honest people of the territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people.

Resolved, That our delegate to Congress be, and he is hereby, instructed to use all honorable means to bring this subject to the earnest consideration of Congress; that the secretary of the territory be, and he is hereby, requested to transmit a copy of the foregong to each house of Congress and to our delegate in Congress.

said authorities" of the municipalities, but there is no limitation of that kind in section seven of the territorial funding act of March 19, 1891, which declares that "any person holding bonds, etc., . . . may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value and the accrued interest at the time of the exchange."

In addition to this, however, the act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants, and other evidences of indebtedness of the territory and its municipalities *shall* be funded with the interest thereon, etc.

We are therefore of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that *the order of the Supreme Court of the Territory must be reversed,* and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.

CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, and John W. McDonald, Receiver thereof, *Plffs. in Err.,*

v.

FIRST NATIONAL BANK OF CADIZ, OHIO.

(See S. C. Reporter's ed. 425-434.)

Federal question, when raised too late—that a judgment is contrary to law is not a Federal question—a decision on general equitable principles does not involve such a question.

1. A Federal question is raised too late for writ of error to a state court when presented on application to the state supreme court for a rehearing.
2. A claim that a judgment holding a receiver of a national bank to be a trustee is "contrary to law" does not raise a Federal question.
3. A decision that money in the hands of a receiver of a national bank is held in trust and has never been a part of the assets of the bank, when rendered on general equitable principles, does not involve any Federal question which will sustain a writ of error to the state court.

[No. 72.]

Argued December 2, 5, 1898. Decided January, 3, 1899.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment of that court affirming the judgment of the District Court of Lancaster County in that state adjudging that the plaintiff, the First National Bank of Cadiz, Ohio, recover from the defendant, the Capital National Bank of Lincoln, Nebraska, the amount of a trust fund found to belong to plaintiff, and that Kent K. Hayden. receiver of said defendant, pay the plaintiff the amount of said trust fund, with interest, out of any money in his hands. *Writ of error dismissed.*

See same case below, 49 Neb. 795.

Statement by Mr. Chief Justice **Fuller:**

*This was an action brought by the First National Bank of Cadiz, Ohio, against the Capital National Bank of Lincoln, Nebraska, and Macfarland, the receiver thereof, in the district court of Lancaster county, Nebraska.

The petition contained five counts for moneys belonging to plaintiff received by defendant from notes transmitted to it for collection and remittance.

Each of the counts concluded thus:

"Plaintiff further says that on or before the 21st day of January, 1893, the said defendant bank then and there became, and for some time prior thereto had been, insolvent, and that under and in pursuance of the laws of the United States the said defendant, Macfarland, was duly appointed, and is now acting, as a receiver thereof, and that all the assets and trusts in and belonging to said bank and the beneficiaries thereof* passed into the [427]
possession of, and are now held by, the said Macfarland for the said bank, and all trusts or money held or obtained by said bank in a fiduciary capacity passed into the hands of said defendant, Macfarland, and he now holds the same in the same capacity that the said bank did before he took possession thereof.

"That in the collection of said note the said Capital National Bank was acting as the agent of this plaintiff for the purpose aforesaid, and the money so collected was the property of and belonged to this plaintiff; that said amount so collected never was a part of the assets of said bank and never belonged to the stockholders thereof; that whether or not said amount was ever mixed or mingled with the true assets of said bank plaintiff is unable to state, but does allege that if the same was mixed or mingled with the assets of said bank that the same was done wrongfully and fraudulently by the officers of said bank and without the knowledge or consent of this plaintiff; that a part of the business and powers of said bank was the collection and remittance of moneys for persons and corporations, and that the said defendant bank was acting as agent for that purpose as hereinbefore alleged."

The prayer was "that an account may be taken of the trust funds to which the plaintiff may be entitled, and that a decree be entered against the said Capital National Bank and the said John D. Macfarland, directing the payment or delivery to plaintiff of the amount of said collections, and that the said amount be decreed to be a trust fund in the hands of said bank and receiver to be first paid to this plaintiff, together with interest thereon, as damages, out of any money that may have passed to or afterwards come into the possession of said bank or receiver as a preferred or special claim, and that plaintiff may have such other or further relief as in equity it may be entitled to."

Macfarland having resigned the receivership, Hayden was appointed to succeed him, and filed an answer (stating preliminarily that he answered "as well for the said defendant bank as for and on his own account as receiver thereof"), admitting the insolvency of the defendant bank, the appointment*of Mac- [428]
farland as receiver and his taking posses-

sion of the bank, "with all and singular its rights, credits, effects, trusts, and duties," and setting up his own subsequent appointment. With the exception of the admissions, the answer amounted to a general denial, there being a special denial of the receipt or collection by the bank or the receiver of the note mentioned in the first count.

The cause came on for hearing, and, after the default of the bank was taken and entered, was tried by the court, which made certain findings of fact, and entered the following judgment: "It is therefore considered, ordered, adjudged, and decreed by the court that the said plaintiff, the First National Bank of Cadiz, Ohio, do have and recover of and from the said defendant, the Capital National Bank of Lincoln, Nebraska, the amount of the trust fund hereinbefore found to belong to plaintiff, to wit, eight thousand and fifty ($8,050) dollars, with interest thereon, at the rate of seven per cent per annum from January 20, 1893, principal and interest amounting to the sum of eight thousand and seven hundred and twenty-two and .95 ($8,722.95) dollars at the date of this decree. And it is further ordered, adjudged, and decreed by the court that the said defendant, Kent K. Hayden, receiver of the said defendant, the Capital National Bank, be, and he is hereby, ordered to pay the plaintiff the amount of said trust fund in his hands, as hereinbefore found, to wit, the sum of eight thousand and fifty dollars, together with seven per cent interest thereon from January 20, 1893, as damages for the detention thereof, the said principal and interest at the date of this decree amounting to the sum of eight thousand seven hundred twenty-two and .95 ($8,722.95) dollars, out of any money now in his hands or that may come into his hands as such receiver; that when said money or any part of it is paid under this order, the same shall apply on the above judgment against said defendant bank; that the said defendant bank and said defendant, Hayden, pay the costs of this action, taxed at $50.03."

Thereupon the defendant bank, "by Kent K. Hayden, its receiver," moved for a new trial on these grounds: "1. The judgment is not sustained by sufficient evidence. 2.
[429] The judgment *is contrary to law. 3. Errors of law occurring at the trial duly excepted to. 4. There is error in the assessment of the amount of recovery in this, that the judgment allows the plaintiff interest on his claim from and after the failure of the Capital National Bank." The motion was overruled, a bill of exceptions duly taken, and the cause carried to the supreme court of Nebraska on error.

The application to that court for the writ of error assigned twenty-seven errors. Some of these asserted that certain enumerated findings of fact were not "sustained by the law;" and the 21st, 22d, 23d, 24th, 25th, 26th, and 27th were:

"21. The court erred in rendering judgment against the plaintiff in error for interest upon the amounts collected by the plaintiff in error for the defendant in error.

"22. The court erred in rendering judgment against the plaintiff for costs.

"23. The court erred in holding that money collected by the Capital National Bank was a trust fund in the hands of the receiver for the benefit of the defendant in error.

"24. The court erred in rendering judgment against the plaintiff in error for the full amount of the notes collected by the Capital National Bank.

"25. The court erred in rendering a judgment which had the effect of making the defendant in error a preferred creditor over the other creditors of the Capital National Bank.

"26. The court erred in ordering that the amount of the judgment should be paid out of any money then in the hands or that might thereafter come into the hands of the plaintiff in error.

"27. The court erred in rendering a judgment which would become a lien upon all the assets of the Capital National Bank."

The supreme court affirmed the judgment of the district court, and, its judgment having been entered, the receiver applied for a rehearing, assigning five reasons therefor, of which the fifth was as follows: "Because said judgment and decree of said district court so affirmed by said judgment and decree of this court adjudged the amount found due the* plaintiff therein to be a lien upon [430]
the property and assets now in the possession of the appellant or which shall hereafter come into his possession, and to be paid out of the proceeds thereof in preference and priority to other creditors of said bank, and is in violation of the provisions of the 'national bank act' of the United States under whose authority this appellant was appointed and is acting."

The petition for rehearing was denied, and thereafter this writ of error was allowed.

After the case had been docketed, the death of Hayden was suggested, and the appearance of John W. McDonald, appointed his successor as receiver, was entered.

Messrs. **A. E. Harvey, John H. Ames,** and *Amasa Cobb* for plaintiffs in error.

Messrs. **Newton C. Abbott** and *Arthur W. Lane* for defendant in error.

*Mr. Chief Justice **Fuller** delivered the [430]
opinion of the court:

The writ of error from this court to revise the judgment of a state court can only be maintained when within the purview of section 709 of the Revised Statutes.

If the denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

Moreover, even though a Federal question

may have been raised and decided, yet if a question, not Federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment.

[431] *In our opinion no Federal right was specially set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-Federal grounds entirely sufficient to support it.

The record discloses no Federal question asserted in terms save in the application to the supreme court for a rehearing, when the suggestion came too late.

The petition did, indeed, allege that the Capital National Bank was organized under the banking act, and that a receiver was appointed, who took possession of the bank's assets and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy, yet no right to appropriate trust funds was claimed by defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plaintiff would be in contravention of any provision of the banking act.

The motion for new trial pursued a common formula, and one of the grounds assigned was that the judgment was "contrary to law," but this cannot be construed as having a single meaning, and distinctly referring to the denial of a right claimed under an act of Congress, consistently with the requirements of section 709 of the Revised Statutes as expounded by numerous decisions of this court.

California Bank v. *Kennedy*, 167 U. S. 362 [42: 198], is not to the contrary, as counsel seem to suppose. There the question was whether a national bank could purchase or subscribe to the stock of another corporation, and the answer averred that if the stock in question appeared to have been issued to the national bank, it was "issued without authority of this corporation defendant, and without authority of law." The grounds presented on motion for new trial, and in the specifications of error which formed the basis of the appeal to the supreme court of the state, asserted the want of power under the laws of the United States; and the California supreme court said in its opinion that the bank appealed on the ground "that, by
[432] virtue of the statutes under which it is* organized, it had no power to become a stockholder in another corporation." The general rule was not questioned that if the alleged right was not claimed before judgment in the highest court of the state, it could not be asserted in this court.

This rule was not complied with here, nor was any Federal question in terms decided, while, on the contrary, the judgment was explicitly rested on non-Federal grounds.

The contention of plaintiff was that the Capital National Bank had money in its hands which belonged to plaintiff, did not belong to the bank, had never formed part of its assets, and was held by the bank in trust for plaintiff.

The right to the money was considered by the trial court in the light of general equitable principles applicable on the facts, and the court adjudged that the money constituted a trust fund to which plaintiff was entitled.

The decision did not purport to affect the assets of the bank, or attempt to direct the distribution thereof, or in any way to interfere with the disposition of assets actually belonging to the bank; nor did it affect the receiver as receiver; or his appointment or authority under the banking act. As the trial court found that certain moneys held by the bank in trust for plaintiff had come into the receiver's hands, he was directed to return them, for he had no stronger title to the trust fund as against the plaintiff than the bank had.

When the case came to the supreme court, that court, finding no reversible error in the record, affirmed the judgment of the district court, and filed an opinion (49 Neb. 795) stating: "This case is of the same general nature as *Capital Nat. Bank et al.* v. *Coldwater Nat. Bank*, 49 Neb. 786. It was submitted upon the same argument, and, governed by the result reached in that case, this is affirmed." From the opinion in the case thus referred to, it appears that that case, now on our docket and numbered 73, was submitted to the supreme court of Nebraska with this case numbered 72, and with three others, also brought here, and numbered 74, 75, and 76, and that the five cases were disposed of by the opinion in No. 73.

The supreme court there held that:

*"A fund which comes into the possession [433]
of a bank with respect to which the bank had but a single duty to perform, and that is to deliver it to the party thereto entitled, is a trust fund, and is therefore incapable of being commingled with the general assets of such bank subsequently transferred to its receiver.

"Under the circumstances above indicated, the receiver of the bank is merely substituted as trustee, and its funds in his hands should be devoted to discharging such trust before distribution thereof is made to the general creditors of the bank."

Among other things, the court said: "It is conceded by the plaintiff in error that the relief granted by the district court was in conformity with the views expressed more or less directly by this court in *Wilson* v. *Coburn*, 35 Neb. 530; *Anheuser-Busch Brewing Association* v. *Morris*, 36 Neb. 31; *Griffin* v. *Chase*, 36 Neb. 328; and *State* v. *State Bank of Wahoo*, 42 Neb. 896, but it is urged that a re-examination of the principles involved should satisfy us that these cases proceeded upon an erroneous view of the law as now settled. A very careful examination has been made of all cases cited in respect to the pivotal question which has already been sufficiently indicated as having been acted upon by the district court." And after reviewing these cases the court announced that it was

not convinced that it should recede from the line of its former decisions.

We know of no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks, or other property in their possession to which they have no title, and it is clear that the state courts had jurisdiction to determine whether this money was or was not a trust fund belonging to plaintiff.

The receiver made no effort to remove the litigation to the circuit court, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the operation of general law.

In these circumstances the result is that this court has no jurisdiction to revise the [434] judgment of the supreme court of *Nebraska, and we, necessarily, intimate no opinion in respect of the views on which the case was disposed of.

Writ of error dismissed.

CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, *et al.*,
v.
COLDWATER NATIONAL BANK OF COLDWATER, MICHIGAN.

CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA,
v.
COLDWATER NATIONAL BANK OF COLDWATER, MICHIGAN.

JOHN W. MCDONALD, Receiver,
v.
SAMUEL CUPPLES WOODEN WARE CO.

JOHN W. MCDONALD, Receiver,
v.
GENESEE FRUIT CO.

(See S. C. Reporter's ed. 434.)

[Nos. 73, 74, 75, 76.]

Messrs. **John H. Ames, Andrew E. Harvey,** *G. M. Lambertson,* and *Amasa Cobb* for plaintiffs in error in all the cases.

Messrs. **Lionel C. Burr** and *Charles L. Burr* for defendants in error in Nos. 73 and 74.

Mr. **C. A. Brandenburgh** for defendants in error in Nos. 75 and 76.

THE CHIEF JUSTICE:

For the reasons given in the opinion in *Capital National Bank* v. *First National Bank of Cadiz, Ohio,* just decided [*ante,* 502], the writs of error in these cases are severally *dismissed.*

HERMAN KECK, *Plff. in Err.,*
v.
UNITED STATES.

(See S. C. Reporter's ed. 434–465.)

Insufficient indictment—tariff act of 1894—attempts to smuggle, not "smuggling"—word "smuggling" in U. S. Rev. Stat. § 2865.

1. An indictment for unlawfully importing and bringing into a certain port of the United States diamonds of a stated value, "contrary to law," with intent to defraud the United States, but not indicating what is relied on as violative of the law, is insufficient, although it charges the offense substantially in the words of U. S. Rev. Stat. § 3082.
2. The word "diamonds," followed by a semicolon, at the head of ¶ 467 in the free list of the tariff act of 1894, does not put all diamonds on the free list; but that word is plainly designed as a heading, and the semicolon following it should be read as though a colon.
3. The offense of smuggling or clandestine introduction of goods into the United States in violation of U. S. Rev. Stat. § 2865, does not include mere attempts to commit the same, and is not committed by the concealment of goods on a ship entering the waters of the United States, with intent to smuggle them, where the goods are not taken through the lines of customs authorities, but are delivered to the customs officer on board the vessel itself at the time when or before the obligation to make entry and pay the duties arises.
4. The word "smuggling" used in U. S. Rev. Stat. § 2865, is not extended beyond the common-law meaning by reason of the provision in the anti-moiety act of June 22, 1874, respecting the rewards of informers, that, for the purposes of that act, smuggling shall include attempts to bring dutiable articles into the United States without passing through the customs house or submitting them to the revenue officers.

[No. 15.]

Argued December 18, 1896. Ordered for reargument January 18, 1897. Reargued January 19, 20, 1898. Affirmed by divided court March 7, 1898. Rehearing granted March 21, 1898. Ordered for Reargument April 25, 1898. Reargued November 10, 1898. Decided January 9, 1899.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment of that court adjudging the defendant, Herman Keck, to be guilty of smuggling under the laws of the United States and sentencing him to pay to the United States a fine of $200 and that he be confined in the eastern penitentiary of the commonwealth of Pennsylvania for the period of one year. *Judgment reversed,* and case remanded, with directions to set aside the verdict and grant a new trial.

The facts are stated in the opinion.

Messrs. **Francis Bacon James** and *Rankin Dilworth Jones,* for plaintiff in error on first argument and on all rearguments:

Where a statute which provides for the

punishment of a crime does not enumerate the facts constituting the crime, an indictment which follows the language of the statute, and does not allege the facts constituting the crime, is fatally defective, and a demurrer thereto should be sustained.

United States v. *Kee Ho*, 33 Fed. Rep. 333; *United States* v. *Claflin*, 13 Blatchf. 178; *United States* v. *Thomas*, 4 Ben. 370, 2 Abb. (U. S.) 114; *United States* v. *Cruikshank*, 92 U. S. 542. 23 L. ed. 588; *United States* v. *Mann*, 95 U. S. 580, 24 L. ed. 531; *United States* v. *Simmons*, 96 U. S. 360, 24 L. ed. 819; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135; *United States* v. *Hess*, 124 U. S. 483, 31 L. ed. 516; *Pettibone* v. *United States*, 148 U. S. 197, 37 L. ed. 419; *Blitz* v. *United States*, 153 U. S. 308, 38 L. ed. 725.

Under the title of the "Free List" is found the following schedule, to wit:

" ¶ 467. Diamonds; miners', glaziers', and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks." This specific provision takes diamonds out of the general class of precious stones, and makes them nondutiable.

Authur v. *Rheims*, 96 U. S. 143, 24 L. ed. 813; *Arthur* v. *Lahey*, 96 U. S. 112, 24 L. ed. 766.

It is a rule of interpretation that you are to ascertain, not what a legislative body meant, but what it meant by what it said.

United States v. *Sehilling*, 11 U. S. App. 603, 53 Fed. Rep. 81, 3 C. C. A. 440.

A court cannot inject into a statute a provision because it is the court's belief that such provision accords with the settled policy of Congress.

Bate Refrigerating Co. v. *Sulzberger*, 157 U. S. 1, 39 L. ed. 601.

Taxation can only be imposed by direct and positive provision of law, and not by implication, construction, or conjecture. Every doubt must be resolved in favor of the citizen.

Ameriean Net & Twine Co. v. *Worthington*, 141 U. S. 468, 35 L. ed. 821; *Henderson* v. *United States*, 26 U. S. App. 538, 66 Fed. Rep. 53, 13 C. C. A. 328; *Hartranft* v. *Wiegmann*, 121 U. S. 609, 30 L. ed. 1012; *United States* v. *Isham*, 17 Wall. 496, 21 L. ed. 728; *Powers* v. *Barney*, 5 Blatchf. 202; *United States* v. *Wigglesworth*, 2 Story, 369; *Adams* v. *Bancroft*, 3 Sumn. 384.

The offense of smuggling is not complete unless some goods, wares, or merchandise are actually brought on shore, or carried from shore, contrary to law.

6 Bacon's Abr. (5th ed.) 286; *Dunbar* v. *United States*, 156 U. S. 185, 39 L. ed. 390; *People* v. *Murray*, 14 Cal. 159; *Mulligan* v. *People*, 5 Park. Crim. Rep. 105; *Seeberger* v. *Schweyer*, 153 U. S. 609, 38 L. ed. 840; *Kelly* v. *Com.* 1 Grant Cas. 484; *Sherman* v. *Robertson*, 136 U. S. 570, 34 L. ed. 540; *State* v. *Wilson*, 30 Conn. 500; *Hartranft* v. *Oliver*, 125 U. S. 525, 31 L. ed. 813; *United States* v. *Vowell*, 5 Cranch, 368, 3 L. ed. 128.

Criminal statutes are to be accurately and strictly construed, and cannot be extended by implication to cases not falling within their terms.

United States v. *Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States* v. *Morris*, 14 Pet. 464, 10 L. ed. 543; *Tiffany* v. *National Bank*, 18 Wall. 409, 21 L. ed. 862; *Texas* v. *Chiles*, 21 Wall. 488, 22 L. ed. 650; *Lewis* v. *United States*, 92 U. S. 618, 23 L. ed. 513; *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563; *United States* v. *Chase*, 135 U. S. 255, 34 L. ed. 117; *Sarlls* v. *United States*, 152 U. S. 570, 38 L. ed. 556.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error on first argument:

The second count in the indictment is good.

Crain v. *United States*, 162 U. S. 625, 40 L. ed. 1097; *Dunbar* v. *United States*, 156 U. S. 185, 39 L. ed. 390; *United States* v. *Cook*, 17 Wall. 168, 21 L. ed. 538.

Mere lack of particularity is not sufficient ground for annulling an indictment. Defendant's remedy is by application for a bill of particulars.

Durland v. *United States*, 161 U. S. 306, 40 L. ed. 709; *Cochran* v. *United States*, 157 U. S. 286, 39 L. ed. 704.

It was originally claimed by the Treasury Department that goods are imported into the United States as soon as they arrive within the limits of a collection district. This contention was overruled by the courts, but it was always admitted that the importation was complete when the goods reached a port of entry.

United States v. *Vowell*, 5 Cranch, 368, 3 L. ed. 128; *Arnold* v. *United States*, 9 Cranch, 104, 3 L. ed. 671; *Meredith* v. *United States*, 13 Pet. 486, 10 L. ed. 258; *Harrison* v. *Vose*, 9 How. 372, 13 L. ed. 179; *United States* v. *Lyman*, 1 Mason, 482; *United States* v. *Ten Thousand Cigars*, 2 Curt. C. C. 436.

Messrs. **Henry M. Hoyt**, Assistant Attorney General, and **James M. Beck**, for defendant in error on first reargument:

Where the offense is purely statutory it is, as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.

Dunbar v. *United States*, 156 U. S. 185, 39 L. ed. 390; *Connors* v. *United States*, 158 U. S. 408, 39 L. ed. 1033; *Evans* v. *United States*, 153 U. S. 584, 38 L. ed. 830.

Messrs. **James M. Beck** and *Henry M. Hoyt*, Assistant Attorney General, for defendant in error on second reargument:

The crimes and offenses aimed at by § 3082 plainly include the acts established in this case.

United States v. *Nine Trunks*, Fed. Cas. No. 15,885; *United States* v. *Sixty-seven Packages of Dry Goods*, 17 How. 85. 15 L. ed. 54; *Wilson* v. *Saunders*, 1 Bos. & P. 267; *Atty. Gen.* v. *Towns*, 6 Price, 198; *Atty. Gen.* v. *Tomsett*, 2 Cromp. M. & R. 170; *United States* v. *Gates*, 2 Fed. Cas. No. 15,191; *United States* v. *Martin*, 1 Hask. 166; *United States* v. *The Express*, Fed. Cas. No. 15,066; *United States* v. *Nolton*, 5 Blatchf.

427; *United States* v. *Smith*, 2 Blatchf. 127; *The Emily*, 9 Wheat. 381, 6 L. ed. 116; *United States* v. *Quincy*, 6 Pet. 445, 8 L. ed. 458.

[436] *Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error was prosecuted under an indictment consisting of three counts. The first was intended to charge a violation of § 3082 of the Revised Statutes, by the alleged unlawful importation into the port of Philadelphia of certain diamonds. The second averred a violation of section 2865 of the Revised Statutes, by the smuggling and clandestine introduction, on the like date, and into the same port, of the articles which were embraced in the first count. The third count need not be noticed, since as to it the trial judge, at the close of the evidence, instructed the jury to return a verdict of not guilty.

The sufficiency of the first and second counts was unsuccessfully challenged by the accused, both by motion to quash and by demurrer. The jury returned a general verdict of guilty; and, after the court had overruled motions for a new trial and in arrest of judgment, the accused was duly sentenced. Error was prosecuted, and the case is here for review.

The assignments of error are numerous, but we need only consider the questions as to the sufficiency of the first and second counts of the indictment and the propriety of the conviction under the second count.

[437] **Was the first count sufficient?*

This count was based upon that portion of section 3082 of the Revised Statutes, which made it an offense to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise, contrary to law."

It was charged in the count that Keck, on the date named, "did knowingly, wilfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States."

As is apparent, the alleged offense averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States* v. *Carll*, 105 U. S. 611, 612 [26: 1135], *United States* v. *Hess*, 124 U. S. 483 [31: 516], and *Evans* v. *United States*, 153 U. S. 584, 587 [38: 830, 832], the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, "contrary to law," contained in the statute clearly relate to legal provisons not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, "import and bring into the United States," did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess Case*, at page 486 [31: 517]:

"The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

As to the sufficiency of the second count.

*In this count it was charged in substance [438] that Keck "did knowingly, wilfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia," certain "diamonds" of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of Keck and with intent to defraud the revenue, were not invoiced nor the duty paid or accounted for.

Two objections were urged against this count: first, that diamonds, under the law then in force, were on the free list, and hence not subject to duty; and, second, that if all diamonds were not on the free list, at least some kinds of diamonds were on such list, and the count should therefore have specifically enumerated the kinds or classes of diamonds which were subject to duty by law.

With respect to the first objection, counsel for plaintiff in error contends that all diamonds were free of duty, because of the following provision contained in the free list of the tariff act of 1894, to wit:

"Par. 467. Diamonds; miners', glaziers', and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

Paragraph 338 imposes duties as follows:

"Precious stones of all kinds, cut but not set, 25 per cent ad valorem; if set, and not specially provided for in this act, including pearls set, 30 per cent ad valorem; imitations of precious stones, not exceeding an inch in dimensions, not set, 10 per cent ad valorem. And on uncut precious stones of all kinds, 10 per cent ad valorem."

It is apparent that it was not the intention of Congress to put one of the most valuable of precious stones on the free list, while all others were made dutiable. The word "diamonds," which is but the commencement of paragraph 467, was plainly designed as a heading, for convenient reference, and the semicolon following should be read as though a colon.

The other ground of objection to the second count is controlled* by the decision in [439] *Dunbar* v. *United States*, 156 U. S. 185 [39: 390]. In that case, paragraph 48 of section 1 of the tariff act of 1890 provided that opium containing less than nine per cent of morphia, and opium prepared for smoking, should be subject to a duty of twelve cents per pound. Counts charging the smuggling

of "prepared opium . . . subject to duty by law, to wit, the duty of twelve cents per pound," were held to sufficiently describe the smuggled goods. Here, as in the *Dunbar Case,* the words of description made clear to the common understanding what articles were charged to have been smuggled; and, for that reason, we hold the objection just considered to be without merit.

Was the conviction under the second count of the indictment proper?

The principal witness for the government was one Frank Loesewitz, a resident of Antwerp, Belgium, and captain of the steamer Rhynland, of the International Navigation Company, which vessel plied between Philadelphia and Liverpool. He testified, in substance, that on January 21, 1896, late in the afternoon, while at the residence of one Franz Von Hemmelrick, a jeweler in Antwerp, he for the first time met the accused; that in his company and that of Von Hemmelrick he went to a café in the neighborhood; that during the conversation which followed Von Hemmelrick took from his pocket a small package and handed it to the witness with the statement, made in the hearing of Keck, that it belonged "to that gentleman here" (Keck); that it did not contain any valuables, and Von Hemmelrick asked the witness to oblige him by taking it over to America. The captain further testified that Keck also said that the package did not contain any valuables. The witness asked Keck where he wished the package sent, whereupon he tore off a piece of a card which was lying on the table, and wrote on it the address of a person in Cincinnati, who, it subsequently developed, was associated in the diamond business with Keck. The card and the package in question were produced in court and identified by the witness. Subsequently, on leaving the place, Keck requested the witness to
[440]send the package to Cincinnati from *Philadelphia by Adams Express. There was no address upon the package, and the card handed by Keck to the witness was placed by him in his pocketbook or card case. Soon after, the witness crossed to Liverpool and joined his vessel there. The package was by him placed in a drawer in his (the captain's) room, where it remained undisturbed until the arrival of the ship at her dock in Philadelphia. Just as the vessel was approaching her moorings, a special agent of the Treasury Department boarded her. This special agent thus describes in his testimony what then ensued:

"Acting on information received that, at the instance of Herman Keck, the captain of the Rhynland had endeavored to smuggle diamonds, I met the steamship Rhynland upon her arrival here on the eleventh day of last February, about four or five o'clock in the afternoon. I went aboard and examined the passenger list to see if Keck was on board, or anyone under that name, and I also examined the manifest to find if there was any diamonds. I found no one particularly on the passenger list corresponding to the name of Herman Keck, and no diamonds appeared on the manifest.

"The weather was very rough that day, and the boarding officers boarded just as she was coming into the dock. I then asked one of the custom inspectors to examine closely the baggage of one or two of the cabin passengers, whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart room where the captain was with Special Agent Cummings."

What occurred in the chart room between the captain and the special agent of the Treasury Department is thus testified to by the captain:

"When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'Yes.' I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that's a package of diamonds *you have got, to be sent to Cincinnati,' and [441]
if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The special agent thus states what passed in the chart room:

"I spoke of the weather and other topics, and then I said: 'Captain'—to whom I was unknown—'you have a package for the Coeterman Diamond Company, the Coeterman-Keck Diamond Company, 24 West Fourth street, Cincinnati, Ohio?' I repeated the name of the company. He said, 'No; I have no such package.' I said, 'I beg leave to differ with you;' and indicating with my fingers, I said, 'You have a small package which you received while in Antwerp. He said, 'I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it.'

"At that time, I understand you to say he did not know you were a Treasury agent?

"No, sir; I was unknown.

"Had you ever met him before?

"Never met him before to know him.

"I then said, 'Captain, I have an order for them.' He said, 'Show me the order, and I will go and get the package.' I replied, 'Captain, I would like to see the package first before delivering the order, and I want to speak to you in private.'

"Was there anything on your clothes like a badge or anything else to show what you were?

"No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he finished, and I said, 'certainly.' After the lapse of about five minutes the captain arose and said, 'You remain here, and I can go and get the package.' As soon as the captain left the chart room I quietly and unperceived by him followed him, and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I

saw it I said, 'Captain, that is the package I want.' He said, 'Where is your order?' I produced my card as United States Treasury [442] agent. *He refused to let me have it until I was identified as a custom house officer. A young man (being) present at the conversation opposite the captain's room, who represented the steamship company, we agreed to go back to the chart room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did."

The package referred to was found to contain five hundred and sixty-three cut diamonds of the value of about seven thousand dollars, which were subject to a duty of twenty-five per cent. The diamonds were subsequently sold under forfeiture proceedings instituted by the government, and no claimant for them appeared.

Exception was taken on behalf of the accused to the following instruction given by the trial judge to the jury: "If the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged." An exception was also noted to the refusal of the court to direct the jury to return a verdict of not guilty upon the second count, and the questions reserved by these two exceptions are pressed as clearly giving rise to reversible error.

The contention on behalf of the accused is that there was error in refusing to instruct a verdict and in the instruction given as to the captain's testimony, because, even although all the acts of the captain of the Rhynland done in relation to the package of diamonds were believed by the jury to be imputable to Keck, they did not constitute the offense of smuggling within the intendment of the statute. At best, it is argued, the legal result of the testimony was to show only an unexecuted purpose to smuggle, a concealment of the diamonds on the ship, and a failure to put them on the manifest of the vessel, all of which, although admitted to be unlawful acts subjecting to a penalty and entailing forfeiture of the goods, were not, it is claimed, in themselves alone the equivalent of the crime of smuggling or [443] clandestine introduction, *which the indictment charged. This crime, it is insisted, is a specific offense arising from the evasion of custom duty by introducing goods into the United States without making entry thereof and without paying or securing payment of the duties, and thus passing them beyond the line of the customs authorities, where the obligation to pay the duty arose, and is not, consequently, established by proving antecedent acts of concealment preparatory to the commission of the overt act of smuggling when these antecedent acts were not followed by the introduction of the goods into the United States, but where, on the contrary, the goods, before or at the time when the obligation to pay the duty arose, were surrendered to the customs authorities.

The United States, on the contrary, maintains that the facts were sufficient to justify a conviction for smuggling or clandestine introduction, as those words embrace all unlawful acts of concealment or other illegal conduct tending to show a fixed intent to evade the customs duty by subsequently passing the goods through the jurisdiction of the customs officials without paying the duties imposed by law thereon. It is hence contended by the prosecution that the crime of smuggling or clandestine introduction was complete if the acts of concealment were in existence when the vessel entered the waters of the United States, even although at such time the period for making entry and paying or securing the duties had not arisen, and even although subsequently and before or at the time when the obligation to make entry and pay duties arose the goods were delivered to the customs authorities.

The questions for determination, therefore, are: Did the testimony of the captain justify the court in giving the instruction that there was a legal duty to convict, if the jury believed such testimony? and, Did the court, admitting the testimony of the special agent to be true, err in refusing to instruct a verdict as requested?

The charge of smuggling was based on section 2865, Revised Statutes, which is as follows:

"If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or* clandestinely [444] introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house, any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both at the discretion of the court."

This section in its complete state is but a reproduction of section 19 of the tariff act of August 30, 1842. 5 Stat. at L. 565, chap. 270. That portion of the section which made it an offense to smuggle or clandestinely introduce articles into the United States was omitted in the revision of 1874, but the act of February 27, 1877 (19 Stat. at L. 247, chap. 69), which recites that it was enacted "for the purpose of correcting errors and supplying omissions in the revision," reinstated the omitted clause by an amendment to section 2865.

Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to com-

mit the offense referred to. It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offense and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offense would become the offense itself; that is to say, that one would be guilty of an offense without having done the overt act essential to create the offense, because something had been done which,
[445] if* carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be "without paying or accounting for the duty," is also beyond question.

From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. From the second, it results that as the words, "without paying or accounting for the duty" imply the existence of the obligation to pay on account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. If this were not a correct construction of the statute, it would result that the offense of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all legal duties had been paid before the goods had been unshipped. The soundness of the deductions which we have above made from the statute is abundantly demonstrated by the line of argument which it has been necessary to advance at bar to meet the dilemma which the contrary view necessarily involves. For, although it was contended that the offense was complete the moment the concealment existed when the ship arrived within the waters of the United States, it was yet conceded that if in legal time the duties were subsequently paid or secured, there would have been no offense committed. But the contention and the admission are completely irreconcilable, since if the subsequent act becomes necessary in order to determine whether an offense has been committed, it cannot in reason be said that the offense was complete and had been committed before the subsequent and essential act had taken place.

[446] *These conclusions arising from a consideration of the text of the statute are rendered yet clearer by taking into view the definite legal meaning of the word smuggling. That term had a well understood import at common law, and, in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at the meaning of the word. *Swearingen* v. *United States*, 161 U. S. 446, 451 [40: 765, 766]; *United States* v. *Wong Kim Ark*, 169 U. S. 649 [42: 890].

Russell, in his work on Crimes (Vol I. p. 277, 6th English edition), thus speaks of the offense:

"Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists in bringing on shore, or carrying from the shore, goods, wares, or merchandise for which the duty has not been paid, or goods of which the importation or exportation is prohibited. An offense productive of various mischiefs to society."

This definition is substantially adopted from the opening sentence of the title "Smuggling and Customs" of Bacon's Abridgment, and in which, under letter F, it is further said:

"As the offense of smuggling is not complete unless some goods, wares, or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices, which have a direct tendency thereto, without being guilty of any offense.

"For the sake of preventing or putting a stop to such practices, penalties and forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end without providing at the same time against the means of accomplishing it."

So, also, Blackstone defines smuggling to be "the offense of importing goods without paying the duties imposed thereon by the laws of the customs and excise." 4 Black. Com. 154. The words "importing without paying the duties" obviously implying the existence of the obligation to pay the duties at the time the offense is committed, and which duty to pay is evaded by the commission of the guilty act.

A reference to the English statutes sustains the statement* of the textwriters above [447]
quoted, that the words "smuggling" and "clandestine introduction," so far, at least, as respected the introduction of dutiable goods from without the Kingdom, signified the bringing of the goods on land, without authority of law, in order to evade the payment of duty, thus illegally crossing the line of the customs authorities. Thus, in 1661, by statute 12 Car. II. chap. 4, sec. 2, dutiable goods were to be forfeited if brought into any port, etc., of the Kingdom and "unshipped to be laid on land" without payment of duties, etc. So, in 1710, by statute 8 Anne, chap. 7, sec. 17, dutiable goods, "unshipped, with intention to be laid on land" without the payment of duties, etc., were to be forfeited, treble the value of the goods was to be forfeited by those concerned in such unshipping, and the vessels and boats made use of "for landing" were also to be forfeited. In 1719, by statute 5 Geo. I. chap. 11, entitled "An Act against the Clandestine Running of Uncustomed Goods, and for the More

Effectual Prevention of Frauds Relating to the Customs," provision was made in the fourth section for the seizure and forfeiture of goods concealed in ships from foreign parts "in order to their being landed without payment of duties;" and in section 8 ships of a certain burden, laden with customable and prohibited goods, hovering on the coasts "with intention to run the same privately on shore," might be boarded, and security exacted against a violation of the laws. In 1722, by statute 8 Geo. I. chap. 18, a forfeiture of twenty pounds was imposed upon those receiving or buying any goods, etc., "clandestinely run or imported," before legal condemnation thereof, knowing the goods to have been clandestinely run or imported into the Kingdom; while in 1736, by statute 9 Geo. II. chap. 31, sec. 21, watermen, etc., employed in carrying goods, "prohibited, run, or clandestinely imported," and found in possession of the same, were to forfeit treble the value of the same; and by section 23 of the same statute penalties were provided to remedy the evil recited in the preamble of unshipping goods at sea, without the limits of any port, "with intent to be fraudulently landed in this Kingdom." In 1786, by statute 26 Geo. III. chap. 40, sec. 15, bond was required to be given by the master and mate
[448] of a *vessel before clearing the vessel for foreign parts, not "to land illegally any goods, or take on board any goods with that intent." In 1763, by statute 3 Geo. III. chap. 22, the object of the statute, as recited in the title, was, among other things, "for the prevention of the clandestine running of goods into any part of his majesty's dominions;" while the preamble of the first section recited the advisability of increasing the share of customs and excise officers in forfeited goods so that they should have "equal encouragement to be vigilant in the execution of their duty, to suppress the pernicious practice of smuggling;" and in the fourth section, "for the more effectual prevention of the infamous practice of smuggling," provision was made looking to the proper distribution among the officers and seamen of public vessels and ships of war of the moiety allowed of the proceeds of goods, etc., seized and condemned.

The statutes just referred to and cognate statutes make it clear, as said above in the passage cited from Bacon's Abridgment, although they contained no express penalty for smuggling *eo nomine*, that the aim was to prevent smuggling, and that to accomplish this result every conceivable act which might lead up to the smuggling of dutiable goods, that is, their actual passage through the lines of the custom house without paying the duty, and every possible act which could follow the unlawful landing, was legislated against, and each prohibited act made a distinct and separate offense, entailing in some cases forfeiture of goods and in others pecuniary penalties and criminal punishments, the forfeitures and punishments varying in nature and extent according as it was deemed that the particular offense to which they were applied was of minor or a heinous character (such as armed resistance to customs officers), or was calculated to bring about the successful smuggling of the goods, and so defraud the revenue and cause injury to honest traders. Hence it is, that although the statute law of England made it clear that smuggling was the clandestine landing of the goods within the Kingdom in violation of law, Parliament sought to prevent its commission, not by the specific punishment of smuggling, but by legislation
*aimed at all acts which could precede or fol- [449]
low the consummation of the unlawful landing of the goods. In other words, the statutes establish, not only what was meant by smuggling, but, to use the language of Bacon, also make it certain that provision against the "end," smuggling, was made by the enactment of numerous distinct and separate offenses "against the means of accomplishing it."

This theory upon which the English law rested is indicated by a statute enacted in 1558, 1 Eliz. chap. 11. The statute contained twelve sections, and provided specific and distinct penalties for various acts tending to lead up to the carrying from English soil of goods prohibited to be exported, and the introduction by clandestine landing of goods prohibited to be imported or of customable goods without the payment of duties thereon. Numerous provisions of the same nature are contained in a statute, consisting of thirty-eight sections, enacted in 1662, 13 and 14 Car. II. chap. 11. Other statutes may be found referred to in 6 Geo. IV. (1825) chap. 105, which specifically and separately refers to 442 statutes, and repeals so much and such parts thereof "as relates to the trade and navigation of this Kingdom or to the importation and exportation of goods, wares, and merchandise, or as relates to the collection of the revenue of customs or prevention of smuggling."

The distinction between smuggling—the ultimate result—and the various means by which it might be accomplished or by which its accomplishment could be made beneficial, is aptly shown by the recital of a statute enacted in 1736 (9 Geo. II. chap. 35), by which all penalties and forfeitures were remitted which had before a date named in the actbeen incurred "in, by or for the clandestine running, landing, unshipping, concealing, or receiving any prohibited goods, wares, or merchandise, or any foreign goods liable to the payment of the duties of customs and excise, or either of them, and who are or may be subject to any information or other prosecution whatsoever for the duties of such goods, or for the penalties for the running, landing, unshipping, concealing, or receiving thereof," as also for many other offenses specifically enumerated which had been enacted with the
object of preventing the illegal* exportation [450]
of goods or the importation of prohibited goods or the illegal landing of customable goods. And it is highly suggestive to observe that the modern English statutes serve but to make clear the purport of the English revenue laws from the beginning concerning the smuggling of dutiable goods. By the statute of 1876 to consolidate the customs laws (39 and 40 Vict. chap. 36), in a subdivision headed, "As to the restrictions on

small craft and the regulations for the prevention of smuggling," it was made a specific offense, by section 186, to "import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, *whether the same be unshipped or not*." While the bringing of dutiable goods within the jurisdiction of Great Britain, that is, into the waters of the Kingdom, with an intent to smuggle or clandestinely introduce the same, was not declared to be punishable, but in the same section, immediately following the quoted clause, it was made an offense to "unship, or assist or be otherwise concerned in the unshipping of . . . any goods liable to duty, the duties for which have not been paid or secured." In other words, this statute demonstrates that where goods might by law be introduced into the Kingdom on paying duties, a violation of the obligation to pay the duties was not committed by the mere entry of the vessel into the waters of the Kingdom before the period for the payment or securing the payment of the duties had arisen.

A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that so far as they embraced legislation designed to prevent the evasion of duties they proceeded upon the theory of the English law on the same subject, that is, that they forbade all the acts which were deemed by the lawmaker means to the end of smuggling or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the expected benefits of his wrongful acts. Therefore, they forbade and prescribed penalties for everything which
[451] could precede* smuggling or follow it, without specifically making a distinct and separate offense designated smuggling or clandestine introduction.

The act of July 31, 1789, chap. 5 (1 Stat. at L. 29), was entitled "An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels and on Goods, Wares and Merchandises Imported into the United States." The act consists of forty sections, and, among other things, establishes ports of entry and delivery. By section 10 masters of vessels from foreign ports were required to deliver a manifest of the cargo to any officer who should first come on board; by section 11 the master, etc., was required within forty-eight hours after arrival of the vessel within any port of the United States, etc., to make entry, and also make oath to a manifest, and a forfeiture of $500 was imposed for each refusal or neglect; by section 12 goods unladen in open day or without a permit—except in case of urgent necessity—subjected the vessel, if of the value of $400, and the goods, to forfeiture, and the master or commander of the vessel "and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same" were to forfeit and pay $400 for each offense, and were disabled for the term of seven years from holding any office of trust or profit under the United States; by section 22 goods fraudulently entered by means of a false invoice were to be forfeited; by section 24 authority was given to customs officials to make search of ships or vessels, dwelling houses, etc., for dutiable goods suspected to be concealed, which when found were to be forfeited; by section 25 persons concealing or buying goods, wares, or merchandise, knowing them to be liable to seizure under the statute, were to "forfeit and pay a sum double the value of the goods so concealed or purchased;" and by section 40 dutiable goods of foreign growth or manufacture brought *into the United States* except by sea and in certain vessels and landed or unladen at any other place than where permitted by the act, were to be forfeited, together with the vessels conveying them; and it was further provided that "all goods, wares and merchandises brought *into the United States* by land contrary* to this act [452]
should be forfeited, together with the carriages, horses, and oxen that shall be employed in conveying the same."

The act of August 4, 1790, chap. 35 (1 Stat. at L. 145), consists of seventy-five sections, and repealed the act of 1789, chap 5. The act was entitled "An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares, and Merchandise Imported into the United States, and on the Tonnage of Ships or Vessels." The provisions of the prior act were substantially re-enacted. Further offenses were also defined, some of which only will now be referred to. Thus, by section 10, when imported goods were omitted from or improperly described in a manifest, the person in command of the vessel was subjected to a forfeiture of the value of the goods so omitted; by section 12 a penalty of not to exceed $500 was declared for the failure, on arrival within 4 leagues of the coast, etc., to produce upon demand to the proper officer a manifest and furnish a copy of the same, or to refuse to give an account of or to make a false statement as to the destination of the ship or vessel; by section 13 a penalty of $1,000 and forfeiture of goods was authorized for unlading goods before a vessel should come to the proper place for the discharge of her cargo and until the unshipping had been duly authorized by a proper officer of the customs; by section 14 vessels in which goods were so unladen were subjected to forfeiture and the master was to forfeit treble value of the goods; by section 28 goods requiring to be weighed or gauged in order to ascertain the duties due thereon, if removed from the wharf or place upon which landed, without permission, were subjected to forfeiture; by section 30 inspectors were authorized to be kept on board of vessels until they were unladen, and among other duties specified enjoined upon such inspectors was one that they were not to "suffer any goods, wares, or merchandise to be landed or unladen from such ship or vessel without a proper permit for that purpose;" by section 66 mas-

ters of vessels or others who should take a false oath were made liable to a fine of $1,000 and to be imprisoned for not exceeding twelve months; and by section 23 mani-
[453] fests *under oath were required to be furnished by vessels bound to a foreign port, and the person in charge of the vessel departing without so clearing was to forfeit $200.

The act of March 2, 1799, chap. 22 (1 Stat. at L. 627), was entitled "An Act to Regulate the Collection of Duties on Imports and Tonnage." It consisted of 112 sections, repealed the act of 1790, chap. 35, and substantially re-enacted the provisions of that act, though amplifying those provisions, particularly by the insertion of forms of manifests, entries, certificates, etc. By section 32 the master in charge of a vessel in which had been brought goods destined for a foreign port was required, before departing from the district in which he first arrived, to give bond "with condition that the said goods, wares, or merchandise, or any part thereof, *shall not be landed* within the United States unless due entry thereof shall have been first made, and the duties thereupon paid, or secured to be paid according to law." In section 46 provision was made for the entry of baggage and mechanical implements, which were exempted from duty, and for the examination of such baggage; the section ending as follows:

"*And provided*, . . . that whenever any article or articles subject to duty, according to the true intent and meaning of this act, shall be found in the baggage of any person arriving within the United States, which shall not, at the time of making entry for such baggage, be mentioned to the collector before whom such entry is made, by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall, moreover, forfeit and pay treble the value of such articles."

This proviso, it may be stated, has ever since remained on the statute books, being now section 2802 of the Revised Statutes.

By sections 49 and 62 of the act of 1799, entry was required to be made and duties paid or secured to be paid before permission to land goods, wares, and merchandise should be granted; by section 103, provision was made as to vessels and packages in which certain articles were thereafter to be imported, a violation to entail a forfeiture of
[454] the vessel and*goods; by section 105 and succeeding sections authority was given to import goods and merchandise into districts established and to be established on the northern and northwestern boundaries of the United States, and on the rivers Ohio and Mississippi, "in vessels or boats of any burthen, and in rafts or carriages of any kind or nature whatsoever;" and like report was to be made, like manifests furnished, and entry made as in the case of goods imported into the United States in vessels from the sea, and, except as specially provided in the act, such importations were to be subject to like regulations, penalties, and forfeitures as in other districts.

The requirements as to the production of invoices upon entry of goods subject to an ad valorem duty were supplemented by acts of April 20, 1818, chap. 79 (3 Stat. at L. 433), and March 1, 1823, chap. 21 (Id. 729), which later statute was enacted to take the place of the former, then about to expire by limitation. Original invoices were required to be furnished as a prerequisite to an entry; specific provisions were enacted as to the manner of making entry; in the case of nonresidents, invoices were required to be verified by the oath of the owner, unless such requirement was dispensed with by the Secretary of the Treasury; and the appointment of appraisers was provided for and the procedure by which the true value of goods was to be determined set forth; and a number of offenses relating to the subject declared.

When the act of 1842, heretofore referred to, was enacted, the provisions of the acts of 1799, as amended or supplemented by the act of 1823, were, in the main, in force, as they still are.

As we have seen, it was not until 1842 that a specific penalty for smuggling or clandestine introduction, *eo nomine*, was enacted. When the significance of the word "smuggling," as understood at common law, is borne in mind, and the history of the English legislation is considered and the development of our own is brought into view, it becomes manifest that the statute of 1842 was not intended to make smuggling embrace each or all of the acts theretofore prohibited which could precede or which might follow smuggling, *and which had been legislated [455]
against by the imposition of varying penalties; in other words, that it had not for its purpose to cause the means to become the end, but to supplement the existing provisions against the means leading up to smuggling, or which might render it beneficial, by a substantive and criminal statute separately providing for the punishment of the overt act of passing the goods through the lines of the customs authorities without paying or securing the duties; that is, the statute was intended not to merge into one and the same offense all the many acts which had been previously classified and punished by different penalties, but to legislate against the overt act of smuggling itself. And this view makes clear why it was that the statute of 1842 related, not generally to acts which precede smuggling or which might follow it, but to the concrete offense of smuggling alone. That this was the purpose which controlled the enactment of the act is cogently manifested by the use of the words "clandestinely introduce," since they, in the common law, were synonymous with smuggling. Indeed, in the English statutes the word "smuggling" and clandestine importation, clandestine running and landing, were constantly made use of, one for the other, as purely convertible terms, all relating to the actual passing of the goods across the line where the obligation to pay the duty existed, and which passing could not be accomplished except in defiance of the duty which the law imposed. The inference that the common-law meaning of the word "smuggling" is to be implied is cogent-

ly augmented by the fact that the statute also uses in connection with it words generally known in the law of England as a paraphrase for smuggling. In reason this is tantamount to an express adoption of the common-law signification. Moreover, this view is fortified by the concluding portion of the statute, which supplements the smuggling or clandestine introduction, by imposing a similar penalty upon every person who "shall make out or pass, or attempt to pass, through the custom house, any false, forged, or fraudulent invoice;" all of which were acts connected with the actual entry of the goods, which, if the object intended to be accom-
[456]plished was effected, would*result in the successful introduction of the goods into the country, without payment, in part at least, of the duties required by law. This relation of the act of 1842 to the then existing legislation and the remedy intended to be accomplished thereby were referred to and elucidated by the court in *United States* v. *Sixty-seven Packages of Dry Goods,* 17 How. 85 [15: 54]. In that case, after observing that the provision making criminal the passing or attempting to pass goods through the custom house by means of false, forged, or fraudulent invoices (now a part of section 2685) was manifestly directed against the production and use of simulated invoices and those fraudulently made up for the purpose of imposing upon the officers in making the entry, the court said (p. 93) [15: 55]:

"The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, secondly, the passing or attempt to pass them through the custom house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices. The latter is an offense which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It was then, therefore, in effect declared that the smuggling or clandestine introduction of dutiable goods into the United States with intent to defraud the revenue of the United States, against which the act of 1842 provided, was an act committed by passing the goods in defiance of and without conformity to the laws and regulations of the customs, or by preparing, attempting, or actually passing the same through the custom house by means of false or fraudulent invoices.

The fact that the smuggling or clandestine introduction into the United States referred to in the act of 1842 had substantially the foregoing significance is also shown by the case of *United States* v. *Jordan,* 2 Low. Dec. 537 (1876), where Lowell, J., in considering the act of 1842 and other statutes, said:

"Under the statutes, smuggling, or bringing in, or introducing goods, has been held by both the circuit and district courts for this district for a long course of years to be proved by evidence of the secret landing of
[457]goods without paying or*securing the duties, which, according to the argument here, would be quite inadmissible if the importation in the sense contended for had no element of concealment about it. I have never known a case of smuggling in which any concealment on board the vessel was relied on by the government. The gist of the offense is the evasion or attempted evasion of the duties, and they, to be sure, are due when the vessel arrives; but they are not payable until some time after, and it is the default in paying which is the fraud, or in omitting the acts which immediately precede the payment. . . . A bringing on shore without making entry, etc., is part of the importation or introduction of the goods, and makes it illegal."

It was earnestly contended in the argument at bar that the successful administration of the revenue laws would be frustrated unless the pains and penalties of smuggling be held to be applicable to all unlawful acts antecedent to the actual introduction of the goods into the United States. But this argument amounts only to the contention that by an act of judicial legislation the penalties for smuggling should be made applicable to a vast number of unlawful acts not brought within the same by the law-making power. And the result would be to control all acts done in violation of the revenue laws by a highly penal criminal statute, although the law has classified them into many distinct offenses according to their gravity, and imposed different penalties in one case than in others.

The contention that because the portion of the act of 1842, now found in section 2865, was omitted in the revision, and was only re-enacted in 1877, therefore its language should be given a wider meaning than was conveyed by the same words when used in the act of 1842, is without merit. When the re-enactment took place the act of 1842 in the particular in question had been considered by this court, and had been enforced in the lower courts as having a specific purpose and meaning. The re-enactment without change of phraseology, by implication, carried the previous interpretation and practice with it. Indeed, the re-enactment of the provisions of the act of 1842 is the best indication of the judgment of Congress that the*portion of the [458]
statute restored should not have been dropped in the revision, and that its meaning should stand as though it had never been so omitted, but had always continued to exist.

It is settled that the rate of customs duty to be assessed is fixed by the date of importation, and is not to be determined by the time when entry of the merchandise is made. But this throws no light on the meaning of the word "smuggling," since that word, both at common law and under the text of the acts of Congress, is an act by which the goods are introduced without paying or securing the payment of the duties, and hence concerns, not the mere assessment of duty, but the evasion of a duty already assessed, by passing the line of the customs authorities in defiance of law.

There remains only one further contention for consideration, that is, the assertion that whatever may have been the meaning of the term "smuggling" at common law, and its significance at the time when the statute of 1842 was adopted, that that word

as now found in section 2865 of the Revised Statutes is to have a more far-reaching significance, because it must be interpreted by the meaning affixed to the word in section 4 of the anti-moiety act of June 22, 1874 (18 Stat. at L. 186, chap. 391). The section relied on is as follows:

"Sec. 4. That whenever any officer of the customs or other persons shall detect and seize goods, wares, or merchandise in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs and charges connected therewith: *Provided*, That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

It suffices to say in answer to this conten-
[459] tion that if the *anti-moiety act had the meaning claimed for it, by the very terms of that act such meaning was restricted to "the purposes" of that act alone. That statute had in view the reward to be reaped by informers under the revenue laws of the United States, and the words, "for the purposes of this act," can in reason only be construed as contemplating a more enlarged construction of the word "smuggling," for the purpose of stimulating efforts at detecting offenders against the revenue laws, and cannot be held applicable, in the absence of the clearest expression by Congress of a contrary intent, to a different and criminal statute. Indeed, if the word "smuggling" in the act of 1842 embraced, as asserted, every unlawful act which might lead up to smuggling, then the explanatory words found in the anti-moiety act would be wholly superfluous. Their insertion in the statute was evidently, therefore, a recognition of the fact that smuggling had at the time of the passage of the anti-moiety act a defined legal and restricted significance, which it was the intent of Congress to enlarge for a particular purpose only, and which enlargement would be absolutely without significance if the term before such enlargement had meant exactly what Congress took pains to state it intended the word should be construed as meaning for the exceptional purposes for which it was legislating.

Examining the case made by the record, in the light of the foregoing conclusions, it results that, whether we consider the testimony of the captain alone or all the testimony contained in the record, as it unquestionably establishes that there was no passage of the packages of diamonds through the lines of the customs authorities, but that on the contrary the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, that the offense of smuggling was not committed within the meaning of the statute, and therefore that the court erred in instructing the jury that if they believed the testimony of the captain they should convict the defendant, and in refusing the requested instruction that the jury upon the whole testimony should return a verdict for
*the defendant. This conclusion renders un- [460]
necessary a consideration of the other questions of alleged error discussed in the argument at bar.

The judgment must therefore be reversed, and the case remanded, with directions to set aside the verdict and grant a new trial.

*Mr. Justice **Brown**, with whom were the [460]
CHIEF JUSTICE, Mr. Justice **Harlan** and Mr. Justice **Brewer**, dissenting:

I find myself unable to concur in the opinion of the court in this case, and particularly in a definition of smuggling, which requires that the goods shall be actually unladen and carried upon shore.

This definition rests only upon the authority of Hawkins' Pleas of the Crown (A. D. 1716), repeated in Bacon's Abridgment (A. D. 1736), and copied into Russell on Crimes (A. D. 1819), and Gabbet's Criminal Law, a work but little known. The diligence of counsel has failed to find support for it in a single adjudicated case in England or this country. If it were ever the law in England, it never found a lodgment in its standard dictionaries, either general or legal, and has never been recognized as such by writers upon criminal law, with the exceptions above stated. It was never treated as the law in America. The truth seems to be that smuggling *eo nomine* was formerly, whatever it may be now, not a crime in England, but a large number of acts leading up to an unlawful unlading of goods were made criminal. Smuggling appears to have been rather a popular than a legal term, and the fact that it was usually accompanied by the landing of goods on shore may have led to the definition made use of by Bacon and Hawkins. Indeed, in all the old English statutes cited in the opinion of the court it is recognized that the ultimate object of all smugglers is to get their goods ashore without payment of duties.

If, as stated by these authors, the actual unlading and carriage of the goods to the shore were an essential ingredient of the offense, it is somewhat singular that it should
have escaped*the notice of so learned a writer [461]
as Sir William Blackstone, who defines it, in accordance with the views of the other writers upon the subject, as "the offense of importing goods without paying the duties imposed thereon by the laws of the customs and excise." 4 Black. Com. 154. Dr. Johnson, with his customary disregard of conventionalities, defines the verb "to smuggle" as "to import or export goods without paying the customs," and a smuggler as "a wretch who, in defiance of justice and the laws, imports or exports goods, either contraband or without paying the customs." In Burns's Law Dictionary (1792) smugglers are said to be "those who conceal prohibited goods

and defraud the King of his customs on the seacoast by running of goods and merchandise." In Brown's Law Dictionary (Eng. 1874), smuggling is defined as "importing goods which are liable to duty so as to evade payment of duty;" and in McClain's Criminal Law (§ 1351), as importing dutiable goods without payment. There are similar definitions in the Encyclopædic and also in the Imperial Dictionary. In the Encyclopædia Britannica, "smuggling" is said to denote "a breach of the revenue laws, either by the importation or the exportation of prohibited goods, or by the evasion of customs duties on goods liable to duty;" and Stephen, in his Summary of the Criminal Law, page 89, defines smuggling as the "importing or exporting of goods without paying the duties imposed thereon by the laws of customs and excise, or of which the importation or exportation is prohibited." Similar definitions are given by Lord Hume in his Commentaries on the Laws of Scotland, as well as in Bell's Dictionary of Scottish Law, page 225. In Tomlin's Law Dictionary, where smuggling is defined as "the offense of importing or exporting goods without paying the duties imposed thereon by the custom or excise laws," a list of some thirty or forty acts connected with the unlawful and fraudulent importation of goods is given, but in none of them is the word "smuggle" mentioned as an offense. In the sixth edition of his work on Crimes, Sir William Russell gives as his authority for the definition Hawkins, Bacon, and Blackstone, the last of whom is against him, and also sets forth a large number of
[462] acts "for the prevention of *smuggling," passed during the present reign, none of which mention the word "smuggle" as a distinct crime. Indeed, the word seems to be a popular summing up of a large number of offenses connected with the clandestine introduction of goods from foreign ports.

But conceding all that is claimed as to the law of England in that particular, the question is not, what was the law of England during the last century, nor what it is today, but what was the law of the United States in 1842, when this act was passed, and in 1877, when it was incorporated in the Revised Statutes? If we are to rely for a definition upon our lexicographers and legal grammarians, there can be no doubt upon the subject, as by Webster, Worcester, the Century, and the Standard Dictionaries, and in all the law lexicons, the offense is defined in somewhat varied phraseology as the clandestine importation of goods without the payment of duties. I know of no American authority, except the *dictum* of Judge Lowell in *United States* v. *Jordan*, 2 Low. Dec. 537, to the contrary.

It would seem from that case and from certain expressions in the opinion of the court in the case under consideration, that the offense is not complete even when the goods are unladen and put upon the shore, and that a failure to pay duty upon them is a necessary element to justify an indictment, or that, as the words "without paying or accounting for the duty" imply the existence of the obligation to pay or account at the time of the commission of the offense, which duty is evaded by the guilty act, it follows that the offense is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. It follows from this that if, as is the custom upon the arrival of trans-Atlantic steamers, a passenger's baggage is landed upon the wharf, and the trunks are filled with goods clandestinely imported, the owner cannot be convicted of smuggling them under this statute, since the obligation to pay the duties upon them does not arise until an attempt is made to carry them off the wharf. *In my view the act of [463]
smuggling is complete when the goods are brought within the waters of a certain port, with intent to land them without payment of duties. Whether, if the duties be subsequently paid, such payment would be a condonation of the offense is a question upon which it is unnecessary to express an opinion. It might depend upon the motives which induced the importer to pay the duties. If they were paid after detection, it might not be considered sufficient; if before detection it would be strong evidence of a change of purpose. If the testimony of the captain in this case is to be believed, he brought the package of diamonds into port wholly ignorant of the fact that it contained dutiable articles. Defendant himself was not on board the steamer, but took passage on another ship to arrive later at another port, thus putting it out of his power to pay or account for the duty. The guilty intent with which the package was delivered in Antwerp to an innocent party for transportation to this country must be held to have continued, since defendant had deliberately deprived himself of any *locus penitentiæ* by handing the package to the captain for transportation and delivery.

But we think it is unnecessary to look beyond the language of the statute itself to determine what is meant by the word "smuggle," since it is there defined as the clandestine introduction into the United States of "any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty." If the words "clandestinely introduce" are not intended as a definition of the prior word "smuggle," they are intended as a separate offense, and in either case the defendant would be liable if he clandestinely introduced the goods without paying or accounting for the duty thereon. What, then, is meant by a clandestine introduction? In at least two cases in this court (*United States* v. *Vowell*, 5 Cranch, 368, [3: 128]; *Arnold* v. *United States*, 9 Cranch, 104, [3: 671]) an "importation" to which the government's right to duty attaches was defined to be an arrival within the limits of some port of entry. Or, as stated by Mr. Justice Curtis in *United States* v. *Ten Thousand Cigars*, 2 Curt. C. C. 436, an importation is complete when the goods are *brought [464]
within the limits of a port of entry, with the intention of unlading them there." A

similar definition of an importation is given in the following cases: *Harrison* v. *Vose,* 9 How. 372, 381 [13: 179, 183]; *United States* v. *Lyman,* 1 Mason, 499; *McLean* v. *Hager,* 31 Fed. Rep. 602, 606; *The Schooner Mary,* 1 Gall. 206, wherein it was said by Mr. Justice Story that "an importation is a voluntary arrival within some port, with intent to unlade the cargo."

Such being the meaning of the word "import," a clandestine importation would be the bringing of goods into a port of entry with design to evade the duties. Should a narrower meaning be given to the words "clandestinely introduce?" I think not. The word "introduce" would strike me as entitled to an even broader meaning than the word "import." To introduce goods into the United States is to fetch them within the jurisdiction of the United States, or at least within some port of entry, and the requirement that they should be unladen or brought on shore is to import a feature which the ordinary use of language and the object of the act does not demand. If the construction of the words "clandestinely introduce" adopted by the court be the correct one, it would follow that a vessel loaded with goods, which the owner designed to import without payment of duty, leaving a European port, might be navigated up the St. Lawrence and through the chain of Great Lakes to Chicago (a voyage by no means unknown), or up the Mississippi to St. Louis, and be moored to a dock, and yet the goods be not introduced into the United States, because not actually unladen upon the wharf. I cannot give my consent to such a narrow definition.

Confirmation of the above meaning of the word "smuggle" may, I think, be found in the act of June 22, 1874 (18 Stat. at L. 186, chap. 391), commonly known as the "anti-moiety act." In section 4 of that act it is provided that the Secretary of the Treasury shall award to officers or others detecting or seizing smuggled goods a proportion of their proceeds, and that "for the purposes of this act smuggling shall be construed to mean the act with intent to defraud or bringing into the United States, or with like intent
[465] attempting to bring into the United *States dutiable goods without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." It is true the definition is given "for the purposes of this act," and evidently with the object of including within its provisions, not only the act of smuggling proper,—that is, the act of importing with intent to defraud dutiable articles without passing, etc.,—but of an *attempt* to do the same, which would probably not be construed as smuggling under the provisions of other acts. It is scarcely possible that Congress should have contemplated wholly different interpretations of the same words in different acts.

But it is useless to prolong this discussion. The whole question turns upon the meaning of the words "smuggle" and "clandestinely introduce." I have given my reasons for believing that they include an importation of goods with an intent to evade the duties, the right to which has already attached; and I am at a loss to understand why an obsolete definition of the English law should be rehabilitated to defeat the manifest intention of Congress.

CHAPPELL CHEMICAL & FERTILIZER COMPANY, *Plff. in Err.,*
v.
SULPHUR MINES COMPANY OF VIRGINIA.

(See S. C. Reporter's ed. 465-471.)

Federal question.

When the decision of a state court rests upon grounds other than those dependent upon a Federal question, it is not reviewable here, although a Federal question was also raised in the state court.

[No. 91.]

Argued December 16, 1898. Decided January 9, 1899.

IN ERROR to the Court of Appeals of the State of Maryland to review a decree of that court affirming a decree of the Circuit Court No. 2 of Baltimore City sustaining a demurrer to the bill of the plaintiff, the Chappell Chemical & Fertilizer Company, and to review a decree of that court affirming an order of Circuit Court No. 2 of Baltimore City refusing the plaintiff leave to file an ancillary bill of complaint. There was also a motion to dismiss. *Dismissed.*

See same case below, 85 Md. 681.

The facts are stated in the opinion.

Mr. **Thomas C. Chappell** for plaintiff in error.

Messrs. **James M. Ambler, Randolph Barton,** *Skipwith Wilmer,* and *Randolph Barton, Jr.,* for defendant in error.

*Mr. Justice **McKenna** delivered the opinion of the court: [466]

This is a suit in equity to restrain the enforcement of a certain writ of attachment and execution issued on a judgment recovered against plaintiff in error. The original bill alleges that the judgment is absolutely void. The following are some of its allegations:

"That the said purported judgment was recovered by the said defendant against your orator in the superior court for Baltimore city, before the judge at large, and that said judgment is rendered *coram non judice,* and your orator herewith files a certified copy of the docket entries in said case, marked 'Complainants' Exhibit B,' reference being had thereto.

"That the entry on said docket, that the case was submitted to the judge, is absolutely fraudulent, and that there is a motion pending in said case to correct said fraudulent docket entry.

"That your orator is advised that the said

case was not before said judge at large when said judgment was rendered, and said judge had no jurisdiction or authority at law to render said judgment.

"That the said judgment was made absolutely by the said judge at large, while there was pending a motion to strike out the verdict and the judgment thereon, and your orator insists that said judgment is absolutely void, and rendered *ultra vires*, and said motion to strike out the judgment is still pending in said superior court."

It is also alleged that there was pending in the case a motion to quash the attachment. There were exhibits filed with the bill. A demurrer was interposed. Subsequently an amended and supplemental bill was filed, containing additional allegations of proceedings, and the prayer was also broadened.

To this bill a demurrer was again filed, and the ground of it stated to be that the bill did not state such a case as entitled plaintiff to any relief in equity.

[467] *The demurrer was sustained, and the bills dismissed on the 2d of June, 1896.

On the 22d of August, 1896, the plaintiff presented a petition for leave to file an ancillary bill in the following words:

The said plaintiff, by Thomas C. Chappell, its attorney, reserving every manner of advantage and exception whatsoever, shows to this honorable court:

1. That since the decree was passed in this case dismissing the bill of complaint herein, the motions of the said Chappell Chemical Fertilizer Company in the case of *The Sulphur Mines Company of Virginia* v. *The Chappell Chemical & Fertilizer Company*, which said motions are referred to in the original and supplemental bills filed herein, have been overruled.

2. That an appeal from the order of the court in said action at law is not an adequate remedy, and that under art. 16, sec. 69, Code Pub. Gen. Laws of Maryland, the said plaintiff herein is entitled to an injunction to enjoin the said plaintiff herein from reaping any benefit from the said purported judgment, and from occasioning this plaintiff any damage by any proceedings in said pretended judgment.

3. That while the filing of an amended or an ancillary or supplemental bill is in the discretion of the court, that discretion is to be exercised within prescribed legal and equitable limitations, according to the decision of the court of appeals.

4. That the property of this plaintiff is tied up and rendered *extra commercium*, and placed in such a position and its title so clouded by this invalid and illegal judgment delivered in a court without jurisdiction, and *coram non judice*, and in violation of the Seventh Amendment and the Fourteenth Amendment of the Constitution of the United States, under which the said plaintiff specially sets up and claims a right, privilege, and immunity, that the said plaintiff is entitled to file an amended, supplemental, and ancillary bill herein, fully setting forth all the facts and insists that said illegal and invalid judgment should be canceled by this honorable court, whose province is to prevent wrong and to do right and the *said plaintiff [468] claims that it is being deprived of its liberty and its property without due process of law, and that under the Declaration of Rights of the state of Maryland, art. 5, and the Constitution of the state and law of the state as laid down by the court of appeals of Maryland, it was entitled to a trial by jury in said case at law, having demanded such trial, and that the action of the judge at large in denying that right and in trying said case after an appeal from an order affecting a constitutional right, without a jury and *ex parte* and without notice to this plaintiff, and without an opportunity to be heard, and without any trial of the facts, and the finding of a verdict by the judge at large upon the false and fraudulent testimony of the officer of the said Sulphur Mines Company of Virginia, at said *ex parte* trial, all of which this plaintiff charges, is the enforcement of law and a regulation of the state abridging a privilege and immunity of this plaintiff, which is a citizen of the United States, and is repugnant to the Fourteenth Amendment of the Constitution of the United States, and every judge and all the people are bound by the Constitution of the United States, art. 2, Declaration of Rights of the state of Maryland, article 6, Constitution of the United States. Wherefore your petitioner prays leave to file an ancillary bill of complaint herein, and specially sets up and claims the privilege, and specially sets up and claims that any denial of the said privilege will be a denial of the equal protection of the laws and repugnant to the Fourteenth Amendment of the Constitution of the United States.

Thos. C. Chappell,
Att'y for Plaintiff.

On the same day leave to file the bill was refused, and the plaintiff, on the 25th of August, 1896, filed the following:

The said plaintiff, by Thomas C. Chappell, attorney, reserving every manner of advantage and exception whatsoever, excepts to the order of court requiring the demurrer filed in this case to be argued before all of the defendants had been served with subpœna, and to the order of court dismissing the original and supplemental bills of complaint herein, and to *the order of court refusing to the [469] plaintiff the right and privilege to file an ancillary bill, and specially sets up and claims that said order abridges a privilege and immunity of the said plaintiff, a citizen of the United States, and are repugnant to the Fourteenth Amendment of the Constitution of the United States, under which said plaintiff specially set up and claim a right, privilege, and immunity.

Thos. C. Chappell,
Attorney for Plaintiff.

And on the same day the following:

Mr. Clerk: Please enter an appeal from the decree in this case dated the 22d day of August, 1896.

Thos. C. Chappell,
Attorney for Plaintiff.

Then follow in the record certain papers which presumably were necessary to perfect the appeal.

The record contains two opinions and two judgments of the court of appeals, all dated the same day. The one which comes first in the record considers and affirms the decree of the lower court sustaining the demurrer and dismissing the bills entered June 2, 1896; the other affirms the order of the 22d of August, 1896, refusing leave to file the ancillary bill.

The following is the opinion of the court on the latter:

"The decree of the court sustaining the demurrer and dismissing the original and supplemental bills of the Chappell Chemical & Fertilizer Company against the Sulphur Mines Company of Virginia *et al.* was passed June 2, 1896. On the next day an appeal was entered, which we have just considered. On the 22d day of August, 1896, over two months and a half after the appeal was taken and while it was still pending, the appellant filed in the original case a petition asking leave to file 'an ancillary bill of complaint herein.' The court very promptly and properly refused to allow it to be done. From that order this appeal was taken.

"Even after a court of equity has sustained a demurrer to a bill, it can grant leave to
[470] amend if it can be seen that the defects *can be remedied by amendment, and the court is of the opinion that substantial justice requires it. But when an application to amend is not made within a reasonable time and the bill is dismissed, it is out of court, and there is nothing to amend. In this case, instead of asking the court to strike out the decree dismissing the bill so it could amend, the appellant took an appeal. The case was thus beyond the right of the plaintiff to amend or to file a supplemental or 'ancillary' bill. But, in addition to that, the reasons assigned in the petition were not sufficient to authorize the interposition of a court of equity. The order of the court in refusing to allow the plaintiff to file an 'ancillary bill' must be affirmed.

"Order affirmed, with costs to the appellee."

There is more confusion when we come to the petition for writ of error. It does not distinguish between these judgments except by a reference to the assignment of errors. The petition recites "that on or about the 5th day of June, 1897, this court [court of appeals] entered a decree herein in favor of the defendant, the appellee, and against this plaintiff." It then recites that there was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against the validity, and also the validity of a statute or an authority exercised under the state, on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the validity; and that "certain errors were committed to the prejudice of this complainant, the appellant, all of which will more fully appear from the assignment of errors, which will be duly filed herein."

The assignment of errors is as follows:

"Afterwards, to wit, on the first Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the Chappell Chemical & Fertilizer Company by Thomas C. Chappell, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that the demurrer aforesaid and the matters therein contained are not sufficient in law for the Sulphur Mines Company *of Virginia to have or **[471]**
maintain its aforesaid decree against the said the Chappell Chemical & Fertilizer Company. There is also error in this, to wit, that by the record aforesaid it appears that the decree aforesaid given was given for the said the Sulphur Mines Company of Virginia against the said the Chappell Chemical & Fertilizer Company, whereas by the law of the land the said decree ought to have been given for the said the Chappell Chemical & Fertilizer Company against the said the Sulphur Mines Company of Virginia; and the said the Chappell Chemical & Fertilizer Company prays the judgment and decree aforesaid may be reversed, annulled, and held for nothing, and that it may be restored to all things which it has lost by occasion of said judgment, etc."

The writ of error, therefore, is directed to the decree of the court of appeals affirming the decree of the lower court of the 2d of June, 1896, while the only appeal that the record contains is from the decree of the latter of the 22d of August, 1896.

But passing by this confusion, and regarding both decrees before us, we come to the motion to dismiss made by the defendants in error on the ground that no Federal question was raised in the state court.

This is true as to all the pleadings and papers, except the petition of the 22d of August, 1896, for leave to file an ancillary bill. If, however, a Federal question was raised by the petition and on the appeal from the order denying it, the motion to dismiss must nevertheless be granted, because the decision of the court of appeals rests on grounds other than those dependent on Federal questions. *Simmerman* v. *Nebraska*, 116 U. S. 54 [29: 535]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *California Powder Works* v. *Davis*, 151 U. S. 389 [38: 206]; *Missouri P. R. R. Co.* v. *Fitzgerald*, 160 U. S. 556 [40: 536]; *Fowler* v. *Lamson*, 164 U. S. 252 [41: 424]. See also *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389 [40: 467]; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685 [41: 1165]; and *Miller* v. *Cornwall R. Co.* 168 U. S. 131 [42: 409].

The writ of error is dismissed.

[472] CHAPPELL CHEMICAL & FERTILIZER COMPANY, *Plff. in Err.*,
v.
SULPHUR MINES COMPANY OF VIRGINIA.

(See S. C. Reporter's ed. 472, 473.)

Federal question.

The dismissal of an appeal on the ground that it is prematurely taken does not present a Federal question.

[No. 92.]

Argued December 16, 1898. Decided January 9, 1899.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment of that court dismissing an appeal from the Superior Court of Baltimore City brought by the defendant, the Chappell Chemical & Fertilizer Company. There was a motion to dismiss. *Writ of error dismissed.*

See same case below, 85 Md. 683.

The facts are stated in the opinion.

Mr. **Thomas C. Chappell** for plaintiff in error.

Messrs. **James M. Ambler, Randolph Barton,** *Skipwith Wilmer,* and *Randolph Barton, Jr.,* for defendant in error.

This cause was argued with No. 91, the preceding case.

[472] *Mr. Justice **McKenna** delivered the opinion of the court:

This is a writ of error to the court of appeals of the state of Maryland to review a judgment made by it, and which is hereafter set out.

The action was at law for the recovery of eight thousand dollars for money payable, goods sold, and work done, and materials furnished by defendants in error (plaintiffs in the court below) to plaintiff in error (defendant in the court below), and was brought in one of the city courts of
[473] Baltimore, *Md. To the declaration a plea was filed February 12, 1895, averring that the defendant was never indebted and never promised as alleged. On January 13, 1896, under the Maryland practice, upon the suggestion of the defendant (plaintiff in error) that it could not have a fair trial, the case was "transmitted" to the supreme court of Baltimore, Md.

The record contains a number of motions and exceptions to the rulings on the motions. One of these exceptions was that the ruling of the court deprived plaintiff in error of a jury trial under a law of Maryland and the rules of court made in accordance therewith, which law and rules plaintiff in error alleges are repugnant to the Constitution of the United States. Another objection was to an order made on the 6th of February, 1896, requiring plaintiff in error to employ new counsel, the cause under the practice of the court having been peremptorily set for trial on the 20th of February, 1896, after having been twice postponed for the alleged sickness of counsel.

An appeal was entered from this order and perfected. The court of appeals dismissed it December 3, 1896, saying:

"The appeal in this case having been prematurely taken, the motion to dismiss it must prevail.

"The defendant, long after the time fixed by the rule of court, demanded a jury trial, and without waiting for the action of the court upon his motion, and indeed before there was any trial of the case upon its merits and before any judgment, final or otherwise, was rendered, this appeal was taken from what the order of appeal calls the order of court of the 6th of February, 1896, denying the defendant the right of a jury trial; but no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed.

"Appeal dismissed."

No Federal question was disposed of by this decision.

Writ of error dismissed.

CHAPPELL CHEMICAL & FERTILIZER COMPANY, *Plff. in Err.*, [474]
v.
SULPHUR MINES COMPANY OF VIRGINIA.

(See S. C. Reporter's ed. 474, 475.)

Removal of cause—equal protection of the laws.

1. The loss of the jurisdiction of a state court by the pendency of a petition for removal of the cause to a Federal court is not shown by a record on writ of error which does not contain the grounds of the petition for removal or the petition itself, and where the fact that this was filed appears only by recital and by the opinion of the court.
2. The equal protection of the laws is not denied by a state statute abridging the right of trial by jury in the courts of a city, without making a similar provision for the counties of the state.

[No. 99.]

Argued December 16, 1898. Decided January 9, 1899.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment of that court affirming a judgment of the Superior Court of Baltimore City in favor of the plaintiff, the Sulphur Mines Company of Virginia. Also on motion to dismiss. *Judgment affirmed.*

See same case below, 85 Md. 684.

The facts are stated in the opinion.

Mr. **Thomas C. Chappell** for plaintiff in error.

Messrs. **James M. Ambler, Randolph Barton,** *Skipwith Wilmer,* and *Randolph Barton, Jr.,* for defendant in error.

This cause was argued with Nos. 91 and 92, preceding it.

[474] *Mr. Justice **McKenna** delivered the opinion of the court:

This is an action at law brought by plaintiff in error against defendant in error and another, for causes growing out of the matters sued on in No. 92. Here, as in No. 92, there was a series of motions which we do not think it is necessary to notice.

The case, on the appeal of plaintiff in error, reached and was passed on by the court of appeals of the state, and to its judgment affirming that of the lower court this writ of error is directed.

The judgment must be affirmed.

Claims under the Constitution of the
[475] United States were set *up in several of the motions and denied by the court. One claim was that the Constitution of Maryland abridged the right of trial by jury in the courts of Baltimore city without making a similar provision for the counties of the state, and that this denies to litigants of the city the equal protection of the laws. This is not tenable. *Missouri* v. *Lewis*, 101 U. S. 22 [25: 989]; *Hayes* v. *Missouri*, 120 U. S. 68 [30: 578].

The other claim was that the state courts lost jurisdiction by reason of the pendency of a petition filed under section 641 Revised Statutes, to remove the case to the United States circuit court. The petition for removal is not in the record, and we only know that it was filed by reason of the recital in other motions and its notice in the opinion of the court of appeals, and the grounds of it do not appear in any part of the record.

In all other matters the judgment of the court of appeals depends on questions of state practice and state laws.

Judgment affirmed.

COLUMBIA WATER POWER COMPANY,
Plff. in Err.,
v.
COLUMBIA ELECTRIC STREET RAILWAY, LIGHT, & POWER COMPANY.

(See S. C. Reporter's ed. 475-493.)

Federal question—reservation of a right to water power by a state—Federal question.

1. A Federal question sufficiently appears, although the complaint does not mention the Constitution of the United States, where the whole theory of the case is the impairment by statute of a contract created by a prior statute, and the presentation and decision of this question appear from the record and opinion of the state court.
2. The right of the state to lease such portion of the water power reserved as it does not require for the use of a penitentiary is included in the rights reserved to the state under S. C. act December 24, 1887, authorizing the transfer of a canal, but providing that the state shall be furnished free of charge 500 horse power of water power "for the use of the penitentiary and for other purposes," aud declaring that "the right of the state to the free use of the said 500 horse power shall be absolute."
3. Questions as to the legal title to land, and the right to erect a steam plant for use when water power is unavailable, as an incident of a right to put an electric plant on the banks of a canal for the use of water power, are not reviewable on writ of error from the Supreme Court of the United States to a state court.

[No. 67.]

Argued December 6, 7, 1898. Decided January 9, 1899.

IN ERROR to the Supreme Court of the State of South Carolina to review a decree of that court affirming a decree of the Court of Common Pleas for Richmond County dismissing the complaint of the plaintiff, the Columbia Water Power Company, for an injunction against using its water power and trespassing upon its banks. *Decree of the Supreme Court affirmed.*

See same case below, 43 S. C. 154.

*Statement by Mr. Justice **Brown:** [476]

This was a complaint in the nature of a bill in equity, filed in the court of common pleas for Richmond county by the Columbia Water Power Company as plaintiff, to enjoin the Columbia Electric Street-Railway Light & Power Company from using certain water power for the propulsion of its cars, lighting its lamps, and furnishing power motors; also from entering upon plaintiff's lands and erecting thereon its buildings, works, and machinery; and also requiring the defendant to remove such as had already been erected; and for the payment of damages.

The bill set forth that a structure known as the Columbia canal begins above the city, passes through the city near the western boundary, and empties into the Congaree river just beyond the limits of the city, passing around the shoals and falls in said river, and when constructed and in use made a continuous communication between the Broad and Congaree rivers; that the canal was begun by the state as a public work in the year 1824, and for the purpose of its construction
*certain lands were purchased within the lim- [477]
its of the city, through which the canal was to be carried and constructed; that the canal was used for purposes of navigation for some time, and remained, with the lands described, the property of the state until February 8, 1882, when the general assembly of the state by an act of that date authorized and directed the canal commission to transfer the canal, with the aforesaid lands, to the board of directors of the state penitentiary, with all the rights and appurtenances thereto acquired by the state; that the board was authorized and directed and subsequently did take possession of the canal and lands, and proceeded with the work of enlarging and developing the canal, expending large sums of money for that purpose, and widened and enlarged its banks, and remained in the full possession thereof until December 24, 1887, when the general assembly passed an act (the material portions of which are printed

in the margin†) "to incorporate the board of trustees of the Columbia canal, to transfer [478]to said board the Columbia *canal with the lands held therewith, with its appurtenances, and to develop the same" (19 S. C. Stat. 1090); that by section 1 of the act the board of directors of the penitentiary was authorized to transfer and release to the board of [479]trustees of the *canal the canal property and its lands, with their appurtenances, and that the same should vest in the trustees for the use and benefit of the city of Columbia; that such transfer was made and possession taken by the board of trustees, and the property so remained in their possession until the date and year hereinafter mentioned.

That by section 21 of the above act the board of trustees was declared a corporate body, and was authorized, among other things, to purchase, sell, or lease lands adjoining the canal, useful for the purposes of the canal, to sell or lease the water power of the canal subject to such rules and regulations as it should prescribe; and that by virtue of such act the trustees became entitled to the exclusive franchise and right to sell or lease the water power developed by the canal for manufacturing and other industrial purposes, without let or hindrance, and without the right of any person or corporation to interfere or interrupt in any manner the use of such water power, save and except it should provide a certain amount of water power to certain persons and parties in said act nominated and mentioned, and that no person or corporation had a right to divert, disturb, impede, or interfere with the flow of water down the said canal.

†Act of December 24, 1887.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same,* That the board of directors of the South Carolina penitentiary are hereby authorized, empowered, and required to transfer, assign, and release to the board of trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the general assembly of this state with reference thereto or otherwise, all and singular the rights, members, and appurtenances thereto belonging; and upon such transfer, assignment, and release all the right, title, and interest of the state of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree river, together with all the appurtenances thereunto belonging, shall vest in the said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of said board of trustees and their assigns: *Provided,* That should the said canal not be completed to Gervais street within seven years from the passage of this act, all the rights, powers, and privileges guaranteed by this act shall cease, and the said property shall revert to the state.

Sec. 2. That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances: and for the purpose of navigation, *for providing an adequate water power for the use of the penitentiary, and for other purposes* herein named, they are hereby authorized, empowered, and directed to improve and develop the same.

. . . .

Sec. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom, and 10 feet deep from the source of the canal down to Gervais street, *and furnish the state, free of charge, on the line of the canal, 500 horse power, of water power,* to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the canal commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree river a few yards above the mouth of Rocky Branch: *Provided, That the right of the state to the free use of the said 500 horse power shall be absolute,* and any mortgage, assignment, or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right.

. . . .

Sec. 21. The said board of trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be "Board of Trustees of the Columbia Canal." Its officers shall be a chairman and a secretary and treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell, or lease lands adjoining the canal useful for the purposes of the canal; *may sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the state with 500 horse power of water power at the penitentiary,* and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the secretary and treasurer as they may deem proper. Section 23 as amended by act of December 24, 1890. (20 S. C. Stat. 967.)

Sec. 23. That the said board of trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said board of trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate, and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said board of trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities, and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and before such sale, alienation, and transfer is made thirty days' notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia.

Approved December 24, A. D. 1890.

That by the 23d section of this act, as amended by the subsequent act of December 24, 1890 (20 S. C. Stat. 967), the board of trustees was given full power and authority to sell, alienate, and dispose of the canal, its lands and appurtenances, to any person or corporation, subject to all duties and liabilities imposed by the act, and to all contracts made by the board, prior to such transfer, up-
[480]on the approval and consent *of nine members of the council of the city of Columbia; that in pursuance of such section, the trustees, before the completion of the canal, and on January 11, 1891, conveyed all of said property to the Columbia Water Power Company, the plaintiff, including the canal and all of the lands held therewith, easements, rights of way, rights of overflow, and appurtenances acquired by the board of trustees, with their rights and franchises; that the plaintiff went into possession of all the property, and so remained in possession without any claim or assertion of an adverse right, and thereby became entitled to all the franchises, privileges, and immunities conferred upon the board of trustees.

That the act of December 24, 1887, provided that upon the development and completion of the canal the board of trustees should furnish the state free of charge 500 horse power of water power; and the 23d section of the act as amended provided that this duty should be imposed upon any person or corporation to whom the board of trustees should sell or transfer the property; that in March, 1892, the development and enlargement of the canal was completed, and on said date, and ever since, the plaintiff was and is ready to furnish the state with the 500 horse power of water power as required by the act aforesaid.

That the defendant, a South Carolina corporation, was organized by the consolidation of three prior companies, and was authorized to construct through the city a street railway, and also to maintain a system of electric lighting; that in May, 1892, the plaintiff was informed by the board of directors of the penitentiary that the defendant company had been authorized by the said board to build a power house, with forebay, flumes, and water wheels, for the purpose of utilizing the 500 horse power to be furnished to the state, and that it was the purpose of such company to erect works under such authority to develop such power, and to furnish to the state, within the walls of the penitentiary, so much of said power as had been agreed upon by and between the board of directors of the penitentiary and the said company; that the plaintiff gave immediate no-
[481]tice to the said board and to the *defendant that it would object to the use of any of its lands or embankments on the west side of the canal by any person or corporation, except so much as would be necessary for the erection of the power house to furnish 500 horse power for the use of the state; that the state should have full liberty to build such works upon the embankment of the canal as were necessary in furnishing such water power; but that such works should be strictly confined to such portion of the property of the plaintiff as should be necessary for that purpose; and that the plaintiff would not recognize the right of the state to assign such horse power, or any part thereof, to any corporation to be used for private purposes, outside of the walls of the penitentiary or any public institution of the state; and that it was under no obligation to furnish water power from the canal to be used by private corporations for private enterprises.

That subsequently the defendant, acting through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the state water power available, and plaintiff approved of the same as not taking more of the land than was necessary for the development of the 500 horse power for the use of the state, and allowed the defendant to proceed with its work, which was completed in accordance with the plans and specifications so submitted; but that thereafter the defendant, against the protests and objections of the plaintiff, proceeded to place in such works machinery intended solely for the purpose of running its electric lights and street railway, and furnishing power to divers persons in the city for their industries, against which plaintiff protested, and gave notice that proceedings would be taken to prevent such misapplication by the electric company, which, notwithstanding such protests, continues to place such machinery in its power house for its own private purposes; and that plaintiff is wholly without power to prevent the action of the defendant in such misapplication of such power for its private purposes, owing to the duty of the plaintiff to furnish power for the use of the state and its penitentiary, as such power is furnished and made available at and by the same *water [482]
wheel; and that, unless such use be enjoined, it will suffer irreparable injury and damage, and its franchise to sell and lease water power for purposes of manufacturing and other industrial purposes will be affected and materially injured.

That the said defendant also in February, 1893, against the protest of the plaintiff, entered upon its premises on the western embankment of the canal and at the southern end of the power house above mentioned, and excavated and removed the earth, rock, and works composing the foundation of such embankment, to the great danger of the canal and embankment, and began erecting the foundations for the steam engine to be used in running generators, dynamos, etc., as above stated, and has placed portions of its machinery in such structure to be used in producing electric power, and in May, 1893, commenced to erect a boiler house and coal house for use in the same business.

The complaint further alleged that the plaintiff had performed all its obligations to the state, and stood ready to continue the performance of the same, but the defendant in disregard of its rights has trespassed upon its property, excavated its embankment, and has interfered with the enjoyment of the franchises granted to it by the state; that a judgment at law against the company would be worthless, and hence the plaintiff prayed

for an injunction against such use of the water power and against further trespasses upon its lands.

The answer put in issue the title of the plaintiff to the lands occupied by the defendant; denied that the board of trustees of the canal ever became entitled to the exclusive franchise and right to sell or lease water power developed by it for purposes of industrial enterprises; denied that the 500 horse power reserved to the state was provided solely for the individual use of the state in its public institutions; denied any intent on its part to injure the plaintiff in its franchise and property by the erection of its works, and alleged that the state, being seised in fee simple of the land and entitled to the unrestricted use of the 500 horse power referred to in the complaint, but being with-
[483] out means to *develop the same, entered into a contract dated May 26, 1892, with the defendant, whereby it was stipulated that the defendant should erect suitable works and machinery for the development of such horse power, furnish to the penitentiary so much as was necessary for its purposes, and as a consideration for this should be allowed to make use of the surplus power for its own purposes; that such contract was thereafter ratified and confirmed by an act of the general assembly, approved December 24, 1892 (21 S. C. Stat. 94); and that the defendant was entitled under such contract to the unrestricted use of such horse power for the purposes contemplated by the contract.

The attorney general, appearing on behalf of the state, filed a suggestion to the effect that, if the injunction were granted, defendant would be prevented from carrying out its agreement with the state, and the state would be deprived of the water power it was entitled to in the manner contracted for, and of the revenue it had secured under the contract. He did not, however, submit the rights of the state to the jurisdiction of the court, but insisted that the court had no jurisdiction of the subject, and asked that the complaint be dismissed.

The case came on for hearing upon the complaint, answer, the suggestion of the attorney general, and the articles of agreement, and resulted in a decree dismissing the complaint. An appeal was taken to the supreme court of the state, which affirmed the decree of the court below (43 S. C. 169), whereupon plaintiff sued out a writ of error from this court, assigning as error the decision of the supreme court affirming the validity of defendant's contract with the board of directors of the penitentiary, and the act of the general assembly ratifying the same.

Mr. **LeRoy F. Youmans** for plaintiff in error.

Messrs. **William H. Lyles** and *John T. Sloan* for defendant in error.

[484] *Mr. Justice **Brown** delivered the opinion of the court:

1. A preliminary motion was made to dismiss this writ of error upon the ground that no Federal question was involved, and, even if there were such question, it was not "specially set up and claimed" in the state court, as required by Revised Statutes, section 709.

An examination of the complaint shows that the plaintiff relies upon the act of the general assembly of December 24, 1887. This statute (sec. 1) authorizes the board of directors of the South Carolina penitentiary, which had acquired the ownership of the canal under a previous act of February 8, 1882, to transfer the property to the board of trustees of the Columbia canal, and (sec. 7) required the completion of the canal and *a reservation to the state, free of charge, on the line of the canal, of 500 horse power of water power*, with a further proviso that the right of the state to the free use of the said 500 horse power should be *absolute*, and any mortgage, assignment, or other transfer of the said canal by the said board of trustees or their assignees should always be subject to this right. In section 21 this reservation is described as a provision for the state, with 500 horse power of water power *at* the penitentiary. By section 23 as amended in 1890, the board of trustees was given authority to *sell, alienate, and transfer the canal*, with its appurtenances, lands, and franchises, to any person or corporation, subject, however, to all contracts, liabilities, and obligations made and entered into by said board prior to such sale and transfer. Pursuant to this authority, the board of trustees, on January 11, 1892, conveyed the canal and its appurtenances to the plaintiff.

The gist of the complaint is that in 1892 the defendant, acting as the agent of the state through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the said 500 horse power of water power available, to which the plaintiff made no objection; but that thereafter, against its protests, proceeded to *construct in such works [485]
machinery intended for the purpose of running its electric lights and street railway and furnishing power to the citizens of Columbia for divers industries; and entered upon the premises of the plaintiff and laid foundations for a steam engine to be used in running its generators, etc., and began the erection of an engine house, boiler house, and coal house for the purpose of establishing a steam plant.

The complaint did not set up the contract of the board of directors of the penitentiary with the defendant and the act of the general assembly of December, 1892, confirming the same, but these were both set forth in the answer and relied upon by the defendant as its authority for the erection of its works. In this contract the defendant agreed to erect, on the western bank of the canal opposite the penitentiary, suitable water wheels of sufficient capacity to utilize and develop the 500 horse power of water power, and to transmit across the canal to some convenient point within the walls of the penitentiary not to exceed 100 horse power for the use and benefit of the penitentiary. In consideration of this the board of directors agreed to allow the defendant the use

of all their right, title, and interest to the land on the west side of the canal and also to allow it the free and uninterrupted use of the said 500 horse power of water power reserved to the penitentiary, with the exception of the 100 horse power so reserved for its private use. This contract was subsequently ratified and confirmed by an act of the general assembly approved December 24, 1892.

While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case taken in connection with the answer is that the rights which it acquired to the 500 horse power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same, is not set up there, it appears in the answer and is relied upon as validating the contract; so that,
[486] reading *the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent state action appears on the face of the pleadings.

In passing upon the case the supreme court, speaking through Mr. Justice Gary, held that one of the objects of the plaintiff's action was to have the contract between the state and the defendant as to the 500 horse power declared null and void on the ground that the state could not lease the same. In view of an intervening suggestion filed by the attorney general, to the purport that the state had interests which would be affected by granting the relief prayed for, he held that the state, being an indispensable party and refusing to become a party, the cause of action on the equity side of the court could not be sustained; and in considering the cause of action on the law side of the court he reached the conclusion that the state was not an indispensable party. He then proceeded to consider whether the contract between the state and the defendant relative to the 500 horse power was null and void, and held that the proviso to section 7 of the act of 1887 being that the right of the state to the free use of this horse power should be *absolute*, the construction given to it by the legislature in the act of 1892 was correct, and that the word "absolute" was used for the purpose of creating a right in the state to this horse power separable and distinct from the ownership in other lands, and not dependent upon any particular lands to which it might be appurtenant. It followed that the contract between the state and the defendant was not null and void.

He further held that the right of the defendant to erect the steam plant depended upon the fact whether it was merely incidental and essential to the enjoyment of the water power plant; that the parties had a right to trial by jury as to these issues, but as no demand was made therefor the court assumed that the circuit court properly decided all questions of fact upon which its judgment rested. The other justices concurred in the result, the Chief Justice saying that he was not satisfied that the plaintiff ever acquired title to the land upon which the works in question had been erected. There is nothing to *indicate that either of [487]
them dissented from the views expressed by Mr. Justice Gary, who presumably spoke for the court, with respect to the Federal question.

In holding that the contract with the defendant and the legislative act confirming the same were valid, the court proceeded upon the idea that the act of 1887 authorizing the transfer of the property to the board of trustees of the Columbia canal made the reservation to the state of the 500 horse power an absolute one; that the directors of the penitentiary could do with it as they pleased, and hence they had the right to turn it over to the defendant if, in their judgment, such course was warranted by a due regard for the interests of the state. While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaird, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or, granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102 [*ante*, 382,] that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31 : 607]; *Bridge Proprietors* v. *Hoboken Land & Improv. Co.* 1 Wall. 116 [17 : 571].

To the argument that the Federal right was not "specially set up and claimed" in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

*(1) "Where is drawn in question the va- [488]
lidity of a treaty, or statute of, or authority exercised under, the *United States*, and the decision is *against* their validity;"

(2) "Where is drawn in question the validity of a statute of, or an authority exercised under, any *state* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity;"

(3) "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, our commission held or authority exercised under, the

United States, and the decision is *against* the title, right, privilege, or immunity *specially set up and claimed* by either party under such Constitution, statute, commission, or authority."

There is no doubt that under the third class the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. *Spies* v. *Illinois*, 123 U. S. 131, 181 [31: 80, 91]; *French* v. *Hopkins*, 124 U. S. 524 [31: 536]; *Chappell* v. *Bradshaw*, 128 U. S. 132 [32: 369]; *Baldwin* v. *Kansas*, 129 U. S. 52 [32: 640]; *Leeper* v. *Texas*, 139 U. S. 462 [35: 225]; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149].

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. *Miller* v. *Nicholls*, 4 Wheat. 311 [4: 578]; *Willson* v. *Blackbird Creek Marsh Co.* 2 Pet. 245 [7: 412]; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410 [7: 458, 468]; *Fisher's Lessee* v. *Cockerell*, 5 Pet. 248 [8: 114]; *Crowell* v. *Randell*, 10 Pet. 368 [9: 458]; *Harris* v. *Dennie*, 3 Pet. 292 [7: 683]; *Farney* v. *Towle*, 1 Black, 350 [17: 216]; *Hoyt* v. *Shelden*, 1 Black, 518 [17: 65]; *Mississippi & M. Railroad Co.* v. *Rock*, 4 Wall. 177 [18: 381]; *Furman* v. *Nichol*, 8 Wall. 44 [19: 370]; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 [35: 1004].

The case under consideration falls within
[489] the second class, *and as it appears from the record and from the opinion of the court which may be examined for that purpose (*Kreiger* v. *Shelby R. R. Co.* 125 U. S. 39 [31: 675],) that the question was presented and decided, that the act of 1892 affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the act of 1887, because that act properly construed conveyed no exclusive rights, we think the Federal question sufficiently appears.

2. Upon the merits the case presents but little difficulty. The argument of the plaintiff is that under the act of 1887 the board of trustees of the Columbia canal, of which plaintiff is the successor, took an absolute title to the canal and appurtenant lands, with the right to "purchase, sell, or lease lands adjoining the canal useful for purposes of the canal," and to "sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided the state with 500 horse power of water power at the penitentiary," for the individual use of the penitentiary alone, and with no right to lease or sublet it to others for private gain. In support of this contention, plaintiff relies not only upon the act of 1887, under which it takes title, but upon certain prior acts of the general assembly.

Thus, under section 2 of the act of September 21, 1866, "to Provide for the Establishment of a Penitentiary" (13 S. C. Stat. No. 4797), it was made the duty of the commission "to select and procure a proper site, at some point if practicable where water power may be made available for manufacturing purposes within the inclosure, on which to erect suitable penitentiary buildings." And by a subsequent act, approved December 19, 1866 (13 S. C. Stat. 398), the commissioners, who had been authorized by a previous act of December 18, 1865, to sell and convey the Columbia canal, were authorized to sell it at public or private sale, at their discretion, provided that at any sale that may be made by said commissioners there be made a reservation to the state of water power *sufficient for the purposes of the state penitentiary* for all time free of charge. In a subsequent act of *September 21, 1868 (14 S. C. Stat. 83), the [490]
commissioners were vested by section 4 with like authority to sell at public or private sale, with a similar reservation to the state of water power sufficient for the purposes of the state penitentiary for all time, free of charge. In another act, approved March 12, 1878 (16 Stat. 445), to provide for the disposal of the Columbia canal, there was also a proviso in section 4 that, "in all grants that may be made, sufficient power shall be reserved to the state *for the use of the penitentiary and the* city of Columbia." So, too, in an act of February 8, 1882 (17 Stat. 855), to authorize the canal company to transfer the canal and lands to the board of directors of the penitentiary, it was provided that the board of directors should take possession on behalf of the state of the canal with its appurtenances, and, *for the purpose of providing an adequate water power for the use of the penitentiary*, were authorized to improve and develop the same. By section 6 of the same act they were authorized "to furnish to the city of Columbia, for the purpose of operating its waterworks and for other purposes, 500 horse power of water power; . . . and after reserving *for the use of the penitentiary* a power sufficient to meet *the demands of its ordinary operations and other industries conducted and carried on within its walls*, they are further authorized, with the comptroller general on behalf of the state, to lease to other persons or corporations water power upon such terms and upon such annual rental per horse power as in their judgment may be proper, and also to lease such mill sites along the line of the said canal as may be owned by the state, upon such terms as may be deemed most advantageous to the interest of the state."

It will be observed that these acts are progressively liberal to the state; that the earlier ones contemplated the use of the water power only for manufacturing purposes within the walls of the penitentiary, while the latter ones indicated that such power was also reserved for the use of the city of Columbia, for the purpose of operating its

waterworks and other purposes, as well as for leasing to others. But however cogent these acts might be to indicate that the ob-
[491]ject of the state *was to reserve to the individual use of the penitentiary the 500 horse power, it is equally clear that the act of 1887 is decisive of a change of purpose in that regard; and in providing that the right of the state to the free use of its amount of water power should be *absolute*, it meant that the directors of the penitentiary should make such use of it as they pleased, regardless of prior acts and the immediate requirements of the penitentiary. The clearer the reservation for the individual use of the penitentiary may have formerly been, the clearer the change of purpose becomes manifest by the use of the word "absolute." The theory of the plaintiff is that by the use of this word was meant simply the right of the state to the free use of the said 500 horse power, unaffected by any mutations of ownership. This, however, was already secured to the state by the previous clause of section 7, requiring the board of trustees "to furnish to the state, free of charge, on the line of the canal 500 horse power of water power." Nor are the requirements of this word met by treating it as the equivalent of "perpetual" or "for all time." In construing statutes, words are taken in their ordinary sense. No authority can be found for such a definition of the word "absolute;" nor does the context suggest it. Its most ordinary signification is "unrestricted" or "unconditional." Thus, an absolute estate in land is an estate in fee simple. 2 Black. Com. 104; *Johnson* v. *M'Intosh*, 8 Wheat. 543, 588 [5: 681, 692]; *Fuller* v. *Missroon*, 35 S. C. 314, 330; *Johnson's Admrs.* v. *Johnson*, 32 Ala. 637; *Converse* v. *Kellogg*, 7 Barb. 590, 597. In the law of insurance. that is an absolute interest in property which is so completely vested in the individual that there could be no danger of his being deprived of it without his own consent. *Hough* v. *City Fire Ins. Co.* 29 Conn. 10; *Reynolds* v. *State Mutual Ins. Co.* 2 Grant, Cas. 326; *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 452 [3 Am. Rep. 149].

We have no doubt that, in providing that the right of the state should be absolute, it was intended to permit the board of directors to do exactly what was done in this case, *i. e.*, to lease such portion of the 500 horse power as was not required for the individual
[492]use of the penitentiary. Indeed, *we perceive no other reason for the insertion of this clause. The right to use it in the penitentiary was already amply secured by clauses so frequently inserted in prior acts that no question of construction could be raised upon them, and when the act of 1887 went still further it was evidently upon the idea that the power not necessary for the penitentiary should not be wasted, but should be applied to such other uses as were conducive to the interests of the state. While the leasing of the same to the defendant may have been for private gain, the lighting of the city by electricity and the establishment of street railways was manifestly a public purpose.

If plaintiff's theory were sound the penitentiary would be unable to make use of its reserved water power unless it were also possessed of the requisite means to establish a plant, while under its actual arrangement with the defendant it grants to the latter its surplus water power, and in consideration thereof receives all such power as is necessary for its own purposes, and in addition thereto a substantial annual revenue for its other needs.

3. The remaining question as to injuries threatened and inflicted upon plaintiff's property by the entry of the defendant upon the western embankment of the canal, the digging, excavating, and removal of the earth, and the erection of buildings and machinery thereon, docs not demand an extended consideration. The court of common pleas found that plaintiff was owner of the property upon which these works were erected, but that the state, having the right to the 500 horse power, had also the incidental right to lease the same to the defendant, which took thereby the right to put its electric plant upon the banks of the canal, as well as the supplementary right to put in a steam plant to be used at times when the water power was unavailable, by reason of freshets or by necessary repairs to the canal or other causes. The supreme court did not expressly pass upon the validity of plaintiff's title to the land, but held that whether the contract conferred upon the defendant the right to erect a steam plant depended upon the fact whether it was merely incidental to or essential to the enjoyment of the water
*plant, and that, no jury having been de-[493]
manded, the court must assume that the circuit judge decided this question properly; and, even if there were error on his part in the finding of fact, it was not the subject of review by the supreme court in a law case. It needs no argument to show that neither of these rulings involved a Federal question. Whether plaintiff had a legal title to the lands was purely a local issue, and whether the erection of a steam plant by the defendant was an incident of its contract with the state penitentiary is, for the reason stated by the supreme court, not reviewable here.

In addition to this, however, the deed through which the state and the plaintiff derived their title is not in evidence before us. The answer admitted that the state did acquire a strip of land lying within the boundaries described in the bill, but denied that the buildings erected by the defendant "at any point touched upon said strip of land." The state appeared to have derived title from one Rawls, whose deed was filed in the state court, but does not appear in the record before us, and the supreme court of the state found that it could not review the finding of the court below to the effect that the plaintiff was the owner in fee of the land.

The decree of the Supreme Court of South Carolina is therefore affirmed.

PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*,

v.

LONG ISLAND LOAN & TRUST COMPANY, Executor of the Last Will and Testament of Charles R. Lynde, Deceased.

(See S. C. Reporter's ed. 493-515.)

Federal question—pendency of a suit in a Federal court.

1. A claim that a lien on property was wholly devested by foreclosure proceedings in a Federal court involves such an assertion of a right and title under an authority exercised under the United States as gives the Supreme Court of the United States jurisdiction to re-examine the final judgment of the state court.
2. The pendency of a foreclosure suit in a Federal court, in which the decree saves the rights secured by a prior mortgage, does not interfere with the negotiation of bonds secured by such prior mortgage, or impair in any degree the lien thereby created.

[No. 16.]

Argued April 11, 12, 1898. Decided January 9, 1899.

IN ERROR to the Supreme Court of the State of Ohio, to review a judgment of that court affirming a judgment of the Circuit Court of Franklin County, in that state, in favor of the plaintiff adjudging that, unless certain sums found due be paid by the defendant to the plaintiff, a certain mortgage securing certain bonds held by the plaintiff be foreclosed, and the defendant barred of its equity of redemption in the premises embraced by the mortgage. *Judgment of the Supreme Court affirmed.*

The facts are stated in the opinion.

Messrs. **Lawrence Maxwell, Jr.,** and **Charles E. Burr** for plaintiff in error.

Messrs. **E. W. Kittredge** and **Joseph Wilby** for defendant in error.

[494] *Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a final judgment of the supreme court of Ohio affirming a judgment of the circuit court of Franklin county, in that state.

[495] *The general question presented for determination is whether certain railroad property may be sold in satisfaction of a judgment obtained in 1891 by Charles R. Lynde in the circuit court of the United States for the southern district of Ohio for the amount of 36 coupon bonds, part of 1,000 bonds issued by the Columbus & Indianapolis Central Railway Company, an Ohio corporation, in the year 1864.

The bonds were secured by a deed of trust, and were made payable to William D. Thompson or bearer, on the 1st day of November, 1904, each bond reciting, among other things, that it was one of an issue of not exceeding $1,000,000, and had a special lien on all of the railway property, equipments, and franchises of the company, as mentioned in the above deed of trust, subject to prior mortgage liens of $3,200,000; that it should "be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner;" also, that it "shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee."

To each bond was attached this certificate: "I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. A. Parkhurst, Trustee."

The property and rights covered by the above deed of trust, and which were ordered to be sold by the decree in this case if the Columbus, Chicago, & Indiana Central Railway Company did not, by a named day, pay the amount found due to the plaintiff, was a line of railroad extending from Columbus, Ohio, to Indianapolis, Indiana, including a branch from Covington to Union, together with the franchises, equipment, property, tolls, and interests appertaining thereto.

The case made by the record is set forth in an extended finding of facts covering sixteen pages of the present transcript. Many of the facts so found are not necessary to be here stated. Those which bear more or less upon the present inquiry may be thus summarized:

*The Columbus & Indianapolis Central [496]
Railway Company prepared, signed, and sealed the 1,000 bonds referred to (part of which were the 36 bonds held by Lynde), and to secure the same executed and delivered the mortgage or deed of trust to Archibald Parkhurst, as trustee.

The above deed recited the consolidation of the Columbus & Indianapolis Railroad Company and the Indiana Central Railway under the name of the Columbus & Indianapolis Central Railway Company, the consolidated company becoming liable for and assuming all the just debts and liabilities of the respective constituent companies; that, for certain purposes, a new series of bonds, 1,000 in number, and each for $1,000, should be issued, dated November 1st, 1864, to be secured by a deed of conveyance covering the mortgagor company's road, its appurtenances, franchises, equipments, property, tolls, income, and interest, to a trustee to secure the payment of said bonds and interest warrants. Such a deed was made, and conveyed to A. Parkhurst, trustee, for the "purpose of assuring the punctual payment of the said 1,000 bonds and each of them to each and every person who may become the holder of the same or any of them," the mortgagor company's entire railroad from Columbus to Indianapolis, including the branch from Covington to Union, its franchises, etc., in trust to secure the bonds about to be issued by it. The deed contained all the provisions usually found in such instruments.

Parkhurst accepted the trust, and the mortgage or deed of trust was duly recorded in Ohio and Indiana.

Shortly after the signing and sealing of the 1,000 bonds they were all duly certified by the trustee in the form above stated.

Prior to January 1st, 1867, of the 1,000 bonds 790 had been duly issued *in exchange* for a like number and amount of the existing second and third mortgage bonds of the Columbus & Indianapolis Railroad Company as provided in said mortgage, and 31 of said bonds had been duly issued and *sold* by the railway company. The highest serial number of the 821 bonds so exchanged and sold was No. 833. The remaining 179 of the 1,000 bonds, including the 36 bonds described in the petition, having been delivered prior
[497] to 1870, by the trustee, Parkhurst, *to Benjamin E. Smith, as president of the company, remained in the latter's possession as president, and the companies into which the same was successively consolidated as hereinafter set forth, until the months of November and December, A. D. 1875, and the happening in those months of the events to be presently stated.

On or about the 11th day of September, 1867, the Columbus & Indianapolis Central Railway Company, which made the above mortgage of 1864, was consolidated with the Union & Logansport Railroad Company and the Toledo, Logansport, & Burlington Railroad Company, and became the Columbus & Indiana Central Railway Company; and on or about the 12th day of February, 1868, the latter company and the Chicago & Great Eastern Railroad Company were consolidated and became the Columbus, Chicago, & Indiana Central Railway Company, one of the defendants in this action.

No authority or consent was thereafter given by the board of directors of the Columbus, Chicago, & Indiana Central Railway Company for the issue or sale of the above 179 bonds, or any of them.

The Columbus, Chicago, & Indiana Central Railway Company on or about the 20th day of February made and executed its 15,000 bonds of that date, each for the sum of $1,000, bearing interest at the rate of seven per cent per annum; and in order to secure their payment executed and delivered its mortgage or deed of trust of that date to James A. Roosevelt and William R. Fosdick, trustees, conveying to them all its property, —such conveyance including the property formerly belonging to the Columbus & Indianapolis Central Railway Company that had been previously conveyed to Parkhurst, trustee. That mortgage was recorded in the states of Ohio, Indiana, and Illinois immediately after its execution.

Afterwards and before Roosevelt and Fosdick, trustees, began the foreclosure suit hereinafter mentioned, the Columbus, Chicago & Indiana Central Railway Company issued and sold of the 15,000 bonds so secured, bonds to the amount of $10,428,000 or more.

On or about the 15th day of December, A.
[498] D. 1868, the *Columbus, Chicago, & Indiana Central Railway Company made and executed its 5,000 bonds, each for the sum of $1,000, of that date and due upon the 1st day of February, A. D. 1909, with interest at seven per cent per annum, and for the purpose of securing their payment executed and delivered its second mortgage or deed of trust to Frederick R. Fowler and Joseph T. Thomas, trustees, conveying to them all its property, including the property described in the petition; which mortgage was immediately thereafter duly recorded in Ohio, Indiana, and Illinois.

It was set forth in the latter instrument that the mortgagor, in addition to the $15,000,000 of first-mortgage bonds, was then indebted for outstanding bonds as follows, to wit: Second-mortgage bonds of the Columbus & Indianapolis Central Railway Company, $821,000; income bonds of the Columbus & Indiana Central Railway Company, $1,243,000; and Chicago & Great Eastern Railway Company construction and equipment bonds, $400,000; total, $2,464,000; and that it was further indebted in other liabilities in the estimated sum of $2,500,000. It was provided in the Fowler-Thomas mortgage that, of the issue of $5,000,000 of bonds, the sum of $2,500,000, being bonds numbered 2501 to 5000 inclusive, should be set aside and used only in exchange for and to satisfy the above $2,464,000 of bonds.

The 821 second-mortgage bonds of the Columbus & Indianapolis Central Railway Company referred to in said mortgage were part of the bonds secured by the mortgage to Parkhurst, trustee.

On or about the 22d day of January, 1869, the Columbus, Chicago, & Indiana Central Railway Company leased to the Pittsburgh, Cincinnati, & St. Louis Railway Company its entire railroad and property, including the railroad and property here in question, for the term of ninety-nine years from the 1st day of February, A. D. 1869, renewable forever. And on or about the 1st day of February, 1869, possession of the leased railroad and property was delivered to the Pittsburgh, Cincinnati, & St. Louis Railway Company, which continued to hold possession thereof and to operate the same *as les- [499]
see till after the sale to which reference will be presently made.

It was provided in that lease that no bonds beyond the $15,000,000 of first-mortgage bonds secured by the mortgage to Roosevelt and Fosdick, and the $5,000,000 of second-mortgage bonds secured by the mortgage to Fowler and Thomas, and the said $2,000,000 of income bonds, should be issued by the lessor company without the consent of the board of directors of the respective parties to the lease. This lease was duly recorded in the states of Ohio, Indiana, and Illinois on or about the 29th day of May, 1873.

On the 1st and 2d days of February, 1875, Roosevelt and Fosdick commenced their actions concurrently in the circuit courts of the United States for the southern district of Ohio, the district of Indiana and the northern district of Illinois, for the foreclosure of the mortgage made to them as trustees, and for other purposes, "but," the finding states, "not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured."

In those actions William L. Scott appeared and filed a cross bill in October, 1881, claiming to be the owner of certain bonds secured by the mortgage to Roosevelt and Fosdick, and praying, among other things, for its foieclosure. But he asked no relief against the Parkhurst mortgage or the bonds secured thereby. Prior to the beginning of the foreclosure suit Thomas resigned his trust under the mortgage made to Fowler and himself, and thereafter that trust was administered by Fowler alone.

In said actions the Columbus, Chicago, & Indiana Central Railway Company, Fowler, and others were made parties defendant, and were duly served with process or entered their appearance therein.

In the bills of foreclosure the plaintiffs, among other things, prayed for the appointment of a receiver or receivers of all the railroad, equipment, and appurtenances and other mortgaged premises, and of the earnings and income, rents, issues, and profits thereof; that the net amount of such earnings should be first applied to the pay-

[500]ment of the interest on all the bonds *issued under the mortgage to the plaintiffs, and to the payment of the interest on all mortgage bonds having prior liens on the property, in such order as the court might direct; and that the balance should be applied to the payment of the sums due and in arrears to and for the sinking fund provided for in the mortgage to them for the redemption of the bonds issued under said mortgage.

Such proceedings were had in the foreclosure suits brought in the circuit courts of the United States that, on the 2d and 3d days of February, 1875, Roosevelt and Fosdick were duly appointed receivers of the railroad, equipment, and appurtenances and other mortgaged premises embraced in and covered by said mortgage, and of the earnings, income, rents, issues, and profits thereof; and they were directed not to disturb the possession of the mortgaged premises by the Pittsburgh, Cincinnati, & St. Louis Railway Company under the lease to it, but should collect and receive the rental payable by the lessee, and apply the same as provided by the further orders of the court. And in the order of appointment it was further directed that the Columbus, Chicago, & Indiana Central Railway Company forthwith transfer and convey to the receivers the said railroad equipment and appurtenances and other mortgaged premises embraced by the mortgage, and including the income, rents, issues, and profits thereof. The conveyance so ordered was duly executed and delivered to Roosevelt and Fosdick as receivers, on or about May 25th, 1875. That deed was not recorded, and the plaintiff Charles R. Lynde had no actual knowledge of its existence until the commencement of this action in 1891.

Immediately after their appointment the receivers, in pursuance of the above order, took possession and control of all said railroad and property, its income, rents, issues, and profits, subject, however, to the physical possession and operation of the railroad by the lessee. They continued in possession and control until after the sale of the railroad and the property hereinafter set forth.

Such further proceedings were had in the foreclosure suits that on the 15th, 16th, and 23d days of November, 1882, in the *several [501]
circuit courts similar decrees were entered, wherein it was adjudged that in case the Columbus, Chicago, & Indiana Central Railway Company failed for ten days to pay the sum found due in the decree the mortgage should be foreclosed and the property conveyed by it—which, as we have seen, *included all the property described in the petition herein*—should be sold for the payment of the principal and interest of said bonds, *subject to the outstanding sectional bonds prior in lien to the mortgage to Roosevelt and Fosdick, and to all other, if any, paramount liens thereon,* but free from the lien of the mortgage to Roosevelt and Fosdick; that the decree should not in any manner affect, prejudice, or preclude *the holders of the paramount liens or any of them,* but should be without prejudice to the right of them and each of them. It was also adjudged that the purchaser of the mortgaged premises should be invested with, and should hold, possess, and enjoy the same and all the rights, privileges, and franchises appertaining as fully and completely as the Columbus, Chicago, & Indiana Central Railway Company *at the commencement of the suit by Roosevelt and Fosdick held or then held and enjoyed, or was entitled to hold or enjoy, but free from liens then represented by any party to said eause.*

In that decree it was further adjudged that the sale decreed to be made, and the conveyance, after confirmation thereof, to be executed and delivered, should be valid and effectual forever, and that thereby *the defendants in said suits,* respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of the suits by Roosevelt and Fosdick,* as purchasers, encumbrancers, or otherwise, howsoever, should be forever barred and foreclosed of and from all rights, estate, and interest, claim, lien, and equity of redemption of, in or to the premises, property, rights, and interests so sold and every or any part thereof.

On or about the 10th day of January, 1883, in conformity with the decree, the said property and every part thereof was sold by masters theretofore appointed to execute the order of sale, to William L. Scott, Charles J. Osborn, and John S. Kennedy, for the sum of $13,500,000, which sum was insufficient *to [502]
pay the outstanding bonds and interest secured by the mortgage to Roosevelt and Fosdick.

Afterwards, and on or about the 30th day of January, 1883, the circuit courts for the northern district of Illinois and the district of Indiana, and on the 31st day of January, 1883, the circuit court for the southern district of Ohio,—the said purchase money having been paid,—by orders entered in those causes, duly confirmed and approved the sale, and ordered said premises and property, rights and franchises, to be conveyed to the purchasers in fee simple, in accordance with

the former decrees of those courts. Such a conveyance was made February 21st, 1883.

Subsequently, on or about the 17th day of March, 1883, Scott, Osborn, and Kennedy, with their respective wives, executed and delivered their deed of that date, conveying said premises and property, rights and franchises, to the Chicago, St. Louis, & Pittsburgh Railroad Company, which was authorized to purchase and own the same.

On or about the 10th day of June, 1890, the Chicago, St. Louis, & Pittsburgh Railroad Company was duly consolidated with the Pittsburgh, Cincinnati, & St. Louis Railway Company, together with other railway companies, under the name of and thereby became the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company.

The latter company was, at the commencement of this suit,—and through its predecessors in title has been ever since the conveyance to Scott, Kennedy, and Osborn,—in the actual, peaceable, and undisputed possession of all said railroad, premises and property, rights and franchises, including that described in the petition.

The history of the 36 bonds in suit is as follows:

On and before the 1st day of November, 1864, Benjamin E. Smith was the president of the Columbus & Indianapolis Central Railway Company. He continued to be president of that corporation and of its successors into which it was successively consolidated, until the sale of the railroad hereinbefore mentioned in 1883.

In the months of November and December, [503]1875, Smith borrowed *for his own purposes $48,000 from W. H. Newbold, Son, & Co., brokers in Philadelphia, executing and delivering to them his individual notes. At that time he had, as president of the Columbus, Chicago, & Indiana Central Railway Company, the custody and possession of the 179 hereinbefore described; and, without the knowledge, authority, or consent of that company, but falsely pretending to W. H. Newbold, Son, & Co. that he was individually the owner of such bonds, delivered certain of them, including the 36 described in the plaintiff's petition, as collateral security for the payment of his notes. He subsequently renewed his notes, with the same collateral, from time to time until about the 14th day of January, 1878, when the 36 bonds were sold by W. H. Newbold, Son, & Co., and the proceeds applied to the payment of Smith's notes. The balance was paid over to him or for his use, and no part of it was used for the benefit of the railway company.

At the time the bonds were so pledged all the past-due coupons had been cut off, and while they were so held as collateral security the subsequent coupons, as they fell due, were cut from the bonds and delivered to Smith, but were never presented for payment.

At the sale of the bonds, Newbold, Son, & Co. themselves became the purchasers of the 36 bonds, paying the full market price and buying them in good faith without knowledge of any defect in them; and thereafter they sent them to New York for sale.

In the months of May, July, and August, 1878, Lynde purchased the 36 bonds in good faith, in the usual course of business, for valuable consideration (being about ninety cents on the dollar, which was at the time the usual market price for them), without knowledge or notice of the unauthorized or fraudulent acts of Smith, and without any knowledge or notice that the bonds had not been sold by the Columbus & Indianapolis Railway Company, and thereby became the bona fide holder and owner of the bonds and the coupons thereto belonging. Before the 36 bonds had been purchased by him the railway company had not made default in the payment *of interest [504] on them, and no holder prior to Lynde had elected that the principal sum should become due.

At the time Lynde purchased the bonds the coupons due May 1st, 1878, were still attached to the bonds and were unpaid.

On or about the 27th day of August, 1878, Lynde presented the 36 bonds for registration to the secretary of the Union Trust Company, New York, which had been designated by the Columbus, Chicago, & Indiana Central Railway Company as registering agent for such bonds in the city of New York,—to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer; and the secretary then caused the same to be registered in the name of Lynde. At the time of such registration no inquiry was made by the secretary as to whether or not the bonds had been regularly issued by the Columbus & Indianapolis Central Railway Company.

The coupons maturing May 1st, 1878, on these 36 bonds, which were attached to them when Lynde purchased, were paid to the latter by the firm of A. Iselin & Co., Wall street, New York, upon presentation by Lynde of the coupons in October, 1878; and the 36 coupons maturing November 1st, 1878, were paid to Lynde by the same firm upon the presentation of the coupons in April, 1879. Iselin & Co. were acting for the receivers and a bondholders' committee,—that committee furnishing the money for taking up the coupons, and being afterwards reimbursed by the receivers. In October, 1879, Lynde presented the coupons falling due May 1st, 1879, on the 36 bonds, but Iselin & Co. then declined to pay them, which was the first knowledge or notice of any kind that he had of any discrimination against or difference between those bonds and any other bonds of the same series. And he has never received payment of any coupon on the 36 bonds or any of them since the payment to him as aforesaid of the coupons maturing in November, 1878. At the time the May and November, 1878, coupons were paid, Iselin & Co. had no knowledge but that the 36 bonds had been regularly issued and sold by the Columbus & Indianapolis Central Railway Company.

From the year 1871 until after the purchase by him of the 36 bonds, *Lynde held and [505] owned other bonds secured by the mortgage of the Columbus & Indianapolis Central Railway Company to Parkhurst, trustee, above referred to, being some of the 821 bonds before described.

The Columbus, Chicago, & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the 1st day of May, 1875, and on the 1st day of November, 1875, and the interest coupons were not paid until after June 30th, 1876, when they were paid by or on behalf of the receivers hereinbefore mentioned, all which facts were known to Lynde at the time he purchased the 36 bonds described in the petition.

At the time of the demand made by Lynde upon Parkhurst, trustee, hereinafter set forth, and at the time of the commencement of this action, interest coupons which had theretofore fallen due upon more than 700 of said 1000 bonds described in said mortgage had been paid.

On or about the 27th day of June, A. D. 1891, at Newark, in the state of New Jersey, Lynde made a personal request and demand in writing of Parkhurst, as trustee, to commence an action for the foreclosure and sale of the premises in accordance with the provisions of the deed of trust, for and on account of the default made by the Columbus & Indianapolis Central Railway Company in the payment of the coupons upon the 36 bonds; and then and there offered to the trustee sufficient security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of the premises. Parkhurst as such trustee refused to take the action requested.

The Columbus, Chicago, & Indiana Central Railway Company and the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company have neglected and refused to pay the coupons due upon each of the bonds described in the petition, being coupons from and including coupon maturing May 1st, 1879, to and including coupons maturing May 1st, 1892, the last two of which fell due since the commencement of this suit.

[506] *On the 1st day of October, 1890, the Pittsburgh, Cincinnati, Chicago, & St. Louis railway Company made its mortgage to the Farmers' Loan & Trust Company of New York, and to W. N. Jackson of Indiana, as trustee, for the purpose of securing an issue of bonds to be made by that company to amount in the total to 75,000 bonds at the par value of $1,000 each, to be issued as in said mortgage set out, and upon the property described in the answer and cross petition of the said Farmers' Loan & Trust Company filed in this cause, including the line of railroad and other property connected therewith, described in the petition of the plaintiff herein; that said mortgage was duly recorded as required by law in all of the counties in the several states through or into which that line runs; that by virtue of that mortgage there have been issued bonds to the total number of 5,318, being the bonds numbered from 1501 to 6818, both inclusive, and amounting in the total to $5,318,000; and that said bonds are now outstanding and in full force, and no default has been made in the payment of interest thereon.

As conclusions of law from the foregoing facts, the court of common pleas found the equities of the case in favor of Lynde. It held that the 36 bonds and the coupons thereto annexed were the valid and binding obligations of the Columbus & Indianapolis Central Railway Company and of the Columbus Chicago, & Indiana Central Railway Company; that Lynde was the owner and holder of those bonds and coupons, and each of them, as well as the coupons that accrued May 1st, 1879, to May 1st, 1891, inclusive; that there was due to him on such coupons, down to the entry of the decree, the sum of $47,673.37; and that, under and by virtue of the said mortgage or deed of trust described in the petition, Lynde had a valid and subsisting lien, to secure said bonds and coupons, upon the railroad property described in the petition as of November 1st, 1864, and was entitled to a decree for the payment of the sum so found due. A decree was subsequently entered in conformity to these conclusions. Upon a writ of error to the circuit court of Franklin county that judgment was affirmed. The judgment of the latter court was *also affirmed upon writ of error to the [507]
supreme court of Ohio.

While the cause was pending in the supreme court of the state, Lynde died, and the Long Island Loan & Trust Company qualified as his executor.

The first question to be considered relates to the jurisdiction of this court to review the final judgment of the supreme court of Ohio.

The contention of the defendant in error is that the record presents no Federal question which this court will review; and that the state court based its decision upon an independent ground, not involving a Federal question, but depending upon principles of general law and broad enough to sustain its judgment. Its further contention is that the supreme court of Ohio rightly held that neither Lynde nor the trustee, Parkhurst, were affected by the proceedings in the foreclosure suits instituted in the circuit courts of the United States.

Upon looking into the record, we find that the defendant railway company claimed in its answer that, if a lien at any time attached to the property in question to secure the 36 bonds purchased by Lynde, such lien was wholly devested and discharged by the above proceedings in the Federal courts, under which that company claims title. This, it would seem, was such an assertion of a right and title under an "authority exercised under the United States" as gives this court jurisdiction to re-examine the final judgment of the state court. Rev. Stat. § 709.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134, 135 [22: 588, 590, 591], which was a suit to subject certain lands in satisfaction of a debt secured by a mortgage, and for the amount of which debt judgment had been obtained,—the defense was rested upon the ground that the defendant purchased the property at a sale made under a judgment of the circuit court of the United States for the eastern district of Louisiana, in a named case, "free of all mortgages and encum-

brances and especially from the alleged mortgage of the plaintiff." This defense was not recognized by the supreme court of Louisiana, and the case was brought to this court by writ of error. One of the questions [508]*considered was as to the jurisdiction of this court under the act of February 5th, 1867, which gives a writ of error to the highest court of a state in which a decision in the suit could be had, "where any title, right, privilege, or immunity is claimed under, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under . . . such authority." U. S. Rev. Stat. 709, 14 Stat. at L. 385, chap. 28. Mr. Justice Bradley, delivering the opinion of the court, said: "Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts." Having disposed of the question of jurisdiction, the court then inquired whether the state court in overruling the defense, had given proper validity and effect to the judgment of the circuit court of the United States. Upon this point the court said: "The only effect that can be justly claimed for the judgment in the circuit court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the circuit court of the United States as such citizens; and consequently that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the state, and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed [509]for the judgment of the *circuit court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If by the laws of the state a judgment like that rendered by the circuit court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the circuit court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judgment of the circuit court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court. We have examined this question with some care, and have come to the conclusion that it would not."

The same question was again before this court in *Crescent Live Stock L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L.* 120 U. S. 141, 146 [30: 614, 617], which was an action for malicious prosecution, the defense being that the existence of probable cause had been previously determined by a judgment in the circuit court of the United States. It was contended that the supreme court of the state failed to give proper effect to that judgment, and thereby denied to the defendant a right arising under the authority of the United States. The case came here upon writ of error, and the jurisdiction of this court to review the final judgment was sustained. Mr. Justice Matthews, speaking for the court, said: "It must therefore be conceded that the sole question to be determined is, Did the supreme court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the circuit court of the United States, subsequently reversed by this court? It is argued by the counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; *and that the rul- [510]
ing in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135 [22: 588, 591], 'no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case, under such circumstances.' *Embry* v. *Palmer*, 107 U. S. 3 [27: 346]. It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the supreme court of Louisiana to the decrees of the circuit court of the United States here drawn in question. The decree of the circuit court was relied upon in the state court as a complete defense to the action for malicious prosecution, on the ground

that it was conclusive proof of probable cause. The supreme court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever."

According to these decisions and in view of the statute giving this court authority to re-examine the final judgment of the highest court of a state denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the circuit courts of the United States under which the plaintiff in error claims title to the lands and property in question.

The plaintiff in error contends that the state court did not give due effect to the decrees of the circuit court of the United States in the suits instituted by Roosevelt
[511] and Fosdick,* in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question, but postponed or subordinated those rights to a lien upon such property, which it is alleged, was created or attempted to be created while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for purposes of being administered.

Did Lynde, under the circumstances stated in the finding of facts, acquire a good title, as between himself and the mortgagor company, and the companies which succeeded it by consolidation, to the 36 bonds purchased by him from Newbold & Son, as well as the right to claim the benefit of the mortgage executed to Parkhurst? Referring to the facts recited in the finding, the supreme court of Ohio said: "Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to the sale or delivery of the bonds, and, as an owner cannot be deprived of his property without his consent, no title passed. It is true that these bonds were negotiated to Newbold & Son without the knowledge or consent of the company; but such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. *Indiana & I. C. Railway Co.* v. *Sprague*, 103 U. S. 756 [26: 554]; *Fearing* v. *Clark*, 16 Gray, 74. Independently of the rules of law designed to protect and give currency to negotiable paper, those principles of natural
justice universally *applicable to the affairs [512]
of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He found them for sale, before they were due, in the market, where such securities are usually offered for sale, and bought them at their fair market value without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York city, the agents of the makers, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him? The maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was, up to and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances, what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him? If the maker of these bonds and those who must abide by its title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon considerations of public policy." 55 Ohio St. 23, 45.

The state court adjudged that there was no rule of law arising out of the public policy of the state, as manifested by state legislation, that required it to deny to the holders of these bonds the rights and privileges per-
taining to commercial *paper purchased in [513]
good faith in the ordinary course of business.

Assuming that this question of general law was correctly determined by that court, we are now to inquire what effect, if any, the proceedings in the foreclosure suits instituted by Roosevelt and Fosdick in the circuit courts of the United States had upon the right of Lynde, as the bona fide holder of the 36 bonds, to the security furnished by the Parkhurst mortgage.

We have seen that when Lynde purchased the 36 bonds to secure which, with other bonds, the Parkhurst mortgage had been previously executed, the property described in that mortgage and here in question was in the actual custody of the circuit courts of the United States by receivers appointed in the foreclosure suits brought by Roosevelt and Fosdick. The contention of the plaintiff

in error is that the property was a fund in those courts to abide the event of the litigation in them, and that, pending the proceedings in those courts and their actual possession of the property, it was impossible that Lynde, by purchasing the 36 bonds, could have acquired any lien thereon which the law would recognize and enforce.

The principal authority cited in support of this contention is *Wiswall* v. *Sampson*, 14 How. 52, 68 [14: 322, 329], in which it was held that while real estate is "in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose." If the rule were otherwise, the court said, the whole fund might pass from its hands before final decree, and the litigation become fruitless. We do not perceive that the principle announced in *Wiswall* v. *Sampson* controls the determination of the present case. If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser. But nothing was done by Lynde, after the institution of the foreclosure suits and pending
[514]proceedings *therein, which was inconsistent with or tended to defeat the object of those suits. He only purchased the bonds in question, and such purchase was not hostile to the possession by the circuit courts in the foreclosure suits of the property mortgaged to secure them, simply because by such purchase he succeeded to an interest in the Parkhurst mortgage. The foreclosure suits proceeded to a final decree without any attempt to interfere with the custody and control of the property for the purposes avowed in those suits; for the bill filed by Roosevelt and Fosdick showed upon its face, that no relief was asked as against the Parkhurst mortgage or the bonds secured by it. It was distinctly found, and it is not disputed, that the Roosevelt-Fosdick suits were for the foreclosure of the mortgage in which they were named as trustees, "but not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured." And by the final decree in those suits the mortgaged property was directed to be sold subject to the outstanding bonds prior in lien to the Roosevelt-Fosdick mortgage, and to all other, if any, paramount liens thereon. The Parkhurst mortgage was prior in date to the Roosevelt-Fosdick mortgage; and the decree in the foreclosure suits expressly declared that nothing contained in it should "in any manner affect, prejudice, or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the rights of them and each of them." Thus the decree expressly saved the rights of those who held bonds secured by mortgage prior in date to the mortgage to Roosevelt and Fosdick. It bound only the defendants in the foreclosure suits, and all persons claiming or to claim under them or any of them, subsequent to the institution of those suits. Strictly speaking, the lien that attended the 36 bonds purchased by Lynde did not arise after the institution of the foreclosure suits, although Lynde's purchase was pending the proceedings in those suits and while the property was in the hands of receivers. That lien had its origin in the execution and delivery of the Parkhurst mortgage and the authentication by the trustee of the bonds named in it, and when any of those bonds became the property of a bona fide *holder, the lien given to secure [515]
them related back to the date of the mortgage, which was long prior to the institution of the foreclosure suits. Besides, Parkhurst, the trustee in the prior mortgage, was not made a party to the foreclosure suits, and neither he nor those whose interests he was appointed to represent were bound by the decree or any of its provisions. The rule is well settled that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to such proceedings. *United Lines Telegraph Co.* v. *Boston Safe Deposit & Trust Co.* 147 U. S. 431, 448 [37: 231, 237]. It would seem, therefore, clear that the pendency of the foreclosure suits did not interfere with the negotiation or transfer of the bonds secured by the prior Parkhurst mortgage, nor did the decree in those suits impair in any degree the lien created by the Parkhurst mortgage, which antedated the mortgage to Roosevelt and Fosdick. The mere purchase of the 36 bonds by Lynde, and the acquisition by him, in consequence of such purchase, of an interest in the Parkhurst mortgage, cannot be regarded as hostile to the possession taken by the circuit courts of the United States of the property embraced by the Roosevelt-Fosdick mortgage for the purpose of selling it in satisfaction of the debts secured by that mortgage, but subject to prior paramount liens, such as the lien created by the Parkhurst mortgage.

We are of opinion, for the reasons stated, that the state court did not fail to give due effect to the several decrees in the circuit courts of the United States in the foreclosure suits instituted by Roosevelt and Fosdick, when it held that those decrees did not prevent the defendant in error from claiming the benefit of the lien created by the mortgage to Parkhurst to secure the payment of the bonds purchased by Lynde from Newbold & Son.

The judgment below is affirmed.

WILLIAM C. FITTS, as Attorney General of [516]
the State of Alabama, A. H. Carmichael, as Solicitor of the Eleventh Judicial Circuit of the State of Alabama, and William H. Gilliam, *Appts.*,

v.

CHARLES McGHEE and Henry Fink, as Receivers of the Memphis & Charleston Railroad, and the Memphis & Charleston Railroad Company.

(See S. C. Reporter's ed. 516-533.)

Suit against a state—injunction to restrain criminal proceedings in a state court—habeas corpus.

1. A suit to restrain officers of a state from taking any steps by means of judicial proceedings, in execution of a state statute to which they do not hold any special relation, is really a suit against the state within the prohibition of the 11th amendment of the Federal Constitution.
2. The circuit court of the United States sitting in equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in a state court.
3. The power of the Federal courts to interfere by habeas corpus with the trial of indictments found in state courts, on the ground that the state statutes under which the indictments are found are repugnant to the Federal Constitution, laws, or treaties, will not be exercised in the first instance, unless there are exceptional or extraordinary circumstances to require it, but the party will be left to make his defense in the state court.

[No. 130.]

Argued October 26, 1898. Decided January 3, 1899.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Alabama in favor of the plaintiffs, the appellees in this court, making perpetual certain injunctions against taking any steps under a statute of Alabama fixing the tolls to be charged on a bridge across the Tennessee river, and providing penalties in case of violation, on the ground that the said statute was repugnant to the Federal Constitution. *Judgment of the Circuit Court reversed,* with directions to dissolve the injunction restraining the institution or prosecution of indictments or other criminal proceedings in the state court, and to dismiss the suit brought by the receivers against the Attorney General of the State of Alabama and the Solicitor of the Eleventh Judicial Circuit of the State, etc.

Statement by Mr. Justice **Harlan:**

An act of the general assembly of Alabama, approved February 9th, 1895, prescribed certain maximum rates of toll to be charged on the bridge across the Tennessee river between the counties of Colbert and Lauderdale in that state, and known as the Florence bridge. It also declared that should the owners, lessees, or operators of the bridge, by themselves or agents, demand or receive from any person a higher rate of toll than was prescribed, he or they should forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public and *ex officio* justice of the peace of either of the counties named.

When that act was passed the cases of *Samuel Thomas* v. *Memphis & Charleston Railroad Company* and *Central Trust Company of New York* v. *Memphis & Charleston Railroad Company* were pending in the court below; and on the 14th day of February, 1895, Charles M. McGhee and Henry Fink, receivers of the Memphis & Charleston Railroad in those causes,—having first obtained
[517] leave to do so,—*filed a bill in the name of themselves and the railroad company against "the State of Alabama, William C. Oates, as Governor of the State of Alabama, and William C. Fitts, as Attorney General of the State of Alabama."

After setting out their appointment as receivers, the order of the court below authorizing the institution of the present suit, the official character of the several defendants, the ownership by the Memphis & Charleston Railroad Company of the bridge in question, the above act of February 9th, 1895, the manner in which that company acquired the right to construct and own the Florence bridge, the charters of the railroad company granted by Tennessee and Alabama, the purchase in 1850 of the bridge by the railroad company under the charter granted by Alabama, and its management of the bridge under the charter of the Florence Bridge Company, the plaintiffs averred that the act incorporating the bridge company was a contract between the state and the owners of the bridge; that the rights acquired by that company under its charter passed to the Memphis & Charleston Railroad Company; that the rates of toll fixed by the act were arbitrary, unreasonable, and amounted virtually to the confiscation of the plaintiffs' property, and that the act was in violation of the Constitution of the United States in that such a legislative enactment deprived the owners of the bridge of their property without due process of law, and denied to them the equal protection of the laws.

It was further alleged that the clause in the act imposing a penalty for demanding or receiving higher rates of toll than those prescribed was intended and had the effect to deter the plaintiffs from questioning by legal proceedings the validity of such legislation.

After stating that they were remediless except by a bill in equity, the plaintiffs prayed that "process of subpœna be issued to and served upon the state of Alabama, the said Wm. C. Oates, as governor of the state of Alabama, and Wm. C. Fitts, as the attorney general of the state of Alabama," requiring them, "in behalf of the state," to answer the bill, and that "an injunction be granted prohibiting and restraining the *said Wm. C. [518]
Oates, as governor of the state of Alabama, and the said Wm. C. Fitts, as the attorney general of the state of Alabama, and all persons whomsoever from instituting any proceeding against the complainants or either of them under the forfeiture clause above set out in the 2d section of said act of the general assembly of Alabama."

Subpœnas to appear, answer, or demur to the bill, were issued and served upon defendant Oates, as governor, and upon defendant Fitts, as attorney general of the state. A subpœna was also issued against the state, and served upon the defendant Oates, as governor.

A temporary injunction was issued, restraining and enjoining William C. Oates, as governor of Alabama, and William C. Fitts, as attorney general of the state, and "all persons whomsoever, from instituting or prosecuting any proceedings" against the plaintiffs, or either of them, under the for-

feiture clause contained in the above act of February 9th, 1895.

The defendants appeared specially for the purpose of moving, and did move, that the bill be dismissed upon the ground that the suit was one against the state, and prohibited by the Constitution of the United States.

The plaintiffs, by leave of the court, amended their bill by adding thereto paragraphs to the effect that frequent and numerous demands had been made by persons on foot, on horseback and in vehicles, of the toll-gate keeper at the bridge to pass them over at the rate of toll fixed by the act, and upon the refusal of the toll-gate keeper to permit them to pass by the payment of the rates so fixed, and his requiring them to pay the rates of toll fixed by the plaintiffs, they had paid the tolls so required of them under protest and had threatened to institute suit or suits against the plaintiffs under the penalty clause of the act, and had also threatened to procure proceedings to be instituted in the courts by the governor and attorney general in the name of the state, by a mandamus or otherwise, to compel the plaintiffs to pass people over the bridge at the rates fixed by the act; that those persons had also threatened to procure proceedings to be instituted in the name of the state for a forfeiture of
[519] the franchise of the Memphis *& Charleston Railroad Company in and to the bridge property because of the failure and refusal to observe and obey the requirements of the act in reference to the rates of toll to be charged over the bridge; and that the persons so protesting and threatening suits were too numerous to be made parties to that suit. Special reference was made to William H. Gilliam, a resident citizen of Colbert county, Alabama, as one of the parties or persons who had made threats of such suits and proceedings.

The bill was amended by making Gilliam a party defendant, and by adding, before the prayer for general relief, a prayer "that an injunction be granted prohibiting and restraining the said William C. Oates, as the governor of the state of Alabama, and the said Wm. C. Fitts, as the attorney general of the state of Alabama, and the said Wm. H. Gilliam and all persons whomsoever, from instituting or procuring the institution of any proceedings against these complainants, or either of them, by mandamus or otherwise, to compel the observance and obedience of said act in reference to the rate of tolls fixed thereby over the said bridge, and also from instituting or procuring to be instituted any proceeding against these complainants, or either of them, for the forfeiture of the franchise of the Memphis & Charleston Railroad Company in and to the said bridge on account of the refusal to charge the rates of toll over it fixed by said act."

Subsequently an order was made, enjoining and restraining William C. Fitts, as attorney general of the state of Alabama, and William H. Gilliam and all persons whomsoever, until the further order of the court, from instituting or procuring the institution of any proceeding against the plaintiffs or either of them, by mandamus or otherwise, to compel the observance and obedience of the act in reference to the rate of tolls fixed thereby over the Florence bridge, and from instituting or procuring to be instituted any proceedings against the plaintiffs or either of them for the forfeiture of the franchise of the Memphis & Charleston Railroad Company in and to the bridge on account of the refusal to charge the rates of toll over it fixed by the act.

*At a later date in the progress of the cause [520]
the plaintiffs, by leave of the court, inserted the following averments in the bill:

"Complainants would further show unto your honors that at the fall term 1895 of the circuit court of Lauderdale county, Alabama, a large number of indictments—some one hundred in number—were found by the grand jury of said court against Thomas Clem and G. W. Brabson, who are the toll-gate keepers at the public crossing of said bridge for complainants, the receivers of the Memphis & Charleston Railroad Company. These indictments were found under section 4151 of the Criminal Code of Alabama, which reads as follows: '4151 (4401). Any person who, being or acting as an officer, agent, servant, or employee of any turnpike company, macadamised road company, or other incorporated road or bridge company, takes, receives, or demands any greater charge or toll for travel or passage over such road or bridge than is authorized by the charter of such company, or, if the charter does not specify the amount of toll to be charged or taken, fixes, prescribes, takes, receives, or demands any unreasonable charge or toll, to be determined by the jury, must, on conviction, be fined not more than one hundred dollars.' Complainants allege and show unto your honors that these indictments were improperly and wrongfully found against said toll-gate keepers, and they are being improperly prosecuted thereby, because the rate of toll which they have charged is only the rate which has heretofore been fixed by the receivers, which was fixed by them before the passage of said unconstitutional act of the general assembly of Alabama reducing the tolls, and is the same rate of tolls which have been charged for more than twenty years by the Memphis & Charleston Railroad Company for the use by the public of said bridge, and the tolls so charged by said toll-gate keepers were authorized by this court, and said indictments have been found and are being prosecuted in violation of the authority of this court and of its orders in the premises, and in violation of the constitutional rights and privileges under the Constitution of the United States, secured* to [521]
the owners of said bridge in the charging of tools before crossing it. A. H. Carmichael is the solicitor for said judicial circuit, and as such is engaged in the prosecution of said indictments."

The plaintiffs asked that Carmichael, as such solicitor, be made a party defendant; that all needful process issue against him; and that a restraining order be issued en-

joining him and all other persons from the prosecution of said indictments.

By a supplemental bill it was averred that writs of arrest had been issued upon the above indictments against Clem and Brabson, and placed in the hands of the sheriff, who in execution thereof had arrested or would arrest the said employees of the receivers. It was further alleged that these criminal proceedings were in contempt of the order of the court below appointing the receivers, as well as in violation of the injunction which the court had issued, and which still remained in force, "enjoining the said governor, attorney general, and all persons whomsoever from instituting any suits or proceedings" under the above act of the state.

After referring to the indictments and the purpose on the part of the state officers to proceed under them, the plaintiffs prayed that the act of February 9th, 1895, be declared repugnant to the Constitution of the United States, and invalid, inoperative, null, and void, and that an injunction be granted, "prohibiting and restraining William C. Oates, as governor of the state of Alabama; William C. Fitts, as attorney general of the state of Alabama, W. H. Gilliam, and A. H. Carmichael, solicitor as aforesaid, and all other persons whomsoever, from instituting any proceeding against these complainants or either of them, their servants or agents, under the forfeiture clause set out in said 2d section of said act of the general assembly of Alabama;" that said officers "and all persons whomsoever be restrained and enjoined from instituting or procuring the institution of any proceeding against these complainants or either of them, their agents, servants, or employees, by a mandamus or otherwise, to compel the observance and obedience to said act in reference to the rate of tolls fixed thereby over said bridge, and also from insti-
[522] tuting *or procuring to be instituted any proceeding against these complainants or either of them for the forfeiture of the franchise of the Memphis & Charleston Railroad Company in and to said bridge on account of the refusal to charge the rates of toll over it fixed by the said act;" and that "the said defendants and said Carmichael, solicitor as aforesaid, and all persons whomsoever, be restrained and enjoined from prosecuting said indictments against the said servants, agents, and employees of the complaintnts, or from interfering in any way, under and by virtue of the color of said unconstitutional act, with the rights, privileges, and franchises and property of the complainants, their servants or agents, with regard to said bridge."

At this stage of the proceedings the plaintiffs dismissed the cause so far as the state was made a party defendant, and amended the bill by striking out its name as a defendant, as well as the words "in behalf of the state." The cause was then heard upon a motion by the governor and attorney general to dismiss the bill upon the ground that the suit was one against the state in violation of the Constitution of the United States.

Upon the filing of the last amendment to the original bill, it was ordered by the court that A. H. Carmichael, as solicitor for the eleventh judicial circuit of Alabama, be enjoined and restrained temporarily and until the further orders of the court "from instituting or prosecuting as such solicitor any indictments or criminal proceedings against anyone for a violation of the alleged unconstitutional act of the legislature of Alabama described in the bill."

The next step in the proceedings was the suing out of writs of habeas corpus by Clem and Brabson, who were under arrest on process issued on the above indictments. Each of the petitioners was released upon his own recognizance in the sum of $150, conditioned that he would appear in court from day to day until discharged.

Gilliam filed an answer, insisting upon the validity of the act of the legislature which had been assailed by the bill as unconstitutional.

*A decree *pro confesso* was taken against [523]
the governor and attorney general of the state, as well as Carmichael, as solicitor aforesaid, all in their respective official capacities. But that decree was set aside, and the cause was heard upon demurrers by the various defendants. The demurrers were overruled, and answers were filed by the governor and attorney general of the state and by the solicitor of the eleventh judicial circuit. There were also motions to dissolve the injunction granted in the case, upon the ground that there was no equity in the bill, and that the injunctions were in violation of the Constitution and statutes of the United States.

The final decree in the case was as follows: "This cause coming on to be heard, the submission at the former term of the court is hereby set aside, and, it being made to appear to the court that the defendant William C. Oates has ceased to be the governor of the state of Alabama, it is thereupon ordered that the said cause be discontinued as to him, and the cause is now resubmitted at this term of the court for final decree upon the pleadings and testimony offered by the parties, and upon due consideration thereof it is considered by the court that the complainants are entitled to relief. It is thereupon ordered, adjudged, and decreed that the act of the legislature of the state of Alabama referred to and set up in the original bill of complaint in the cause, which act was approved February 9th, 1895, and entitled 'An Act to Fix the Maximum of Tolls to be Charged by the Owners, Lessees, or Operators of the Road Bridge across the Tennessee River, between the Counties of Colbert and Lauderdale, and Known as the Florence Bridge, and to Fix the Penalty for Demanding or Receiving a Higher Rate of Tolls,' is violative of the constitutional rights of the owners of said bridge and of the complainants as their representatives, in that it fixes a rate of tolls for said bridge which are not fairly and reasonably compensatory, and it is therefore hereby declared to be invalid and inoperative, and the injunctions heretofore granted in the cause are hereby made perpetual. It is further ordered, adjudged, and decreed that the de-

fendants pay the costs of this proceeding, for which let execution issue."

Messrs. **William J. Wood** and *William C. Fitts,* Attorney General of Alabama, for appellants:

In cases where state is a party on the record the question of jurisdiction is decided by inspection.

Osborn v. *Bank of United States,* 9 Wheat. 852, 6 L. ed. 231.

A suit against the officers of a state as representing the state's action and liability, and thus making it the real party against which the judgment will so operate as to compel it to specifically perform its contracts, cannot be maintained.

Reagan v. *Farmers' Loan & T. Co.* 154 U. S. 389, 38 L. ed. 1021, 4 Inters. Com. Rep. 560; *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 35 L. ed. 363; *Covington & L. Turnp. Co.* v. *Sandford,* 164 U. S. 578, 41 L. ed. 560; *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649, 39 L. ed. 567; *Chicago & G. T. R. Co.* v. *Wellman,* 143 U. S. 339, 36 L. ed. 176.

A court of equity has no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction.

People v. *Canal Board,* 55 N. Y. 394; *Moses* v. *Mobile,* 52 Ala. 198.

Injunction will not lie to restrain the action or discretion of executive officers of the state.

Mississippi v. *Johnson,* 4 Wall. 475, 18 L. ed. 437; *State, Taylor,* v. *Lord,* 28 Or. 498; *People, Sutherland,* v. *The Governor,* 29 Mich. 320, 18 Am. Rep. 89.

The present doctrine of this court is that the charge for rates must be reasonable, the rights of the public considered, and that each case must be examined in the light of its peculiar facts and circumstances.

Smith v. *Ames,* 169 U. S. 466, 42 L. ed. 819; *Covington & L. Turnp. Co.* v. *Sandford,* 164 U. S. 578, 41 L. ed. 560; *Chicago & G. T. R. Co.* v. *Wellman,* 143 U. S. 339, 36 L. ed. 176; *Budd* v. *New York,* 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *Dow* v. *Beidelman,* 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56.

Messrs. **Milton Humes** and *Paul Speake,* for appellees:

The suit is clearly brought in the proper forum, regardless of the amount involved or the citizenship of the parties.

Re Tyler, 149 U. S. 164, 37 L. ed. 689; *Re Swan,* 150 U. S. 637, 37 L. ed. 1207; *White* v. *Ewing,* 159 U. S. 36, 40 L. ed. 67; *Ex parte Chamberlain,* 55 Fed. Rep. 706; *Ledoux* v. *La Bee,* 83 Fed. Rep. 761; *Clark* v. *McGhee,* 59 U. S. App. 69, 87 Fed. Rep. 791, 31 C. C. A. 321.

A bill of this character is the method best calculated to test the constitutionality of the act, and thus to settle litigation and prevent a multiplicity of suits.

Chicago, M. & St. P. R. Co. v. *Minnesota,* 134 U. S. 459, 460, 33 L. ed. 982, 983, 3 Inters. Com. Rep. 209; *St. Louis & S. F. R. Co.* v. *Gill,* 156 U. S. 649, 39 L. ed. 567.

The suit is not one against the state within the meaning of the 11th Amendment to the Federal Constitution.

Davis v. *Gray,* 16 Wall. 203, 21 L. ed. 447; *Tomlinson* v. *Branch,* 15 Wall. 460, 21 L. ed. 189; *Litchfield* v. *Webster County,* 101 U. S. 773, 25 L. ed. 925; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200; *Board of Liquidation* v. *McComb,* 92 U. S. 531, 23 L. ed. 623; *Poindexter* v. *Greenhow,* 114 U. S. 270, 29 L. ed. 185; *Re Tyler,* 149 U. S. 164, 37 L. ed. 689; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. ed. 819; *Scott* v. *Donald,* 165 U. S. 58, 41 L. ed. 632.

An injunction will lie against officers of the state to prevent the execution of laws which violate rights under the Constitution of the United States.

Central Trust Co. v. *Citizens' Street R. Co.* 82 Fed. Rep. 1; *Indianapolis Gas Co.* v. *Indianapolis,* 82 Fed. Rep. 245; *Mutual L. Ins. Co.* v. *Boyle,* 82 Fed. Rep. 705.

The act of February 9, 1895, impairs the obligation of the contract embraced in the charter of the Florence Bridge Company, whereby that company and its successors are granted the right to fix rates within a certain limit, that is, not to exceed "the present rate of ferriage at said ferry."

Stone v. *Yazoo & M. Valley R. Co.* 62 Miss. 642, 52 Am. Rep. 193; *Railroad Commission Cases,* 116 U. S. 307, 29 L. ed. 636.

The act of February 9, 1895, is in violation of the Federal Constitution, in that it deprives appellees of their property without due process of law.

Stone v. *Farmers' Loan & T. Co.* 116 U. S. 330, 29 L. ed. 644; *Covington & L. Turnp. Road Co.* v. *Sandford,* 164 U. S. 578, 41 L. ed. 560; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. ed. 819.

*Mr. Justice **Harlan,** after stating the facts as above reported, delivered the opinion of the court: [524]

The principal question before us is whether this suit is one of which a circuit court of the United States may take cognizance consistently with the Constitution of the United States.

From the history given of the proceedings below it appears that the circuit court adjudged—

That the legislative enactment of February 9th, 1895, was unconstitutional and void in that it did not permit the owners of the Florence bridge, and the plaintiffs as their representatives, to charge rates of toll that were fairly and reasonably compensatory; and,

That the defendants Fitts and Carmichael, holding respectively the offices of attorney general of Alabama and solicitor of the eleventh judicial circuit of the state, should not institute or prosecute any indictment or criminal proceeding against anyone for violating the provisions of that act.

Is this a suit against the state of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power

of the United States shall not extend to suits against a state by citizens of such state. But it has been adjudged by this court upon full consideration that a suit against a state by one of its own citizens, the state not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states. *Hans* v. *Louisiana,* 134 U. S. 1, 10, 15 [33: 842, 845, 847]; *North Carolina* v. *Temple,* 134 U. S. 22 [33: 849]. It is therefore an immaterial circumstance in [525]*the present case that the plaintiffs do not appear to be citizens of another state than Alabama, and may be citizens of that state.

What is and what is not a suit against a state has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain, in each case as it arises, whether it falls on one side or the other of the line marked out by our former decisions.

We are of opinion that the present case comes within the principles announced in *Re Ayers,* 123 U. S. 443, 485, 496–500, 505 [31: 216, 223, 226–228, 230]. It appears from the report of that case that the circuit court of the United States for the eastern district of Virginia, in *Cooper* v. *Marye,* made an order forbidding the attorney general of Virginia and other officers of that Commonwealth from bringing suits under a certain statute of Virginia, in its name and on its behalf for the recovery of taxes, in payment of which the taxpayers had previously tendered tax-receivable coupons. The state officers did not obey this order, and having been proceeded against for contempt of court, they sued out writs of habeas corpus, and asked to be discharged upon the ground that the circuit court had no power to make the order for disobeying which the proceedings in contempt were commenced. This court said that the question really was whether the circuit court had jurisdiction to entertain the suit in which that order was made, the sole purpose and prayer of the bill therein being by final decree to enjoin the defendants, officers of Virginia, from taking any steps in execution of the statute the validity of which was questioned.

It was adjudged that, although Virginia was not named on the record as a party defendant, nevertheless, when the nature of the case against its officers was considered, that Commonwealth was to be regarded as the actual party in the sense of the constitutional prohibition. The court said: "It follows, therefore, in the present case, that the personal act of the petitioners sought to be restrained by the order of the circuit court, reduced to the mere bringing of an [526]action *in the name of and for the state against taxpayers, who, although they may have tendered the tax-receivable coupons, are charged as delinquents, cannot be alleged against them as an individual act in violation of any legal or contract rights of such taxpayers." Again: "The relief sought is against the defendants, not in their individual, but in their representative, capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains—supposing that such a suit could be maintained—it would have been subjected to the jurisdiction of the court by process served upon its governor and attorney-general, according to the precedents in such cases. *New Jersey* v. *New York,* 5 Pet. 284, 288, 290 [8: 127, 128, 129]; *Kentucky* v. *Dennison,* 24 How. 66, 96, 97, [16: 717, 725]; Rule 5 of 1884, 108 U. S. 574 [20: 901]. If a decree could have been rendered enjoining the state from bringing suits against its taxpayers, it would have operated upon the state only through the officers who by law were required to represent it in bringing such suits, *viz.,* the present defendants, its attorney general, and the commonwealth's attorneys for the several counties. For a breach of such an injunction, these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with a single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

One of the arguments made in the *Ayers Case* was that the circuit court had jurisdiction to restrain by injunction officers *of [527]
the state from executing the provisions of state enactments void by reason of repugnancy to the Constitution of the United States. In support of that position reference was made to *Osborn* v. *Bank of the United States,* 9 Wheat. 738 [6: 204]. But this court said: "There is nothing, therefore, in the judgment in that cause, as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that case, in the argument at the bar and in the opinion of the court, that an action at law would lie, either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselves under the authority of a void act of the general assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission

of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the state, and not to be one in which the state was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the state. This they were not permitted to do, because the authority under which they professed to act was void." And these were stated by the court to be the grounds upon which it had proceeded in other cases, —citing *Allen* v. *Baltimore & Ohio Railroad Co.* 114 U. S. 311 [29: 200]; *Poindexter* v. *Greenhow*, 114 U. S. 270, 282 [29: 185, 190]; *United States* v. *Lee*, 106 U. S. 196 [27: 171]. The court further said: "The very
[528] object and purpose of the *Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

It was accordingly adjudged that the suit in which injunctions were granted against officers of Virginia was in substance and in law one against that commonwealth, of which the circuit court of the United States could not take cognizance.

If these principles be applied in the present case there is no *escape from the conclu- [529]
sion that, although the state of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. As a state can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of February 9th, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state. In the case supposed they would be compelled to make good the state's claim to the property, and could not shield themselves against suit because of their official character. *Tindal* v. *Wesley*, 167 U. S. 204, 222 [42: 137, 143]. No such case is before us.

It is to be observed that neither the attorney general of Alabama nor the solicitor of the eleventh judicial circuit of the state, appears to have been charged by law with any special duty in connection with the act of February 9th, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were *Poindexter* v. *Greenhow*, 114 U. S. 270 [29: 185]; *Allen* v. *Baltimore & Ohio Railroad Co.* 114 U. S. 311 [29: 200]; *Pennoyer* v. *McConnaughy*, 140 U. S. 1 [35: 363]; *Re Tyler*, 149 U. S. 164 [37: 689]; *Reagan* v. *Farmers' Loan and Trust Co.* 154 U. S. 362, 388 [38: 1014, 1020, 4 Inters. Com. Rep. 560]; *Scott* v. *Donald*, 165 U. S. 58 [41: 632]; and *Smyth* v. *Ames*, 169 U. S. 466 [42: 819]. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit
*against individuals holding official positions [530]
under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held

any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as the executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.

What has been said has reference to that part of the final decree which holds the act of February 9th, 1895, to be invalid and inoperative. Whether the owners of the bridge, and the plaintiffs as their representa-
[531] tives, were denied by the statute *fair and reasonable compensation for the use of the property by the public, was a question that could not be considered in this case. That is not a matter to be determined in a suit against the state; for of such a suit the circuit court could not take cognizance.

It remains only to consider the case so far as the final decree assumes to enjoin the officers of the state from instituting or prosecuting any indictment or criminal proceedings having for their object the enforcement of the statute of 1895. We are of opinion that the circuit court of the United States, sitting in equity, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court. This view is sustained by *Re Sawyer*, 124 U. S. 200, 209, 210 [31: 402, 405]. It was there said: "Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn* v. *Holme*, 21 How. 481, 484-487 [16: 198, 199, 200]; *Thompson* v. *Central Ohio Railroad Co.* 6 Wall. 134 [18: 765]; *Heine* v. *Levee Commissioners*, 19 Wall. 655 [22: 223]." Again: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes and misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative departments of the government." At the present term of the court, in *Harkrader* v. *Wadley*, 172 U. S. 148, 169, 170 [*ante*, 399], we said: "In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state." Again: "Much more are we of opinion that a circuit court of the United States, sitting in equity in the administration of civil remedies, has no jurisdiction to stay by injunction proceedings pending in a state court in the name of a state to *enforce the criminal laws of such [532]
state." Undoubtedly, the courts of the United States have the power, under existing legislation, by writ of habeas corpus, to discharge from custody any person held by state authorities under criminal proceedings instituted under state enactments, if such enactments are void for repugnancy to the Constitution, laws, or treaties of the United States. But even in such case we have held that this power will not be exercised, in the first instance, except in extraordinary cases, and the party will be left to make his defense in the state court. *Ex parte Royall*, 117 U. S. 241 [29: 868]; *New York* v. *Eno*, 155 U. S. 89 [39: 80]; *Whitten* v. *Tomlinson*, 160 U. S. 231 [40: 406]; *Baker* v. *Grice*, 169 U. S. 284 [42: 748]. But the existence of the power in the courts of the United States to discharge upon habeas corpus by no means implies that they may, in the exercise of their equity powers, interrupt or enjoin proceedings of a criminal character in a state court. The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the act of 1895 in respect of tolls. Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised and is under a duty to enforce the mandates of the supreme law of the land. *Robb* v. *Connolly*, 111 U. S. 624 [28: 542]. And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court.

It appears from the record that Clem and Brabson were indicted in the state court under section 4151 of the Criminal Code of

Alabama. Having been arrested under those indictments, they sued out, as we have seen, writs of habeas corpus upon the ground that they were indicted for taking tolls in violation of the above act of February 9th, 1895, which they alleged to be unconstitutional, [533]and that their arrest was in disregard *of the injunction of the circuit court restraining the institution and prosecution of indictments or other criminal proceedings in execution of that act. The circuit court discharged the petitioners upon their own recognizances. It was error to discharge them and thereby interfere with their trial in the state court. As already indicated, the circuit court, sitting in equity, was without jurisdiction to prohibit the institution or prosecution of these criminal proceedings in the state court. Further, even if the circuit court regarded the act of 1895 as repugnant to the Constitution of the United States, the custody of the accused by the state authorities should not have been disturbed by any order of that court, and the accused should have been left to be dealt with by the state court, with the right, after the determination of the case in that court, to prosecute a writ of error from this court for the re-examination of the final judgment so far as it involved any privileges secured to the accused by the Constitution of the United States. *Ex parte Royall*, *New York* v. *Eno*, *Whitten* v. *Tomlinson*, and *Baker* v. *Grice*, above cited. There were no exceptional or extraordinary circumstances in these cases to have justified the interference by the circuit court, under writs of habeas corpus, with the trial of the indictments found in the state courts.

The judgment of the Circuit Court is reversed, with directions to dissolve the injunction restraining the institution or prosecution of indictments or other criminal proceedings in the state court, to dismiss the suit brought by the receivers against the Attorney General of Alabama and the Solicitor of the Eleventh Judicial Circuit of the State, and to remand Clem and Brabson to the custody of the proper State authority.

Reversed.

---

[534]THE WASHINGTON GASLIGHT COMPANY, Charles B. Bailey, and John Leetch, *Plffs. in Err.*,

v.

THOMAS G. LANSDEN.

(See S. C. Reporter's ed. 534-557.)

Principal's liability—agent's authority—liability of principal in libel suit against agent—intention to furnish information for a libel—liability of the writer of a letter—evidence in libel action—charge to jury—power of court to reverse judgment in toto.

1. To hold a corporation liable for the torts of any of its agents the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal.
2. The authority to act for another party is a legal question for the court to decide, if only one inference can be drawn from the evidence, and that is want of authority.
3. A gas company is not liable for the act of its general manager in writing a personal letter, which he copied into the official copybook in the company's office, and which was used as the basis of a libelous publication respecting the testimony of the former manager of the company as to the price of gas.
4. An intention to furnish information for the publication of a libel cannot be inferred by a mere guess from the fact that a memorandum of figures which is used for that purpose was furnished without knowing what was wanted of it.
5. The writer of a letter which is used as the basis of a libel and is written for that purpose cannot escape liability therefor because of the fact that other matters, not contained in his letter, are included in the same article as published.
6. Evidence of the wealth of one of the defendants in a libel case, offered as bearing on the allowance of exemplary damages, is inadmissible in a case when the verdict must be for one entire sum against all the defendants found guilty, and might be collected from any one of them, who would have no right of contribution.
7. Merely charging the jury that punitive damages cannot be recovered will not cure the erroneous admission of evidence, in a libel case, of the wealth of one of the defendants, when this evidence is not specifically withdrawn.
8. On reversing a judgment for error as to some of the defendants, the court has power to reverse it *in toto* and grant a new trial in regard to all the defendants, if it might work injustice if left intact as against one of the defendants only.

[No. 43.]

Argued October 17, 18, 1898. Decided January 16, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that Court affirming a judgment of the Supreme Court of the District of Columbia upon a verdict rendered in favor of the plaintiff, Thomas G. Lansden, for $12,500 for an alleged libel in a periodical published in the city of New York, and known as The Progressive Age. *Judgment reversed*, with directions to the Court of Appeals to reverse the judgment of the Supreme Court of the District of Columbia, and to grant a new trial to the plaintiffs in error.

See same case below, 9 App. D. C. 508.

The facts are stated in the opinion.

Messrs. **R. Ross Perry** and **Walter D. Davidge**, for plaintiffs in error:

Where it is sought to charge any party for the act of another, agency or authority on the part of the former in respect of the specific act complained of must be as clearly shown as is required when it is sought to make a party liable for his own act, instead of that of another. The foundation of liability is that the evil intention of a wrongdoer finds expression through the act of another, instead of his own act, and hence he is properly held responsible.

Parkes v. *Prescott*, L. R. 4 Exch. 169; *Cochran* v. *Butterfield*, 18 N. H. 115, 45 Am. Dec. 363; *Adams* v. *Kelly*, Ryan & M.

157; *Queen* v. *Cooper*, 8 Q. B. 533; *King* v. *Johnson*, 7 East, 65.

Republication is not, in law, the natural and proximate consequence of the original slander or libel.

Ward v. *Weeks*, 7 Bing. 211; *Tunnicliffe* v. *Moss*, 3 Car. & K. 83; *Barnett* v. *Allen*, 1 Fost. & F. 125; *Stevens* v. *Hartwell*, 11 Met. 542; *Terwilliger* v. *Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Gough* v. *Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579; *Hastings* v. *Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Shurtleff* v. *Parker*, 130 Mass. 293, 39 Am. Rep. 454.

The word "tenor" in the complaint imports identity, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be regarded as a fatal variance.

State v. *Townsend*, 86 N. C. 676; *State* v. *Bonney*, 34 Me. 383; *People* v. *Warner*, 5 Wend. 271; *Com.* v. *Wright*, 1 Cush. 65; *State* v. *Johnson*, 26 Iowa, 407, 96 Am. Dec. 158; *Com.* v. *Stevens*, 1 Mass. 203.

Any allegation which narrows and limits that which is essential becomes descriptive, and must be proved as alleged.

Greenleaf, Evidence, §§ 58-60; *Perry* v. *Porter*, 124 Mass. 339; *Crotty* v. *Morrissey*, 40 Ill. 477; *Chapin* v. *White*, 102 Mass. 139; *Gates* v. *Bowker*, 18 Vt. 23; *Strader* v. *Snyder*, 67 Ill. 404; *Parkes* v. *Prescott*, L. R. 4 Exch. 169; *Adams* v. *Kelly*, Ryan & M. 157; *Whiting* v. *Smith*, 13 Pick. 371.

The admission of evidence as to the financial condition of the gaslight company, and the failure to withdraw the same and to caution the jury, were errors.

Pennsylvania Co. v. *Roy*, 102 U. S. 451, 26 L. ed. 141; *Howe Mach. Co.* v. *Rosine*, 87 Ill. 105; *Lycoming F. Ins. Co.* v. *Rubin*, 79 Ill. 402; *Erben* v. *Lorillard*, 19 N. Y. 299; *Furst* v. *Second Ave. R. Co.* 72 N. Y. 542.

In case of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

Somerville v. *Hawkins*, 10 C. B. 583; *Simmons* v. *Holster*, 13 Minn. 249.

The law demands as a prerequisite to the responsibility of the master for the servant's wrongful acts, that the particular matter in which the servant has done wrong shall be one which the master has intrusted to the servant.

Sleath v. *Wilson*, 9 Car. & P. 607; *Philadelphia & R. R. Co.* v. *Derby*, 14 How. 468, 14 L. ed. 502; *New Jersey S. B. Co.* v. *Brockett*, 121 U. S. 637, 30 L. ed. 1049; *Hawes* v. *Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Fogg* v. *Boston & L. R. Corp.* 148 Mass. 513; *Freeborn* v. *Singer Sewing Mach. Co.* 2 Manitoba Rep. 253; *Southern Exp. Co.* v. *Fitzner*, 59 Miss. 581, 42 Am. Rep. 379; *Harding* v. *Greening*, 8 Taunt. 42; *Illinois C. R. Co.* v. *Downey*, 18 Ill. 259; *Isaacs* v. *Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418.

Messrs. **J. J. Darlington** and *J. Altheus Johnson*, for defendant in error:

If enough of the words stated in the declaration are proved to constitute substantially the charge imputed to plaintiff, the jury should find for the plaintiff.

Casey v. *Aubuchon*, 25 Mo. App. 91; *People* v. *Horton*, 13 Wend. 9, 27 Am. Dec. 167; *Barr* v. *Gaines*, 3 Dana, 258; *Dufresne* v. *Weise*, 46 Wis. 290; *Scott* v. *McKinnish*, 15 Ala. 662; *Miller* v. *Miller*, 8 Johns. 74; *Pursell* v. *Archer*, Peck (Tenn.) 317; *McClintock* v. *Crick*, 4 Iowa, 459; *Compagnon* v. *Martin*, 2 Wm. Bl. 790; *Baker* v. *Young*, 44 Ill. 42, 92 Am. Dec. 149; *Nestle* v. *Van Slyck*, 2 Hill, 282.

A corporation may be liable for punitive damages for the wilful and malicious acts of its officers and agents.

Cleghorn v. *New York C. & H. R. R. Co.* 56 N. Y. 44, 15 Am. Rep. 375; *Merrils* v. *Tariff Mfg. Co.* 10 Conn. 384, 27 Am. Dec. 682; *Maynard* v. *Fireman's Fund Ins. Co.* 34 Cal. 48, 91 Am. Dec. 672; *Denver & R. G. R. Co.* v. *Harris*, 122 U. S. 597, 30 L. ed. 1146; *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 126, 10 Am. Rep. 103; *New Orleans J & G. N. R. Co.* v. *Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Atlantic & G. W. R. Co.* v. *Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Goddard* v. *Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39.

An objection to evidence on the ground that it is "irrelevant, incompetent, and immaterial," is too general, and the specification of the real grounds comes too late when made for the first time in the appellate court.

Lake Erie & W. R. Co. v. *Parker*, 94 Ind. 91; *McCullough* v. *Davis*, 108 Ind. 292; *Washington Gaslight Co.* v. *Poore*, 3 App. D. C. 127; *Patrick* v. *Graham*, 132 U. S. 629, 33 L. ed. 460; *District of Columbia* v. *Woodbury*, 136 U. S. 450, 34 L. ed. 472.

The jury may infer from circumstances that an act of a corporation's employee is done in the course of his business as its servant.

Fogg v. *Boston & L. R. Corp.* 148 Mass. 513; *Denver & R. G. R. Co.* v. *Harris*, 122 U. S. 597, 30 L. ed. 1146; *Salt Lake City* v. *Hollister*, 118 U. S. 256, 30 L. ed. 176; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 113, 37 L. ed. 103; *Williams* v. *Planters' Ins. Co.* 57 Miss. 764, 34 Am. Rep. 494; *Philadelphia & R. R. Co.* v. *Derby*, 14 How. 468, 14 L. ed. 502; *First Nat. Bank* v. *Graham*, 100 U. S. 702, 25 L. ed. 751; *Union Mut. L. Ins. Co.* v. *Thomas*, 48 U. S. App. 575, 83 Fed. Rep. 803, 28 C. C. A. 96.

*Mr. Justice **Peckham** delivered the opinion of the court: [535]

This action was brought by the defendant in error, plaintiff below, in the supreme court of the District of Columbia, against the Washington Gaslight Company, John R. McLean, its president, Charles B. Bailey, its secretary, William B. Orme, its assistant secretary, and John Leetch, its general manager. The action was brought to recover damages for an alleged libel which the plaintiff stated the defendants had published, or caused to be published, of and concerning him, in a periodical printed in the city of New York, called the Progressive Age. The plaintiff recovered a verdict of $12,500 against the corporation defendant, its secretary Bailey, and its general manager Leetch. There seems to have been no finding as to the other defendants.

Those defendants against whom the verdict was rendered brought the case by ap-

peal to the court of appeals for the District, where the judgment was affirmed, and the defendants then brought the case here on writ of error.

It appears from the declaration that a committee of the House of Representatives, in January, 1893, having in charge the sundry civil appropriation bill, had therein provided that not more than seventy-five cents per thousand feet should be paid for gas used in the government buildings in the District of Columbia. The gas company desired to defeat this provision in the bill, and the president, Mr. McLean, sent for the plaintiff below, who was general manager of the company, for the purpose of inquiring what the plaintiff could testify to in regard to the price of gas if called before the committee. The president asked the plaintiff to furnish
[536] him with a written *memorandum showing generally what he could testify to, and which he might use as a basis for questions to be put to him by some member of the committee. The plaintiff wrote out such a memorandum, but did not mention therein the cost of gas to the defendant company, and when the president noticed the omission he asked the plaintiff what the cost would be, and plaintiff stated that that was a matter which should come from the chief officers of the company, and which was unknown to him.

The plaintiff did not testify before the committee at that session of Congress.

Thereafter and in February, 1894, and when not requested by the president of the company or any of its officers or agents, the plaintiff did appear before a committee of Congress, and did testify to figures at which plaintiff supposed gas could be actually produced and furnished in the city of Washington.

The plaintiff then alleged that the defendants in the month of February, 1894, published or caused to be published in a newspaper or periodical called the Progressive Age, which was printed in the city of New York, and widely circulated as an organ devoted to the interests of gas producers and manufacturers throughout the country, the libel in question.

The article states in substance as follows: The plaintiff had once filled the position of general manager of the gas company, which he had resigned in June, 1893, and that in his testimony before the congressional committee in 1894 the plaintiff had arrayed himself within the ranks of those who sought to tear down and lay waste the business and emoluments of his former employers. He gave testimony which was reported through the land, and was of such a nature as was calculated to do the utmost harm to gas interests everywhere. The figures supplied by Mr. Lansden of the cost of gas were startling, and only a year ago (in 1893) a similar inquiry emanating from the same quarter was instituted before a congressional committee against the Washington Gaslight Company, and plaintiff appeared as a witness in behalf of the company; that he then
[537] occupied the position *of general manager of the company, and his testimony then, as compared with that given subsequently, was sadly at variance; that he had there testified before the committee that it cost 48.38 cents per thousand to manufacture gas in the holder, and 40.09 cents per thousand for distribution, and that he knew of but one way that a small amount could be saved, and that was by reducing the salaries of the clerks and the price paid to the laborers, which the company would not like to do. In 1894, before a committee of Congress, the plaintiff testified that, from his knowledge of the business and the condition of affairs at Washington, the gas company could sell gas and pay a reasonable profit at a dollar a thousand. He stated that in his opinion the gas could be manufactured and put in the holder for about thirty-two cents a thousand feet, and that it ought to be distributed for from twenty to twenty-two cents a thousand, which would make the whole cost from fifty-two to fifty-four cents per thousand. The article then continued:

"From the foregoing extracts of this witness's testimony only one of two conclusions can be arrived at, and we are too sensible of the reader's power of analysis and feel too keenly for the witness to heap coals of fire on the head of one who, it is only too evident, has allowed his sense of justice to be distorted by real or fancied grievances. The testimony given by Mr. Lansden in 1893 states in effect that there is no way open to his company by which it eould reduce the cost of manufacturing gas. In 1894 he tells the committee that—taxes and repairs added, items not considered in the inquiry of the previous year—the cost of gas delivered to the consumer could be brought within seventy cents, or about eighteen and one half cents less per thousand than he quoted as the lowest manufacturing and distributing cost the year before; and yet Mr. Lansden must know that the generating apparatus at the Washington works is the same as when he filled the position as superintendent; that the cost of all materials used, coal, and labor, are just the same, save only naphtha, which is now higher in price than when he testified a year ago."

*For publishing or eausing to be published [538]
this article the plaintiff brought this action.

The defendants joined in their plea of not guilty, and the plaintiff joined issue thereon. After verdict a motion for a new trial was made and denied, and judgment entered upon the verdict.

The questions which present themselves in this record relate primarily to the liability of each of the plaintiffs in error, and those questions depend for their proper solution upon the evidence set forth in the record.

And first in regard to the liability of the corporation. From the evidence it appears that at the time of the publication of the libel John Leetch was the general manager of the gas company. After the plaintiff had been sworn before the congressional committee, in February, 1894, one E. C. Brown, who was the publisher of the periodical called The Progressive Age, and who lived in the city of New York, wrote a letter, under date New York, February 12, 1894, addressed on the inside to the Washington Gaslight Com-

pany, Washington, D. C. That letter reads as follows:

Gentlemen:

I have watched with great interest the continued reports of the proceedings against your company, as published in the local newspapers of your city, and I have been somewhat surprised at the character and extent of Mr. Lansden's testimony. Was his statement correctly reported in the Washington Star of 3d inst.? Newspapers all over the country are taking up his figures and using them to suit their own ends against home companies. Any information you would care to give us concerning the object of Mr. Lansden's attack will be considered confidential as to source of information.

Very truly yours,
E. C. Brown.

The envelope enclosing this letter was addressed to "John Leetch, Manager Washington Gaslight Co."

In reply to that letter, Mr. Leetch wrote
[539]*the following:

Washington, D. C., Feb. 13, 1894.

E. C. Brown, Esq., Publisher Progressive Age, 280 Broadway, N. Y.

Dear Sir:—

I have just now received yours of the 12th instant, relative to the statement made by Mr. T. G. Lansden, former sup't of the Washington Gaslight Company, before the investigating committee of Congress to reduce the price of gas in this city.

As Mr. Lansden is no longer in the employ of the gas company, the motive was generally understood that prompted his statement.

As the newspapers in Washington gave a correct version of his statement, there is no doubt he said that gas could be furnished at the meter for seventy cents and to the consumer for $1.00 per 1,000 cubic feet. This price at the meter was exclusive of repairs, services, etc.

Under a former resolution of Congress, bearing date of February, 1893, Mr. Lansden was called upon to answer certain questions bearing upon the reduction of price of gas in Washington, and made the following replies:

"Q. What does gas cost to manufacture at your works?

"A. It costs us 48.38 c. per thousand in the holder and 40.09 c. per thousand for distribution.

"Q. Can you in any way reduce the cost of gas in the manufacturing so your company could sell for less to the consumer?

"A. I know of but one way that a small amount could be saved,—that is, by reducing the salaries of our clerks and the price paid to our laborers. This we would not like to do.

"Q. How do the prices charged for lamps in Washington compare with other cities?

"A. They are as low as any where the same amount of gas is burned to the lamp and the same number of hours lighted in the year, and when the company lights and cleans the lamps."

You will notice that he makes a difference of about 18½ cents per 1,000 feet then as compared with his statement now, *although [540]
he must know that the material used, coal, and labor, is just the same now as then, except price of naphtha, which is higher. You can try to reconcile the two statements.

Very truly yours,
John Leetch, General Manager.

There is no evidence that any other officer of the company or any member of its board of directors advised or requested Mr. Leetch to send this letter or was cognizant of his intention in that regard. Mr. Leetch swore that the letter was written by him unaided, and that the letter from Brown was a personal letter, and he answered it as such.

After Leetch received the letter, and before he answered it, he had a conversation with Mr. Bailey, the secretary, in which he informed the secretary that he had received such a letter, and he then showed it to Bailey, who read it and returned it to Leetch. Bailey then said to Leetch that he (Bailey) had a paper in plaintiff's handwriting, where he stated "that the price of gas was so and so, and that the price of distribution was so and so," and he then gave Leetch the paper. Bailey said he did not know what Leetch wanted with it, and he thought nothing more about it; that Leetch took the paper and went off to his room, and Bailey never saw it again or heard of it until after Leetch's letter was written and sent. Bailey swore he knew nothing about Leetch's letter in answer to Brown until after it was sent, and that he gave no data to Leetch to reply to the letter, but simply told Leetch as matter of fact the plaintiff had said that gas could be made and sold at a profit at a dollar a thousand.

On the 14th of February, 1894, Mr. Brown wrote another letter, addressed to John Leetch, general manager, Washington Gaslight Company, Washington, D. C., in which he asked for more details in regard to the testimony of plaintiff before the committee of Congress. Receiving no reply, Mr. Brown, under date of February 19, again wrote Leetch, asking for the details as mentioned in his preceding letter of the 14th. This letter was answered as follows:

*E. C. Brown, Esq., Publisher Progressive [541]
Age, 280 Broadway, N. Y.

Dear Sir:—

I am in receipt of yours of the 14th and 19th instant. This delay in reply was my inability to secure a copy of report of proceedings before investigating committee of Congress. Only about twenty copies have thus far been printed for use of committee.

To-day I received a copy, which I herewith inclose for your use.

Respectfully,
John Leetch, General Manager.

There is no evidence showing that this letter was either written by authority of any officer or director of the company, or that any such officer or director had any knowledge in regard to it.

It appeared in evidence that some time after Leetch answered the letters he placed them among papers of the company in the secretary's office, and they were so placed, because, as Mr. Leetch testified, it was a matter that had then assumed a position when it was necessary to save the letters, and he therefore placed them in the care and custody of the secretary.

Mr. Leetch further testified that none of the letters written by him was written in his capacity as general manager of the company; that they were written by him as a mere personal matter, altogether exclusive of any duty that he owed the gas company; that the gas company had no interest in the matter, and that he merely wrote them as an act of courtesy, stating the facts.

It also appeared that all the letters written by Mr. Leetch to Mr. Brown were copied by Leetch into the letter book of the company kept in the secretary's office, all the letters in which book were written either by the secretary, the assistant secretary, or the general manager. Mr. Leetch did not know of any letters of personal or individual matters in that book prior to March 1, 1894, or
[542]that did not relate to the affairs of *the gas company, except those of the same nature as those letters above referred to.

The testimony also showed that Mr. Leetch, at the time he was made manager, was appointed generally to take care of the works and to do the best he could for the company; that he was a gas engineer, and took care of the works and took the place of what used to be the engineer, and after his appointment they had two engineers, one at each end, who were subordinate to Mr. Leetch.

As bearing upon the duties of Mr. Leetch, the record also contains evidence in the shape of a letter signed by the president by the authority of the board of directors of the gas company, dated Washington, March 1, 1865, and addressed to Mr. George A. McIlhenny, by which the latter was appointed superintendent of the gas works, and his duties were therein stated to be to take charge of every portion of said works pertaining to the manufacture, distribution, and consumption of gas, and all persons employed in those departments; contracts for purchasing coal and selling tar were to be made by the president, but the superintendent was authorized to contract for other supplies to the works, the contracts to be submitted to the president for approval. The superintendent was to fix the price of coke, but all coke was to be purchased and paid for at the office. The superintendent was to have stated hours for being at the office in town and give attention to all complaints of leaky mains, etc. His special attention was directed to certain points regarding the standard for gas and increasing its product per pound of coal; increasing the coke sold; saving of refuse coke; reduction of men employed at the works; number of thousand feet of gas produced, and all other points which need correction; the letter closing with the statement: "The welfare of the company demands economy in its management, and that the gas produced shall be uniformly good." From that time until the year 1886 there is no evidence regarding the duties of superintendent or manager of the company.

In September, 1886, at a meeting of the board of directors, the president called attention of the board to the necessity *of em- [543]
ploying a competent man to fill the position of superintendent of the company (said position being formerly designated engineer), and Mr. McIlhenny (the president) was authorized to employ such person for the position. Pursuant to that authority the president wrote to Mr. Lansden (the plaintiff) stating: "Our board of directors has authorized me to employ a superintendent, and I have concluded to offer you the position at a salary of $5,000 per annum, payable monthly, the condition being that you will give satisfaction, presuming that you are a first-class gas-works superintendent, otherwise this agreement may be revoked at any time." The plaintiff was at this time a gas engineer, who is, as plaintiff testified, a man who constructs and manufactures gas works and manufactures gas. His duties as superintendent would not enable him precisely to know the cost of the manufacture and distribution of gas.

Mr. McLean, president of the company, testified on this trial in regard to the position of Mr. Leetch: That he first had a recognized position with the company after Mr. Lansden (plaintiff) had left the service of the company; that he thought Leetch was on the pay roll of the company at that time; he was just generally employed there and familiarized himself with the company, but had no positive employment until after Mr. Lansden, the plaintiff, left; that Mr. Leetch was not put in exactly the position Mr. Lansden had occupied, but that in fact he was appointed generally "to take care of the works and do the best he could do for the company; that he was a gas engineer and took care of the works."

This is all the evidence contained in the record bearing upon the duties of Mr. Leetch as general manager of the company and of his right to act for it in the above matter.

The question arises whether, upon these facts and the legitimate inferences which may flow from them, the corporation defendant can be held liable for the publication of the libelous article in the Progressive Age.

That a corporation may be held responsible in an action for the publication of a libel is no longer open for discussion in this court. *Philadelphia, W. & B. Railroad Company* v. **Quigley*, 21 How. 202 [16: 73]. In that case [544]
the company was held liable in damages to the plaintiff, Quigley, for the publication of a libel regarding the plaintiff's skill and capacity as a mechanic. Quigley brought his action against the company because the company published a letter addressed to it in the course of an investigation by its board of directors in regard to the conduct of some of its subordinates. The letter contained libelous matter in regard to the plaintiff, and

with much other testimony was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. In that case Mr. Justice Campbell, in delivering the opinion of the court, said: "That for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances." The doctrine of this case has been approved and reaffirmed in many cases in this court since that time.

The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal or vote of the corporation, constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. *Salt Lake City* v. *Hollister, Collector*, 118 U. S. 256, 260 [30: 176, 177]; *Denver & Rio Grande Railway Co.* v. *Harris*, 122 U. S. 597, 609 [30: 1146, 1148]; *Lake Shore & M. S. Railway Co.* v. *Prentice*, 147 U. S. 101, 109 [37: 97, 102], and cases cited at page 110 [37: 102].

In this case no specific authority was pre-
[545] tended to have *been given the general manager, Leetch, to write the letters which he sent to Brown, or to authorize the publication of anything whatever in the periodical named. We are, then, limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that in order to render the company liable there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself. There is no evidence of an express authority, or of any subsequent ratification of Leetch's conduct by the company. Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence we find nothing upon which such an inference can be based; nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment. Commencing with the time when a superintendent was employed in March, 1865, down to the employment of Leetch, no such power could be inferred from the evidence regarding the duties of a superintendent or manager. In March, 1865, the duties of such an officer were plainly stated. They were: "To take charge of every portion of said works pertaining to the manufacture, distribution, and consumption of gas, and all persons employed in those departments." Further details of his duties were mentioned in the writing making the appointment, but they all related to the carrying on of the business of the company. From all *that appears in the record the du **[546]**
ties of superintendent of the gas works remained as stated in the communication as above mentioned, with possibly a change in the name from superintendent to engineer, until 1886, when under authority of the board of directors, Mr. Lansden, the plaintiff, was employed as superintendent upon the presumption, as stated, that he was a first-class gas-works superintendent. There is nothing from which we could infer that the character or scope of the duties of superintendent was enlarged or changed, at the time the plaintiff accepted the position, from what those duties were stated to be in the letter appointing a superintendent in 1865.

From the evidence in the case no presumption could be indulged that the duties of the general manager of the corporation in question included in their general scope or character the right to represent the corporation in any business such as is referred to in the letters of Brown or in the letters of Leetch in answer thereto. The letters of Mr. Brown had nothing whatever to do with the transaction of the business of the corporation, or with anything relating thereto which the superintendent was authorized to perform. It was an inquiry relative to a past transaction regarding the testimony supposed to have been given before a committee of Congress, having, among other things, the subject of the price of gas in the city of Washington before it for consideration. From the evidence in this case it is plain that it was no part of the duty of the general manager even to appear before that committee unless summoned so to do by the committee, or specially directed by the company to so appear. In no view of the evidence can we see the least basis for an inference that the manager had authority to represent the company in any matter connected with third parties and relating to the character of the evidence given by the plaintiff before the committee of Congress.

The manager did not himself regard the correspondence as one of an official nature, and he swears that he answered the letters

as a mere personal matter, altogether exclusive of any duty that he owed to the gas [547] company; that the gas*company had no interest in it, and he merely wrote the letters as an act of courtesy stating the facts, and that none of the officers of the company was informed as to the contents of the letters that he wrote, and they were ignorant regarding them.

The plaintiff, of course, would not be bound by the evidence of Mr. Leetch as to how he regarded the letters or in what capacity he thought that he was answering them, if there were other evidence in the case from which a contrary inference could properly be drawn,—evidence from which it could be inferred that the manager was acting within the scope of his employment as manager. In such case it would be proper to refer the question of fact to the jury to ascertain whether the letters were written within the scope of his employment, notwithstanding his assertion that he wrote them in his personal capacity. But there is no such evidence.

The fact that the manager copied his letters to Brown into the official copy book kept in the office of the secretary is not material upon this question. It was the act of Mr. Leetch, unknown to the officers of the company, so far as the record shows, and the company cannot be held liable for the original act of Leetch by such evidence. It does not tend to show that his action was within the scope of his employment as manager.

If we set aside for a moment the testimony in regard to the duties to be performed by the superintendent, as stated in the communication of March, 1865, and look simply at the other facts in the case, we are still without any evidence from which it might be inferred that the act on the part of the manager was within the scope of his employment. The burden is upon the plaintiff to show this fact.

From the use of the term "general manager" we should not be authorized to infer any such authority, nor would it be permissible to allow the jury to make a mere guess that it existed. A general manager of a business corporation, such as this gas company is, would not be presumed to have this power. The term, in our judgment, when used in connection with such a corporation, [548] cannot, in the absence of any *evidence on the subject, be presumed to mean anything more than that the person filling the position has general charge of those business matters for the carrying on of which the company was incorporated. These might include the buying of material, the employment of laborers, the supervision of their labor, the manufacture of gas, its distribution, and the general ways and means of accomplishing the object of the corporation,—all these in subordination to the board of directors and such superior officers as the board should provide.

We are of opinion that the court erred in submitting to the jury the question whether Leetch, in respect to the subject of the letters written by him to Brown, had authority to bind the company. The court should have directed a verdict for the corporation on the ground that there was an entire lack of evidence upon which to base a verdict against it.

The next question arises in regard to the defendant Bailey.

The only evidence is regard to this defendant is that he was secretary of the company at the time in question; that after Mr. Lansden, the plaintiff, had made the memorandum in preparation for his being called as a witness before the congressional committee in 1893, and in which memorandum he had stated the cost of gas (although, as he says, he took that cost from the president, and did not pretend to state it as of his own knowledge), he gave the memorandum to Mr. McLean, the president of the defendant company, who gave it to Mr. Bailey, the secretary, who had kept it in his possession from that time; that after Mr. Leetch received Mr. Brown's first letter relating to the plaintiff's testimony before the congressional committee of 1894, Mr. Leetch showed him (Bailey) the letter, and that Mr. Bailey then read it, and stated: "I have a paper in Mr. Lansden's own handwriting, where he stated that the price of gas was so and so and the price of distribution was so and so;" and he then gave Leetch the paper; that he then knew that the items therein, so far as they regarded the cost of distribution, did not rest on plaintiff's personal knowledge, but that they came from the books; that he did not know what Leetch wanted with the paper; that he thought nothing about it; that Leetch had asked him, *"Where is the paper?" and he then got it, [549]
and Leetch asked him to let him take it; and that Leetch did take it and went off to his room, and that Bailey never saw it again or heard of it until after the letter was written; that Bailey did not give Leetch any data to reply to the letter, and he thought nothing about writing the letter, and that he simply said, as a matter of fact, that he (Lansden) had said that gas could be made and sold at a profit at a dollar. He never knew that the first letter of Brown had been answered until he saw it in the Progressive Age.

This is all the evidence connecting Mr. Bailey in any way with the publication of the libel, and we think it wholly insufficient for that purpose. We think there is nothing in this evidence from which the inference can reasonably and fairly be drawn that there was any intention on the part of Mr. Bailey to furnish Mr. Leetch with the figures in the memorandum so that he might answer the letter from Mr. Brown, and have the figures or any other matter published in his paper.

A finding by the jury that Mr. Bailey furnished the information contained in this memorandum to Mr. Leetch for the purpose of having him communicate it to Mr. Brown, and for the purpose of having Mr. Brown publish the same, would not be supported by any evidence in this case. Such a finding would be a pure guess, unsupported by any evidence, and the jury should not be offered the opportunity to make it. The judgment should therefore be reversed as against Mr. Bailey.

The third question relates to the judgment against Leetch.

We are of the opinion that the judgment ought also to be reversed and a new trial

awarded as against him. We do not think it would constitute a defense in his case that there were other matters contained in the article published by Mr. Brown, not pertaining to and which were no part of the subject-matter upon which Mr. Leetch wrote his letters. For anything appearing in that publication, which was outside and beyond the scope of the subject-matter of the letters of Mr. Leetch, he would not be responsible, because he could not be charged with authorizing the publication of such matter in any form; but if upon all the evidence on an-
[550]other trial the jury should be satisfied *he furnished the publisher, Mr. Brown, with information of a libelous character regarding the plaintiff, for the purpose and with the intention of having the same published by Mr. Brown, we think that the defendant might be held liable for such publication on the ground that it was published by his aid and procurement and substantially by his agent. Of course, the evidence would have to be sufficient to justify a jury in finding the fact of such intention and that the information was so furnished to Mr. Brown.

There are, however, two grounds upon which we think this judgment should be reversed, and no judgment entered upon the verdict, even as against Mr. Leetch, one of which rests upon an exception to evidence, and the other is based upon the substantial injustice which we think might be the result if we were to permit judgment to be entered upon the verdict as against him alone.

When the plaintiff was on the stand, upon direct examination, he testified that the total capital stock of the company defendant was $2,000,000. He was then asked as to the dividends that had been paid upon the stock within his knowledge. This was objected to by counsel for defendants, who said it was perfectly well known that the gas company was able to pay the amount claimed in this libel case, and what dividends they pay is a matter private to the company.

Counsel for plaintiff said he was seeking to show only its earning capacity. To which counsel for defendants said they would admit that the company was able to pay this amount claimed. "The Court: Still, they have the right to show the volume of the property of the company, and any evidence tending to show the volume of the property would be competent." To which ruling of the court counsel for the defendants excepted.

The witness then testified that the company had paid the last two regular dividends of ten per cent upon its capital stock.

The court then said to counsel: "That the admission of the fact that the company was able to respond in damages amounted to nothing; that the object of the evidence
[551]was *to furnish the jury a basis upon which they might calculate exemplary damages if they were entitled to exemplary damages, as was claimed. If the jury were going to give exemplary damages they might give much larger damages against a very wealthy person than they would against a person of ordinary circumstances." Counsel for the defendants said that their claim was only $50,000. To which the court responded: "If you admit that if they are entitled to a verdict at all they are entitled to $50,000, that does away with the necessity of the evidence; otherwise I think it would be admissible." And under the objection and exception of the defendants' counsel the witness then testified that he knew what dividends had been paid by the gas company since 1890, but did not know what had been earned: that every year they had paid 10 per cent; that in 1893 they had paid 15 per cent; that was an extra dividend; that in 1895 they had paid $400,000,—an extra dividend; that from 1890 down to the present time they had paid the regular 10 per cent dividend every year, and that in 1890 they had issued $600,000 of interest-bearing certificates to the stockholders, which would make it 40 per cent for that year, and in 1893 there was a special dividend paid of $3 per share in addition to the 10 per cent; that in 1894 he did not know of anything being paid but the regular dividend; that in 1895 they paid $4 a share, and that it takes $200,000 to make the regular dividend, and they paid $400,000 extra in $600,000 altogether. The court did not directly instruct the jury that the evidence was only admissible for the purpose stated by him in his reply to the objection made by counsel for the defense. In his final charge to the jury and upon the request of the counsel for the defendants, the court instructed the jury that the plaintiff was not entitled to recover punitive damages against the defendant company or against either of the other defendants, but only such damages as the evidence proves that he has sustained on account of the action of the defendants, if any.

The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against *the company alone. All the **[552]**
defendants joined in a plea of not guilty, and the jury could not find a verdict of guilty against all, and apportion the damages among the several defendants by giving a certain amount as against the company and a certain other amount as against the individual defendants. Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, without examining the question of the different degrees of culpability. And if but one is sued, he is liable for all the damages inflicted by the most culpable. Cooley on Torts, 133, 135, 136; *Currier* v. *Swan*, 63 Me. 323; *Berry* v. *Fletcher*, 1 Dill. 67; *Pardridge* v. *Brady*, 7 Ill. App. 639; *McCarthy* v. *De Armit*, 99 Pa. 63–72.

The rule is different in South Carolina, where the jury can apportion the damages among the different defendants found guilty. It is acknowledged to be a departure from the rule at common law. *White* v. *M'Neily and others*, 1 Bay, 11.

As between themselves, there is no contribution among several tort feasors. *Merryweather* v. *Nixan*, 8 T. R. 186; *Farebrother*

v. *Ansley*, 1 Campb. 343; *Wilson* v. *Milner*, 2 Campb. 452; Cooley on Torts, pp. 148, 149. A verdict might, therefore, be rendered against all defendants and collected out of one, and he would have no right of contribution. And the verdict enhanced by the evidence of the wealth of one defendant, might be collected from the defendant the least able to respond and the least culpable of all, who would thus be mulcted in punitive damages, the amount of which might have been measured by the evidence of the wealth of another defendant.

In this case the jury was bound to give one entire sum against all the defendants found guilty, and that sum would be included in the judgment against each of them. The object of the evidence in relation to the capital stock of the corporation and the dividends declared by it was, as stated by the court to counsel, for the purpose of furnishing the jury the basis upon which they might calculate exemplary damages, yet it is not plainly limited to that purpose by any direction given to the jury by the court. If [553] the evidence would be admissible *for the purpose stated by the court to counsel, in a case against the corporation alone, can it be that it would be admissible also in a case like this, where individual defendants are joined by the voluntary act of the plaintiff? We are of opinion that the evidence in regard to them would be inadmissible. It would form no basis for any verdict against the individual defendants. While a defendant who is least to blame is still liable for all the damages suffered by plaintiff, he is not liable to respond in punitive damages, the amount of which may be based upon particular evidence of the wealth of some other defendant.

Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that when a plaintiff voluntarily joins several parties as defendants, he must be held thereby to waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them. This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not, perhaps, certain. 7 Ill. App. 639; 99 Pa. 63. But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all.

In many cases against several defendants it frequently happens that evidence is competent and is admitted as against one of the defendants only, and the court, on its own motion or on the request of the other defendants, would charge the jury that such evidence could not be taken into consideration as against the defendants to whom it did not apply. But here such a *power cannot [554] be exercised. The court cannot say to the jury that the evidence of the wealth of the corporation is only received in regard to it and as furnishing a basis for a computation of exemplary damages against it. If received at all it must be received against all the defendants, as but one verdict can be given against all who are found guilty, when in truth in regard to all of them but the corporation it is evidence which is absolutely incompetent. Yet if the evidence is received on the assumption that it is material in relation to the corporation, the other defendants are affected by it the same as the corporation, and a verdict may very probably be enlarged against them because of the evidence as to the ability of the corporation defendant to pay. The jury is thus permitted to take into consideration the wealth of one defendant upon the question of the amount of the verdict against all of them.

Objection to the evidence was taken by counsel, and we think under the circumstances was well taken, and the exception is good in behalf of the individual defendants who were necessarily affected by its introduction.

But it is said that this error, if any, was cured by the ruling of the court in response to the request of defendants' counsel that punitive damages should not be granted. We are not certain as to that. As we have said, the court gave no instruction to the jury that it could only consider the evidence in connection with the question of punitive damages. The remark of the court as to the object of the evidence was made to counsel, and the court did not, in any instructions given, plainly limit the jury to its consideration for that purpose alone. The evidence was never withdrawn by the court, nor was the jury directed to take no notice of it. If the court admitted the evidence for one purpose only, and yet did not afterwards in terms withdraw it from the consideration of the jury, it was of such a nature that it still might affect the jury, even though the basis for its admission originally had disappeared. It is true the defendants did not in so many words ask the court to withdraw the evidence from the jury. It was, however, duly objected to when received, and it was *error [555] to receive it. Under such circumstances, in order to cure the error, the court, when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn this particular evidence from the jury. We cannot be certain that its effect was removed by this action of the court. In a case of this character, where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of a plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of a jury, we think it is utterly

impossible to say that, by merely charging the jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to the wealth of one of the defendants was thereby removed, or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case.

We are also of opinion that, even upon the assumption that no error was committed upon the trial as against the defendant Leetch, which in itself would call for a reversal, yet the judgment should be wholly reversed and no judgment entered upon the verdict as to him, because the original verdict was against the three defendants, and it was given under such circumstances that we might well fear the amount was enlarged by the evidence as to the wealth of the corporation, and it is possible, if not probable, that if a verdict had been rendered against the individual defendant alone it would have been for a materially less amount. At any rate, the jury has never been called upon to render a verdict against a sole defendant, and while it may be said that, whether against one or against all the defendants, the plaintiff suffers the same damage and should be entitled to a verdict for the same sum, still the question arises whether a jury, in passing upon the several liability of the individual defendant, would give a verdict of the same amount as it would if both the other defendants remained. We cannot say it would, and as the jury has never rendered a verdict against Mr. Leetch individually and solely, and as the case is one where damages are so largely in the sole discretion of the jury, we think it unjust and improper to
[556] permit this *verdict to stand against Leetch alone while we set it aside as against the other defendants.

Where the judgment is based upon a cause of action of such a nature that it might work injustice to one party defendant if it were to remain intact as against him while reversed for error as to the other defendants, then we think the power exists in the court, founded upon such fact of possible injustice, to reverse the judgment *in toto* and grant a new trial in regard to all the defendants.

The question is discussed with much fullness in *Albright* v. *McTighe and others*, 49 Fed. Rep. 817, and the same conclusion is arrived at.

The provisions contained in the judgment in *Pennsylvania Railroad Company* v. *Jones*, 155 U. S. 333, at 354 [39: 176, at 183], indicate the opinion of this court that it was right to reverse the entire judgment in that case for error in regard to one of several defendants; but the court held that as the error did not affect the others the plaintiff should have liberty to become nonsuit as to the one defendant, and to then have judgment upon his verdict against the others. In that case there was a failure to prove a cause of action against the one defendant, while no such failure existed as to the others, and there were no special reasons for a total reversal, but, on the contrary, justice seemed to require that plaintiff should have the liberty of entering judgment upon his verdict against the other companies.

In regard to the defendants, McLean, the president, and Orme, the assistant secretary, the judge charged the jury that there was no prayer granted or asked by plaintiff's counsel directed specially to informing the jury whether it might or might not find against those defendants; that he did not understand that the plaintiff's counsel earnestly insisted upon a verdict against them personally; and he could only say that the evidence tending to show that they were personally liable was slight, and he submitted the case to the jury with that expression, leaving it to their discretion to find for or against them as they might think best. There was no finding by the jury against those defendants, and no judgment was entered against them, and they have not brought error. In reversing *the [557]
judgment we do not intend to reverse what may be considered a finding of the jury in their favor.

For the reasons given, *we reverse the judgment of the Court of Appeals of the District of Columbia*. with directions to that court to reverse the judgment of the Supreme Court of the District of Columbia, and to grant a new trial to the three defendants who are plaintiffs in the writ of error sued out from this court.

ORIENT INSURANCE COMPANY of Hartford, Connecticut, *Plff. in Err.*,
v.
ROBERT E. DAGGS.

(See S. C. Reporter's ed. 557-567.)

When a corporation is not regarded as a citizen—equal protection of the laws—validity of state statute.

1. A corporation is not a citizen within the meaning of the constitutional provision as to privileges and immunities of citizens.
2. A fire insurance company is not denied the equal protection of the laws by a statute applicable to fire insurance only, which makes the entire amount of the insurance payable in case of total loss, except as reduced by depreciation of the property after it was insured.
3. A state statute compelling fire insurance companies in case of total loss to pay the amount for which the property was insured, less depreciation between the time of issuing the policy and the time of loss, does not deprive the insurer of property without due process of law, as it leaves the parties to fix the valuation of the property as they choose, but makes their action in this matter conclusive.

[No. 81.]

Argued December 8, 1898. Decided January 16, 1899.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming a judgment of the Circuit Court of Scotland County in said state in favor of the plaintiff, the defendant in

error in this court, sustaining a demurrer to the answer of the defendant, and giving the plaintiff judgment for $875, being the amount of a policy of insurance, and costs. *Judgment affirmed.*

See same case below, 136 Mo. 382, 35 L. R. A. 227.

Statement by Mr. Justice **McKenna:**

[558] *This is an action at law upon a policy of insurance issued by the plaintiff in error, a corporation organized under the laws of the state of Connecticut. The policy was issued in June, 1893, insuring the defendant in error against loss or damage by fire to a certain barn situated in Scotland county, Missouri, in a sum not to exceed $800. The barn was, within less than three months after the issuing of the policy, entirely consumed by fire; and an action was brought upon the contract to compel the payment of the entire sum of $800.

The petition filed in the case avers the delivery of the policy of insurance to the defendant in error, and says that the company, by virtue of said policy, promised to pay the plaintiff the sum of $800 in case said barn should be destroyed by fire, and attaches a copy of the policy to the petition as the basis of the action.

The answer filed by the company stated that the "defendant is a corporation, organized and existing under and by virtue of the laws of the state of Connecticut, doing a general fire insurance business in the state of Missouri, and avers it has been doing such business continually since and prior to the first day of June, 1873, and that said defendant was and is fully authorized to do such business in the state of Missouri." The answer admitted the delivery of the policy and the total destruction of the barn by fire; that the plaintiff was the owner thereof, and that proofs of loss had been made.

The defendant, further answering, stated that the contract of insurance sued on in the case was the contract between the parties, and that it provided that "said insurance company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and that the loss or damage shall be ascertained or estimated according to the actual cash value of the property at the time of the fire, and shall in no case exceed what it will cost to replace the same, deducting therefrom a suitable amount for any depreciation of said property from age, use, or location, or otherwise."

[559] *The answer further averred that at the time of the burning of the building in question it was not worth to exceed $100, which amount the plaintiff in error then offered to pay, with interest from the date of the fire, and to return the premium. The answer of the defendant further averred as follows:

"The defendant says that section 5897 of chapter 89, article 4, Revised Statutes of the state of Missouri, compiled in the year 1889, provides as follows: 'In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant' . . . And that section 5898 of said chapter provides that no condition in any policy of insurance contrary to the provisions of this article, meaning thereby article 4, shall be legal or valid. The defendant says that said statute was enacted prior to the issuing of said policy and has not been repealed."

The defendant pleaded that said statute is contrary to the Constitution of Missouri, and that the same is unconstitutional, null and void, and proceeded to aver as follows:

"The defendant, further answering, says that sections 5897, and 5898 of chapter 89, article 4, of the statutes of Missouri are contrary to and in contravention of the Constitution of the United States, which provides that no state shall pass any bill of attainder or *ex post facto* law, or laws impairing the obligation of contracts.

"Defendant, further answering, says that said sections, and each of them, are contrary to and in contravention of article 14 of the Constitution of the United States, commonly called the Fourteenth Amendment, and particularly of article 1 of said amendment, which is as follows:

*" 'All persons born or naturalized in the [560] United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"And that said sections 5897 and 5898 of chapter 89, article 4, of the Revised Statutes of Missouri are unconstitutional and contrary to the Constitution of the United States, and are null and void.

"That the defendant has the constitutional right to limit its liability by contract to actual damages caused by fire."

To this answer the plaintiff and assured filed a demurrer, which demurrer the court sustained, and the defendant, electing to stand upon the ruling upon said demurrer, judgment was entered in favor of the plaintiff, and in due course the cause was appealed to the supreme court of Missouri. At October term, 1896, the supreme court of Missouri rendered an opinion in said case, affirming the judgment of the court below. 136 Mo. 382 [35 L. R. A. 227]. The case then came to this court in due course upon petition in error.

There are twenty-three assignments of error which present the claim of plaintiff in error under the Constitution of the United

States, and the alleged error of the state court denying the claim.

Mr. **Alfred H. McVey** for plaintiff in error.

No counsel for defendant in error.

[560] *Mr. Justice **McKenna** delivered the opinion of the court:

The statute of Missouri is alleged to violate the Fourteenth Amendment of the Constitution of the United States in the following particulars: (1) That it abridges the privileges or immunities of citizens of the
[561] United States; (2) denies to *persons within its jurisdiction the equal protection of the laws; and (3) deprives persons of property without due process of law.

(1) It is not clear that this ground is relied on. It is, however, not available to plaintiff in error. A corporation is not a citizen within the meaning of the provision, and hence has not "privileges and immunities" secured to "citizens" against state legislation. This was decided in *Paul* v. *Virginia,* 8 Wall. 168 [19: 357], against a corporation upon which were imposed conditions for doing business in the state of Virginia, and has been repeated in many cases since, including one at the present term, *Blake* v. *McClung,* 172 U. S. 239 [*ante,* 432].

(2) It is not easy to make a succinct statement of the objections of plaintiff in error under this provision. Coun says: "The business of insurance includes insurance against damages on account of death, accident, personal injury, liability for acts of employees, damages to plate glass, damages by hail, lightning, high wind, tornadoes, and against damages to personal property on account of fire or casualty by other elements, as well as insurance against loss or damage to buildings on account of fire. . . . No other business is subject to the discrimination, in case such business is involved in litigation, of having the damages assessed without due process of law. The statute singles out persons engaged in fire insurance as against all other kinds of insurance, and as against all other kinds of business, and imposes the onerous and unusual conditions provided in the statute, against such persons." And again: "The statute thus discriminates as to the subject-matter, as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compels it to pay damages never sustained, and prevents it from having an investigation upon the trial by due process of law."

This mingles grounds of objection, and confounds the prohibitions of the provision we are considering with that of the next provision. Whether the statute of Missouri provides for "due process" we shall consider
[562] hereafter, and upon that consideration *determine how much of the complaint against it in that regard is true. Now we may confine ourselves to the more specific contention that it discriminates between fire insurance corporations or companies and those engaged in other kinds of insurance.

It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283 [42: 1037]. We said in that case that "the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion." And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured,—differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify, if not demand, different legislative treatment. Of course it is not for us to debate the policy of any particular treatment; and the freedom of discretion which we have said the state has is exhibited by analogous, if not exact, examples to the Missouri statute in *Missouri P. Railway Company* v. *Mackey,* 127 U. S. 205 [32: 107]; and in *Minneapolis & St. L. Railway* v. *Beckwith,* 129 U. S. 26 [32: 585].

In *Missouri P. Railway Company* v. *Mackey,* 127 U. S. 205 [32: 107], a law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification, notwithstanding that it did not apply to other carriers, or even to other corporations using steam. The law was objected to, as the statute of Missouri is objected to, on the ground that it violated the provisions of the Constitution which we are now considering.

*To the first contention the court, by Mr. [563]
Justice Field, said: "The plain answer to this contention is that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state." And after further comment added: "That its passage was within the competency of the legislature, we have no doubt." To the second contention it was said: "It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact." The legislation was justified by the character of the business of railroad companies, and it was declared to be a matter of legislative dis-

cretion whether the same liability should or should not be applied to other carriers, or to persons and corporations using steam in manufactures.

In *Minneapolis & St. L. Railway Company* v. *Beckwith,* 129 U. S. 26 [32: 585], a law of Iowa making a class of railroad corporations for special legislation was sustained.

(3) "What it is for a state to deprive a person of life, liberty, or property without due process of law" is not much nearer to precise definition to-day than it was said to be by Mr. Justice Miller in *Davidson* v. *New Orleans,* 96 U. S. 97 [24: 616].

The process "of judicial inclusion and exclusion" has proceeded, and yet this court, in *Holden* v. *Hardy,* 169 U. S. 366 [42: 780], again declined specific definition. Mr. Justice Brown, speaking for the court, said: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard,—as, that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his own defense." These principles were extended to
[564] the right *to acquire property and to enter into contracts with respect to property; but it was said "this right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers."

The legislation sustained was an act of the state of Utah making the employment of workingmen in all underground mines and workings and in smelters and all other institutions for the reduction and refining of ores or metals eight hours per day, except in cases of emergency, where life or property should be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract,—that of the employer and that of the employed,—enforced by a criminal prosecution and penalty on the former and on his agents and managers. It was held a valid exercise of the police powers of the state. These powers were not defined except by illustration, nor need we now define them. The case is a precedent to support the validity of the Missouri statute now under consideration.

The statute provides as follows: "In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; *and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured,* less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss; and the burden of proving such depreciation shall be upon the defendant." It is also provided that no condition in any policy of insurance contrary to such provision shall be legal or valid.

The specific objections which, it is claimed, bring the statute within the prohibition of the Constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

*The right claimed is to make contracts of [565]
insurance. The essence of these, it is said, is indemnity, and that the statute converts them into wager policies,—into contracts (to quote counsel) having for their bases speculation and profit, "contrary to the course of the common law." The statement is broad, and counsel in making it ignores many things. The statute tends to assure, not to detract from the indemnity of the contracts, and if elements of chance or speculation intrude it will be on account of carelessness or fraud. It is admitted that the effect of the statute is to make valued policies of those issued; and the conclusive effect which has been ascribed to their valuation has never been condemned as making them wager policies or as introducing elements of speculation into them.

The statute, then, does not present the alternative of wager policies to indemnity policies. The change is from one kind of indemnity policy to another kind, from open policies to valued policies, both of which are sanctioned by the practice and law of insurance; and this change is the only compulsion of the law. It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done,—estoppel, it must be observed, to the acts of the parties, and only to their acts in open and honest dealing. Its presumptions cannot be urged against fraud, and it permits the subsequent depreciation of the property to be shown.

We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change, because, as we have seen, the presumptions of the statute do not obtain against fraud or change in the valuation of the property. Risk, then, can only come from the failure to observe care, —that care which it might be supposed, without any prompting from the law, underwriters would observe, and which, if observed, would make their policies true contracts of assurance, not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid. The state surely has the power to determine that this result is desirable, and to *accomplish it even [566]
by a limitation of the right of contract claimed by plaintiff in error.

It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non lædas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particu-

lar conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule.

The cases cited by plaintiff in error, which hold that the legislature may give the effect of prima facie proof to certain acts, but not conclusive proof, do not apply. They were not of contract nor gave effect to contracts. It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish and force a result against property or liberty.

The statute is not subject to the condemnation that it regulates contracts made or rights acquired prior to its enactment; and we may repeat the language of Mr. Justice Field, in *Missouri P. Railway Co.* v. *Mackey*, that "it cannot be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state."

That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California*, 155 U. S. 648 [39: 297, 5 Inters. Com. Rep. 610], and need not be repeated.

[567] *It is urged that the statute is not made a condition upon foreign corporations, but this view is not open to our acceptance. The supreme court of Missouri, exercising its function of interpretation, decides that it is. But we do not care to enter fully into the subject of conditions on corporations, foreign or domestic. The statute is sustained on the grounds that we have given.

The other contentions of plaintiff in error we do not consider it is necessary to review.

Judgment affirmed.

UNITED STATES, *Plff. in Err.*,
v.
WALTER S. HARSHA.

(See S. C. Reporter's ed. 567-573.)

Judgment, when reviewable by circuit court of appeals—vacancy in office of clerk of circuit court.

1. A judgment rendered under the act of Congress of March 3, 1887, providing for bringing suits against the United States in an action at law in the district court of the United States for fees due the clerk of the United States circuit court, is, reviewable by the United States circuit court of appeals upon writ of error.
2. The act of July 31, 1894, that no person holding an office the annual salary of which amounts to $2,500 shall hold any other office, did not, *ex proprio vigore*, create a vacancy in the office of the clerk of the United States circuit court for the eastern district of Michigan, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the United States circuit court of appeals of the sixth circuit.

[No. 127.]

Submitted January 11, 1899. Decided January 23, 1899.

CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit certifying certain questions to this court for instruction in an action brought by Walter S. Harsha in the District Court of the United States for the Eastern District of Michigan for his fees as clerk of the Circuit Court of the United States for that district, in which action the District Court rendered judgment in favor of the said Harsha, which judgment was brought up for review to said Circuit Court of Appeals by writ of error. *First question answered in the affirmative; second question answered in the negative.*

Statement by Mr. Justice **Gray**:

On May 24, 1897, the circuit court of appeals for the sixth circuit, upon a writ of error from that court to review a judgment rendered by the district court of the United States for the eastern district of Michigan in favor of Walter S. Harsha in an action brought by him against the United States under the act of March 3, 1887, chap. 359, to recover fees as clerk of the circuit court of the United States for that district, for services rendered during the first quarter of the *year 1895, certified to this court the following statement of facts and questions of law: [568]

"Walter S. Harsha was duly appointed clerk of the circuit court of the United States for the eastern district of Michigan, June 6, 1882, took the oath of office and filed his official bond in the sum of $20,000 on the same day, and is now and has from that time until the present been continuously, under said appointment by the judges of said court, and with their continued assent and approval, acting as clerk of said court under a bona fide claim of title to said office, no other person having at any time made any claim of title thereto; nor has his title been otherwise questioned than as hereafter stated.

"The said Harsha is now, and has been continuously since his appointment as clerk, a permanent resident of the city of Detroit, in the eastern district of Michigan, where his official duties as such clerk are to be performed, and has during the whole of said time, from June 6, 1882, to the date hereof, given his actual personal attention to such duties, and has not at any time removed from said district.

"The accounts of Harsha as such clerk, for the first quarter of the calendar year 1895, amounting to $482.90, were made, presented, proved, and allowed by the circuit court of the United States for the eastern district of Michigan, as provided by law; said accounts were for services actually rendered, and were correct, and were duly forwarded to the Attorney General for examination under his supervision, as provided by statute.

"The said Harsha was duly appointed clerk of the United States circuit court of appeals for the sixth circuit, June 16, 1891, took his oath of office and filed his official bond in the sum of $20,000 on the same day, and continued to perform the duties of the office of clerk of said court from June 16, 1891, aforesaid, to and including October 2, 1894, and received salary as such clerk at the rate of $3,000 per annum for that time.

"On February 24, 1894, Harsha presented to the judges of said court of appeals his resignation as such clerk, which resignation was accepted by said judges October 2, 1894.

[569] *"Upon the presentation at the Treasury Department of said accounts so forwarded to the Attorney General, the Comptroller of the Treasury, upon his construction of the act of Congress of July 31, 1894, decided that a vacancy occurred in the office of said clerk of the circuit court of the United States, beginning August 1, 1894, for the reason that after that date Harsha continued to hold the office of clerk of the United States circuit court of appeals for the sixth circuit, the annual compensation of which office was $3,000, and that such vacancy continued thereafter until the expiration of said first quarter of the calendar year 1895, and, upon the ground of such vacancy, disallowed the said accounts of petitioner as clerk of the United States circuit court for the eastern district of Michigan for the said first quarter of the calendar year 1895.

"This action was brought by Harsha to recover his fees earned as clerk of the circuit court, in the district court of the United States for the eastern district of Michigan, under the second section of the act of March 3, 1887, entitled 'An Act to Provide for the Bringing of Suits against the Government of the United States;' and after making a finding of facts and stating its conclusions of law the district court filed the same, and entered judgment for the petitioner Harsha in the sum of $482.90. The United States, by its attorney, then applied to the district judge, holding the district court for the allowance of a writ of error from this court to the district court. The writ was allowed, and was issued by the clerk of this court to the district court.

"The instruction of the supreme court is respectfully requested on certain questions of law arising on the foregoing statement of facts as follows, to wit:

"First question. Can such a judgment rendered under the act of March 3, 1887, in the circuit or district court, be brought before this court for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the supreme court of judgments of the court of claims, to wit, by appeal?

"Second question. Did the act of July 31, 1894, above referred *to, *ex proprio vigore*, create a vacancy in the office of clerk of the circuit court for the eastern district of Michigan, by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals of the sixth circuit? [570]

"Third question. Does the general rule that officers *de facto* may not recover by suit compensation for services rendered as such apply to a case in which the incumbent holds his office by the continued assent and approval of the sole appointing power, under a bona fide claim of title to the office, when no other person has at any time made any claim of title thereto, and when the only defects in his title are a failure on the part of the appointing power to make a formal reappointment and a failure on the part of the incumbent formally to requalify after a technical vacation of the office originally held by him under a valid appointment and qualification?"

Messrs. **L. A. Pradt,** Assistant Attorney General, and *E. C. Brandenburg* for plaintiff in error.

Mr. **Edwin F. Conely** for defendant in error.

*Mr. Justice **Gray** delivered the opinion of the court: [570]

This suit being an action at law under the act of March 3, 1887, chap. 359, the judgment of the district court therein was, as has been directly adjudged by this court, reviewable by the circuit court of appeals upon writ of error. 24 Stat. at L. 505; *Chase* v. *United States*, 155 U. S. 489 [39: 234]; *United States* v. *King*, 164 U. S. 703 [41: 1182]. The first question certified must therefore be answered in the affirmative.

Mr. Harsha was appointed and qualified as clerk of the circuit court on June 6, 1882, and has ever since performed all his duties as such.

On June 16, 1891, he was appointed and qualified as clerk of the circuit court of appeals. On February 24, 1894, he presented to the judges of that court his resignation of the *office of clerk thereof; and his resignation was accepted by them on October 2, 1894. From his appointment until the acceptance of his resignation he performed all the duties and received the salary of the clerk of that court. [571]

In 1893 it was adjudged by the circuit court of appeals, affirming a judgment of the circuit court, in an action brought by Mr. Harsha against the United States for services as clerk of the circuit court during the last half of 1891 and the first half of 1892, that his acceptance of the office and receipt of the salary as clerk of the circuit court of appeals during that period did not vacate the office of clerk of the circuit court, or deprive him of the right to the compensation then sued for. *United States* v. *Harsha,* 16 U. S. App. 13.

The subject of the present suit is the right of Mr. Harsha to recover compensation for his services as clerk of the circuit court during the first quarter of the year 1895.

On July 31, 1894, Congress, by a provision inserted in the middle of a general appropriation act, and as an addition to a section relating to the pay of assistant messengers, firemen, watchmen, laborers, and charwomen, enacted as follows: "No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation is attached, unless specially heretofore or hereafter specially authorized thereto by law; but this shall not apply to retired officers of the Army and Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate." Act of July 31, 1894, chap. 174, § 2, 28 Stat. at L. 162, 205.

The second question certified by the circuit court of appeals to this court is whether this act, *ex proprio vigore*, created a vacancy in the office of clerk of the circuit court, "by reason of the fact that at the time of its taking effect the then lawful incumbent of that office was also holding the office of clerk of the circuit court of appeals."

The provision of the act in question, so far as concerns the question now before this
[572] court, is simply this: "No person *who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars, shall be appointed to or hold any other office to which compensation shall be attached." If the appointment to the other office were made after the passage of the act, it might well be held to be void, leaving the person in possession of the first office. But when, at the time of the passage of the act, a person is holding two offices, to each of which compensation is attached, and the compensation of either or both of which is by an annual salary, the act does not say which of the two offices he shall be deemed to have resigned, or which of the two he shall continue to hold. If the compensation of each office were a fixed salary of two thousand five hundred dollars or more, an election by the incumbent would be the only possible method of determining which office he should continue to hold. He must have the same right of election between the two offices, when one is paid by a fixed salary and the other by fees. The act, while it makes the two offices incompatible for the future, does not undertake to compel the defendant to give up the office which is paid by fees, when he prefers to hold that office and to give up the one which is paid by a salary.

At the time of the taking effect of the act, Mr. Harsha was actually holding under lawful appointments, and was performing the duties of, two offices, that of clerk of the circuit court, paid by fees, and that of clerk of the circuit court of appeals, paid by a salary of three thousand dollars. He never showed any intention of resigning or abandoning the former office; and he had done all that he could to get rid of the latter office, by presenting his formal resignation thereof to the judges five months before the passage of the act, and never attempting to recall that resignation. Even if his resignation of this office could not take full effect until accepted, yet such resignation, coupled with his unequivocal intention to retain the other office, prevented the act of Congress from creating, of its own force and independently of any action of his, a vacancy in that office. The fact that so long as his resignation of the one office had not been accepted, and while he *con- [573]
tinued to perform the duties of both offices, he claimed the compensation attached to both,—whether this was owing to his overlooking the provision in question, or to his own understanding of its effect,—has no tendency to show that he elected to retain the office which he had resigned, and to give up the other.

The second question certified must therefore be answered in the negative, and the third question becomes immaterial.

Ordered accordingly.

FIRST NATIONAL BANK of Grand Forks, North Dakota, *Plff. in Err.*,
v.
ALEXANDER ANDERSON.

(See S. C. Reporter's ed. 573-576.)

National bank, when liable for notes purchased by it.

A national bank which itself purchases notes that it holds as collateral security, when it has been directed to sell them to a third party, may be held liable for their value as for a conversion, even though it is not within the powers of the bank to sell them as the owner's agent.

[No. 223.]

Submitted January 3, 1899. Decided January 23, 1899.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment of that court affirming the judgment of the district court for the first judicial district of North Dakota in favor of Alexander Anderson in an action brought by him against the First National Bank of Grand Forks, North Dakota, for the balance of the value of certain notes belonging to the plaintiff, which the bank had converted. On motion to dismiss or affirm. *Affirmed.*

See same case below, 4 N. D. 182, 5 N. D. 80, 451, 6 N. D. 497.

The facts are stated in the opinion.

Mr. **Henry W. Phelps** for defendant in error in favor of motion to dismiss or affirm.

Messrs. **Burke Corbet** and *W. E. Dodge* for plaintiff in error in opposition to motion.

*Mr. Chief Justice **Fuller** delivered the [573]
opinion of the court:

This was an action at law brought by Anderson against the First National Bank of Grand Forks, North Dakota, in *the district [574]
court for the first judicial district of North Dakota, to recover the balance of the value

of certain notes belonging to Anderson, which he alleged the bank had converted.

The notes amounted to seven thousand dollars, secured by mortgage, and had been indorsed, and the mortgage assigned, to the bank as collateral security for a loan of two thousand dollars, and Anderson had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance. But, instead of doing this, the bank, according to Anderson, had undertaken to purchase the notes itself, and had not accounted for their value.

The cause was tried four times, and four times carried to the supreme court of North Dakota. 4 N. D. 182, 5 N. D. 80, 451, 6 N. D. 497. On the fourth appeal a judgment in favor of Anderson was affirmed by the supreme court, and this writ of error to revise it was allowed, which defendant in error now moves to dismiss, or, if that motion is not sustained, that the judgment be affirmed.

By exceptions to the admission of certain testimony, taken on the trial, and by the assignment of errors in the supreme court, plaintiff in error raised the point that, under the statutes of the United States in respect of national banks, it was not within its power to become the agent of defendant in error to sell the notes in question to a third person, and not within the power of its cashier, who conducted the transaction, to bind the bank by such contract of agency.

On the third appeal (5 N. D. 451) the supreme court ruled that "when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its conceded power to collect the claim out of such collateral notes." But further, that even though the act of agency were *ultra vires*, yet if the bank, instead of selling the notes to a third person, had, without the owner's knowledge, sold them to itself, it would be guilty of conversion, and could be held responsible therefor. As to the cashier, the
[575] court held that on the *pleadings and facts in the case his act was the act of the bank.

The supreme court in its opinion on the fourth appeal (6 N. D. 497, 509), among other things, said: "The question of *ultra vires* has been already discussed in a previous opinion. See 5 N. D. 451. We have nothing to add on that point. The recent decision of the Federal Supreme Court cited by counsel for appellant (*California Bank* v. *Kennedy*, 167 U. S. 362 [42: 198]), does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal, on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant, is still applicable to the case on the record now before us. In its answer and the brief of its counsel the defendant admits that the writing of the letters referred to was its act, and not the act of an unauthorized agent. By its own pleading and admissions it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

The argument urged in support of the motion to dismiss is, principally, that the judgment of the state supreme court rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question.

This contention is so far justified as to give color to the motion, although under our decision in *Logan County National Bank* v. *Townsend*, 139 U. S. 67 [35: 107], we must decline to sustain it, while at the same time that case affords sufficient authority, if authority were needed, for an affirmance of the judgment.

There, bonds had been sold and delivered to a national bank at a certain price, under an agreement that the bank would, on demand, replace them at that or a less price; and the bank had refused compliance. In an action against the bank, its defense was in part that, by reason of want of authority to make the alleged agreement and purchase, it could not be held liable for the bonds on any ground whatever. It was decided, however, that the national banking act did not give
*a national bank an absolute right to retain [576]
bonds coming into its possession by purchase under a contract which it was without legal authority to make, and that although the bank was not bound to surrender possession of them until reimbursed to the full amount due to it, and might hold them as security for the return of the consideration paid, yet that when such amount was returned, or tendered back to it, and the return of the bonds demanded, its authority to retain them no longer existed; and from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it became liable for their value on grounds of implied contract, apart from the original agreement under which it obtained them.

Here, the bank was found to have itself purchased notes which the owner had authorized it to sell to a third party, and on general principles of law it was held liable for their value as for a conversion, even though it was not within its powers to sell them as the owner's agent.

We are of opinion that *the Supreme Court of North Dakota committed no error in the disposition of any Federal question, and its judgment is affirmed.*

UNITED STATES, *ex rel.* ALFRED L. BERNARDIN, *Plff. in Err.*,
v.
CHARLES H. DUELL, Commissioner of Patents.

(See S. C. Reporter's ed. 576-589.)

Appeal from Commissioner of Patents to court of appeals of the District of Columbia.

The Commissioner of Patents in deciding an interference case exercises judicial functions, and therefore the provisions of the act of

Congress of February 9, 1893, giving an appeal from his decisions to the court of appeals of the District of Columbia is not unconstitutional on the ground that it provides for the revision of an executive act by a judicial tribunal.

[No. 444.]

Argued December 1, 2, 1898. Decided January 23, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of that District in favor of the defendant, Charles H. Duell, Commissioner of Patents, dismissing a petition for a writ of mandamus filed by Alfred L. Bernardin to compel the commissioner to issue a patent to him. *Affirmed.*

See same case below, 7 App. D. C. 452, 10 App. D. C. 294, 11 App. D. C. 91, 13 App. D. C. 379. See also 169 U. S. 600 [42: 873].

Statement by Mr. Chief Justice **Fuller:**

In an interference proceeding in the Patent Office between Bernardin and Northall, the Commissioner, Seymour, decided in favor of Bernardin, whereupon Northall prosecuted an appeal to the court of appeals of the District of Columbia. That court awarded Northall priority and reversed the Commissioner's decision. 7 App. D. C. 452. Bernardin, notwithstanding, applied to the Commissioner to issue the patent to him and tendered the final fee, but the Commissioner refused to do this in view of the decision of the court of appeals, which had been duly certified to him. Bernardin then applied to the supreme court of the District of Columbia for a mandamus to compel the commissioner to issue the patent in accordance with his prior decision, on the ground that the statute providing for an appeal was unconstitutional and the judgment of the court of appeals void for want of jurisdiction. The application was denied, and Bernardin ap-
[578]pealed to *the court of appeals which affirmed the judgment. 10 App. D. C. 294.

Seymour resigned as Commissioner and was succeeded by Butterworth, and Bernardin recommenced his proceeding, which again went to judgment in the supreme court, and the court of appeals. 11 App. D. C. 91. The case was brought to this court, but abated in consequence of the death of Butterworth. 169 U. S. 600 [42: 873]. Bernardin thereupon brought his action against Duell, Butterworth's successor, and judgment against him was again rendered in the District supreme court, that judgment affirmed by the court of appeals, and the cause brought here on writ of error.

The following sections of the Revised Statutes were referred to on the argument:

"Sec. 4906. The clerk of any court of the United States, for any district or territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpœna for any witness residing or being within such district or territory, commanding him to appear and testify before any officer in such district or territory authorized to take depositions and affidavits, at any time and place in the subpœna stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpœna is served upon him.

"Sec. 4907. Every witness duly subpœnaed and in attendance shall be allowed the same fees as are allowed to witnesses attending the courts of the United States.

"Sec. 4908. Whenever any witness, after being duly served with such subpœna, neglects or refuses to appear, or after appearing refuses to testify, the judge of the court whose clerk issued the subpœna may, on proof of such neglect or refusal, enforce obedience to the process or punish the disobedience, as in other like cases. But no witness shall be deemed guilty of contempt for disobeying such subpœna, unless his fees and traveling expenses in going to, returning from, and one day's attendance at, the place of examination, *are paid or tendered him at the time [579]
of the service of the subpœna; nor for refusing to disclose any secret invention or discovery made or owned by himself.

"Sec. 4909. Every applicant for a patent or for the reissue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners in chief; having once paid the fee for such appeal.

"Sec. 4910. If such party is dissatisfied with the decision of the examiners in chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person.

"Sec. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the supreme court of the District of Columbia, sitting in banc.

"Sec. 4912. When an appeal is taken to the supreme court of the District of Columbia, the appellant shall give notice thereof to the Commissioner, and file in the Patent Office, within such time as the Commissioner shall appoint, his reasons of appeal, specifically set forth in writing.

"Sec. 4913. The court shall, before hearing such appeal, give notice to the Commissioner of the time and place of the hearing, and on receiving such notice the Commissioner shall give notice of such time and place in such manner as the court may prescribe, to all parties who appear to be interested therein. The party appealing shall lay before the court certified copies of all the original papers and evidence in the case, and the Commissioner shall furnish the court with the grounds of his decision, fully set forth in writing, touching all the points involved by the reasons of appeal. And at the request of any party interested, or of the court, the Commissioner and the examiners may be examined under oath, in explanation of the principles of the thing for which a patent is demanded.

"Sec. 4914. The court, on petition, shall

hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient
[580] time as the court may *appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

Section 780 of the Revised Statutes of the District of Columbia reads thus:

"Sec. 780. The supreme court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to section forty-nine hundred and fifteen, inclusive, of chapter one, title LX. of the Revised Statutes, 'Patents, Trademarks, and Copyrights.'"

Section nine of the "act to establish a court of appeals for the District of Columbia, and for other purposes," approved February 9, 1893 (27 Stat. at L. 434, chap. 74), is—

[581] *"Sec. 9. That the determination of appeals from the decision of the Commissioner of Patents, now vested in the general term of the supreme court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be and the same is hereby vested in the court of appeals created by this act; and, in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said court of appeals."

Messrs. **Julian C. Dowell** and **George C. Hazelton** for plaintiff in error.

Mr. **John K. Richards**, Solicitor General, for defendant in error.

Mr. Jeremiah M. Wilson submitted a brief for Assignee of William H. Northall, by special leave of court.

*Mr. Chief Justice **Fuller** delivered the [581]
opinion of the court:

The court of appeals for the District of Columbia adjudged that Northall was entitled to the patent. By section eight of the act establishing that court (27 Stat. at L. 434, chap. 74), it is provided that any final judgment or decree thereof may be revised by this court on appeal or error in cases wherein the validity of a statute of the United States is drawn in question. The validity of the act of Congress allowing an appeal to the court of appeals in interference cases was necessarily determined when that court went to judgment, yet no attempt was made to bring the case directly to this court, but the relator applied to the district supreme court to compel the commissioner to issue the patent in disregard of the judgment of the court of appeals to the contrary, and, the application having been denied, the court of appeals was called on to readjudicate the question of its own jurisdiction.

The ground of this unusual proceeding, by which the lower court was requested to compel action to be taken in defiance *of the court [582]
above, and the latter court was called on to rejudge its own judgment, was that the decree of the court of appeals was utterly void because of the unconstitutionality of the statute by which it was empowered to exercise jurisdiction.

Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy, nor unless the duty sought to be enforced is clear and indisputable; and we think that, under the circumstances, the remedy by appeal existed; and that it is not to be conceded that it was the duty of the Commissioner to disobey the decree because in his judgment the statute authorizing it was unconstitutional, or that it would have been consistent with the orderly and decorous administration of justice for the District supreme court to hold that the court of appeals was absolutely destitute of the jurisdiction which it had determined it possessed. Even if we were of opinion that the act of Congress was not in harmony with the Constitution, every presumption was in favor of its validity, and we cannot assent to the proposition that it would have been competent for the Commissioner to treat the original decree as absolutely void, and without force and effect as to all persons and for all purposes.

But as, in our opinion, the court of appeals had jurisdiction, we prefer to affirm the judgment on that ground.

The contention is that Congress had no power to authorize the court of appeals to review the action of the Commissioner in an interference case, on the theory that the Commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that therefore such action cannot be subjected to the revision of a judicial tribunal.

Doubtless, as was said in [*Den,*] *Murray,*

v. *Hoboken Land & Improv. Company*, 18 How. 284 [15: 378], Congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination, but at the same time, as Mr. Justice Curtis, delivering the opinion of the court, further observed, "There are matters
[583]involving public *rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." The instances in which this has been done are numerous, and many of them are referred to in *Fong Yue Ting* v. *United States*, 149 U. S. 714, 715, 728 [37: 913, 915, 918].

Since, under the Constitution, Congress has power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and to make all laws which shall be necessary and proper for carrying that expressed power into execution, it follows that Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that object.

And by reference to the legislation on the subject, a comprehensive sketch of which was given by Mr. Justice Matthews in *Butterworth* v. [*United States*,] *Hoe*, 112 U. S. 50 [28: 656], it will be seen that from 1790 Congress has selected such instrumentalities, varying them from time to time, and since 1870 has asserted the power to avail itself of the courts of the District of Columbia in that connection.

The act of 1790, chap. 7 (1 Stat. at L. 109), authorized the issue of patents by the Secretary of State, the Secretary for the Department of War, and the Attorney General, or any two of them, "if they shall deem the invention or discovery sufficiently useful and important," and this was followed by the act of 1793, chap. 11, 1 Stat. at L. 318, authorizing them to be issued by the Secretary of State upon the certificate of the Attorney General that they were conformable to the act. The ninth section of the statute provided for the case of interfering applications, which were to be submitted to the decision of three arbitrators, chosen one by each of the parties and the third appointed by the Secretary of State, whose decision or award, or that of two of them, should be final as respected the granting of the patent.

Then came the act of 1836, chap. 357 (5
[584]Stat. at L. 117), creating *in the Department of State the Patent Office, "the chief officer of which shall be called the Commissioner of Patents," and "whose duty it shall be, under the direction of the Secretary of State, to superintend, execute, and perform all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions, and improvements as are herein provided for, or shall hereafter be by law directed to be done and performed." . . . By that act it was declared to be the duty of the Commissioner to issue a patent if he "shall deem it to be sufficiently useful and important;" and, in case of his refusal, the applicant was (sec. 7) secured an appeal from his decision to a board of examiners, to be composed of three disinterested persons appointed for that purpose by the Secretary of State, one of whom, at least, was to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertained. The decision of this board being certified to the Commissioner, it was declared that "he shall be governed thereby in the further proceedings to be had on such application." A like proceeding, by way of appeal, was provided in cases of interference. By section 16 of the act a remedy by bill in equity, still existing in sections 4915, 4918, Revised Statutes, was given as between interfering patents or whenever an application had been refused on an adverse decision of a board of examiners. By section 11 of the act of 1839, chapter 88 (5 Stat. at L. 354), as modified by the act of 1852, chapter 107 (10 Stat. at L. 75), it was provided that in all cases where an appeal was thus allowed by law from the decision of the Commissioner of Patents to a board of examiners, the party, instead thereof, should have a right to appeal to the chief judge or to either of the assistant judges of the circuit court of the District of Columbia; and by section 10 the provisions of section 16 of the act of 1836 were extended to all cases where patents were refused for any reason whatever, either by the Commissioner or by the chief justice of the District of Columbia upon appeals from the decision of the Commissioner, as well as where the *same shall have been refused on account of [585]
or by reason of interference with a previously existing patent.

By the act of 1849, chapter 108 (9 Stat. at L. 395), the Patent Office was transferred to the Department of the Interior. The act of 1861, chap. 88 (12 Stat. at L. 246), created the office of examiners in chief, "for the purpose of securing greater uniformity of action in the grant and refusal of letters patent . . . to be composed of persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the applicant for that purpose being filed, to revise and determine upon the validity of decisions made by examiners when adverse to the grant of letters patent; and also to revise and determine in like manner upon the validity of the decisions of examiners in interference cases, and when required by the Commissioner in applications for the extension of patents, and to perform such other duties as may be assigned to them by the Commissioner; that from their decisions appeals may be taken to the Commissioner of Patents in person, upon payment of the fee hereinafter prescribed; that the said examiners in chief shall be governed in their action by the rules to be prescribed by the Commissioner of Patents."

The act of July 8, 1870 (16 Stat. at L. 198, chap. 230), revised, consolidated, and amended the statutes then in force on the subject, and by section 48 an appeal to the supreme

court of the District of Columbia sitting in banc was provided for, whose decision was to govern the further proceedings in the case (§ 50); and the provisions of the act material to the present inquiry were carried in substance into the existing revision.

By the act of February 9, 1893, the determination of appeals from the Commissioner of Patents, which was formerly vested in the general term of the supreme court of the District, was vested in the court of appeals, and, in addition, it was provided that "any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said court of appeals."

As one of the instrumentalities designated
[586] by Congress in *execution of the power granted, the office of Commissioner of Patents was created, and though he is an executive officer, generally speaking, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.

Now, in deciding whether a patent shall issue or not, the Commissioner acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests; and so as to reissue, or extension, or on interference between contesting claimants; and in all this he exercises judicial functions.

In *Butterworth* v. [*United States,*] *Hoe*, *supra*, Mr. Justice Matthews, referring to the constitutional provision, well said:

"The legislation based on this provision regards the right of property in the inventor as the medium of the public advantage derived from his invention; so that in every grant of the limited monopoly two interests are involved, that of the public, who are the grantors, and that of the patentee. There are thus two parties to every application for a patent, and more, when, as in case of interfering claims or patents, other private interests compete for preference. The questions of fact arising in this field find their answers in every department of physical science, in every branch of mechanical art; the questions of law, necessary to be applied in the settlement of this class of public and private rights, have founded a special branch of technical jurisprudence. The investigation of every claim presented involves the adjudication of disputed questions of fact upon scientific or legal principles, and is therefore essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions."

That case is directly in point and the *ratio decidendi* strictly applicable to that before us. The case was a suit in mandamus brought by the claimant of a patent in whose favor the Commissioner had found in an interference case, to compel the Commissioner to issue the patent to him. The Commis-
[587] sioner *had refused to do this on the ground that the defeated party had appealed to the Secretary of the Interior, who had reversed the Commissioner's action, and found in appellant's favor. This court held that while the Commissioner of Patents was an executive officer and subject in administrative or executive matters to the supervision of the head of the department, yet that his action in deciding patent cases was essentially judicial in its nature and not subject to review by the executive head, an appeal to the courts having been provided for. And among other things it was further said:

"It is evident that the appeal thus given to the supreme court of the District of Columbia from the decision of the Commissioner is not the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one in the statutory proceeding under the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose by litigation in courts of general jurisdiction to question the validity of any patent thus awarded, is nevertheless conclusive upon the Patent Office itself, for, as the statute declares (Rev. Stat. § 4914), it 'shall govern the further proceedings in the case.' The Commissioner cannot question it. He is bound to record and obey it. His failure or refusal to execute it by appropriate action would undoubtedly be corrected and supplied by suitable judicial process. The decree of the court is the final adjudication upon the question of right; everything after that dependent upon it is merely in execution of it; it is no longer matter of discretion, but has become imperative and enforceable. It binds the whole Department, the Secretary as well as the Commissioner, for it has settled the question of title, so that a demand for the signatures necessary to authenticate the formal instrument and evidence of grant may be enforced. It binds the Secretary by acting directly upon the Commissioner, for it makes the action of the latter final by requiring it to conform to the decree.

"Congress has thus provided four tribunals for hearing applications for patents, with three successive appeals, in which the Secretary of the Interior is not included, giving jurisdiction *in appeals from the Commis- [588]
sioner to a judicial body, independent of the Department, as though he were the highest authority on the subject within it. And to say that under the name of direction and superintendence the Secretary may annul the decision of the supreme court of the District sitting on appeal from the Commissioner, by directing the latter to disregard it, is to construe a statute so as to make one part repeal another, when it is evident both were intended to coexist without conflict.

. . . .

"No reason can be assigned for allowing an appeal from the Commissioner to the Secretary in cases in which he is by law required to exercise his judgment on disputed questions of law and fact, and in which no appeal is allowed to the courts, that would not equally extend it to those in which such appeals are provided, for all are equally embraced in the general authority of direction and superintendence. That includes all or

does not extend to any. The true conclusion, therefore, is that in matters of this description, in which the action of the Commissioner is quasi-judicial, the fact that no appeal is expressly given to the Secretary is conclusive that none is to be implied."

We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and as the proceeding in the court of appeals on an appeal in an interference controversy presents all the features of a civil case, a plaintiff, a defendant, and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment "because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution." *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447 [38: 1047, 4 Inters. Com. Rep. 545].

It will have been seen that in the gradual development of the policy of Congress in dealing with the subject of patents, the recognition of the judicial character of the questions involved became more and more pronounced.

[589] *By the acts of 1839 and 1852 an appeal was given, not to the circuit court of the District of Columbia, but to the chief judge or one of the assistant judges thereof, who was thus called on to act as a special judicial tribunal. The competency of Congress to make use of such instrumentality or to create such a tribunal in the attainment of the ends of the Patent Office seems never to have been questioned, and we think could not have been successfully. The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal (*United States* v. *Coe*, 155 U. S. 76 [39: 76]); and *a fortiori* existing courts of competent jurisdiction might be availed of.

We agree that it is of vital importance that the line of demarcation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers; but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional.

Judgment affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, *Appt.*,

v.

WILLIAM V. MYERS, Treasurer of Jefferson County, Montana.

(See S. C. Reporter's ed. 589-602.)

Lands included in grant to Northern Pacific Railroad Company, when subject to state taxation.

Lands included in the grant to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, are subject to state taxation for their value as agricultural lands, although they have not been patented to the railroad company and their mineral or non mineral character is under investigation under the provisions of the act of Congress of February 26, 1895, chap. 131.

[No. 214.]

Argued October 21, 1898. Decided January 23, 1899.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit reversing the decree of the Circuit Court of the United States for the District of Montana in favor of the Northern Pacific Railway Company, which enjoined the enforcement and collection of certain taxes levied under the laws of Montana against lands within the grant to the Northern Pacific Railroad Company. *Affirmed.*

See same case below, 48 U. S. App. 620.

Statement by Mr. Justice **McKenna:**

*This suit involves the validity of a tax **[590]**
levied under the laws of the State of Montana against certain lands lying within the grant to the Northern Pacific Railroad Company, made by the act of Congress, approved July 2, 1864, chap. 217 (13 Stat. at L. 365).

It was brought in the circuit court of the United States for the district of Montana by the receivers of the Northern Pacific Railroad Company, a Federal corporation, and the receivers were appointed by a decree of the Federal court.

The suit proceeded in the circuit court in the name of said receivers to a hearing on demurrer, and to a submission of the case upon bill, answer, and stipulated facts. On the twelfth of November, 1896, it was stipulated and represented to the court that the Northern Pacific *Railway* Company had purchased the property in question pending the litigation, and it was agreed and thereupon ordered by the court that the Northern Pacific *Railway* Company be substituted as plaintiff in place of the receivers. Thereupon a decree was passed on the sixteenth day of December in favor of the complainant, enjoining the enforcement and collection of the taxes. From this*decree the defendant, Will- **[591]**
iam Myers, county treasurer, appealed to the circuit court of appeals, which reversed the decree of the circuit court. *Myers* v. *Northern Pacific Ry. Co.* 48 U. S. App. 620. The plaintiff railway company takes this appeal.

It was agreed "that the sole question desired to be submitted upon the pleadings, and this stipulation, is whether the lands described in the bill were subject to taxation under the laws of the United States and of the state of Montana." This being the only question submitted, the allegations of the pleadings and statements of the stipulation not bearing on that question need not be stated; and it is sufficient to note that the bill and stipulation showed the incorporation of the Northern Pacific Railroad Company by the act of July 2, 1864; its power to construct a railroad from Lake Superior to Pu-

get sound; the grant of land to it by section 3, which is quoted hereafter; the performance by the railroad company of all the conditions of the grant, both provisional and final, including the construction of the road and its acceptance by the United States; and the freedom of the lands from pre-emption claims and rights.

Prior to the attempted assessments and tax levies assailed, the lands were surveyed by the United States or its authority, and were reported by the surveyors making such surveys to be agricultural lands, nonmineral in character; and the company prepared, in the manner prescribed by the Secretary of the Interior, lists of the lands claimed by it under the grant, including the lands in controversy, and filed them in the proper district land office, paying the fees thereon; and attached to each of said lists was an affidavit of the land commissioner of the railroad company, in which it was affirmed "that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by said Northern Pacific Railroad Company as inuring to the said company" under its grant by the act of Congress of July 2, and a joint resolution approved May 31, 1870, and "that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated
[592] by the *grant, being within the limit of forty miles on each side of the line of route for a continuous distance of——, being a portion of said lands for a section of ——miles of said railroad, commencing at ——and ending at ——."

The said lists were duly filed, and their accuracy tested by the district land officers, and so certified, and it was also certified that the filing was allowed; that they were surveyed public lands within the limits of the grant, "and that the same are not or is any part thereof returned and denominated as mineral land or lands." It was also certified that no claims were on file against the lands, and that the fees were paid."

The lists were transmitted to the office of the Commissioner of the General Land Office.

The stipulation shows the manner of examination in the land office, and "that such lands are not patented or certified to the company until clear lists are approved by the secretary." And the lists have not yet been examined or passed or patented to the company, and that the mineral or nonmineral character is under investigation under the provisions of the act of Congress of February 26, 1895, chap. 131 (28 Stat. at L. 683).

The company has such right, title, interest, and property in the lands as was conferred upon it by the act of July, 1864, and the act and joint resolutions amendatory thereof, and acquired by a compliance with their terms.

One Thomas G. Merrill, a citizen of Montana, transmitted to the Secretary of the Interior a letter signed by Thomas G. Miller as chairman citizens' executive committee, declaring that the selections of the railroad company embraced thousands of recorded mineral claims and extensive mining properties being prospected, developed, and worked, "and in view of the irreparable injury which would be caused to the people and state of Montana by the premature or unlawful conveyance of title to such lands to the railroad company, I beg leave to formally file the following requests:

"That the Commissioner of the General Land Office be directed to suspend the patenting of lands in Montana to the Northern Pacific R. R. Company until the mineral or nonmineral *character of the lands selected [593]
by said company shall have been investigated and definitely ascertained and adjudicated by proper proceedings, and until mineral claimants and the state of Montana shall have opportunity to be heard before the department on questions of law and fact.

"2. That the commissioner be directed to cause to be noted on the lists of the company's selections the tracts and townships alleged to be mineral in character by affidavits now on file in the Department of the Interior.

"Very respectfully,
"Thomas G. Miller,
"Chairman Citizens' Executive Committee."

November 4, 1889, the Secretary of the Interior referred said letter to the Commissioner of the General Land Office, with the following indorsement:

Referred to Commissioner of Gen'l Land Office, with approval of within requests and direction to comply thereunto. Please notify me when done.
Nov. 4, '89. J. W. Noble, Sec'y.

This order was not revoked prior to 1895.

The company and its receivers have been diligent to prosecute the identification of the lands, and the defendant, conceding this, denies that they have not been or are not fully defined and identified as part of the grant to the company.

Three commissioners were appointed as provided in the act of February 26, 1895, and commenced the examination and classification of said lands during the year 1895, and have classified certain of the lands as mineral, a list of which is inserted, and that the remainder of the lands have not been examined and classified. And it was admitted that other lands, a list of which is given, are in contest in the Interior Department, and that a certain section of land was decided in 1894, but subsequent to the assessment, to be mineral, and excepted from the grant, and that there were other lands to which there were claims, but which were disputed by the company, and that some contests were decided in favor of the company.

In the year 1894 the assessor of Jefferson county, Montana,*proceeded to and did assess [594]
the lands described in the complaint herein, in the manner and form prescribed by law, and described and included said lands in the assessment book of said county of Jefferson for said year.

The receivers appeared before the board of equalization and objected to the assessment,

and the board refused to strike the lands from the assessment roll, and the taxes were assessed and levied against the lands with the other lands of the county; that the tax proceedings were in manner and form in all respects as required by the laws of Montana; that the taxes amounted to $3,000, and that the treasurer of the county was proceeding to collect the same by sale, and would so collect the same if not enjoined and restrained by the order of the court.

As a ground of relief by injunction the bill alleges: "And your orators show that said tax levies cloud the title to said described lands, and impair the value thereof as an asset in the hands of your orators; that said certificates and deeds when issued, as your orators believe and show they will be, will constitute further clouds upon the title thereto. That if said lands be sold a multiplicity of suits will be necessary to quiet the title thereto and to remove the clouds thereby created."

Among the things which were asked to be adjudged at the final hearing were:

"1. That the lands described in schedule 'A' hereunto annexed, and each and all thereof, were not subject to assessment and taxation by said county of Jefferson or state of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor.

"2. That it may be ordered, adjudged, and decreed that said pretended and attempted assessments and tax levies were and are null and void, and constitute a cloud upon the title to said described lands."

Section three of the act of July 2, 1864, is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors, and assigns, for the purpose of aiding in the construction of said railroad
[595]and *telegraph line to the Pacific Coast, . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied, by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. . . . Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd sections, nearest to the line of said road, may be selected as above provided; and further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

Section four provides for the issuing of patents on the completion and acceptance of each twenty-five consecutive miles of said railroad and telegraph line.

The assignment of errors is as follows:

"The said court held that the lands described in the bill of complaint in said action were subject to taxation, although it appears from the pleadings and stipulation in said cause:

"(*a*) That said lands were at the time of the assessments and tax levies complained of unpatented, and were involved in contests pending before the Interior Department over questions of fact between said railway company and various settlers and the United States.

*"(*b*) Although it further appears from [596]
the pleadings and stipulation in said cause that said lands were not, at the time of the assessment and tax levies complained of, identified and defined as lands passing under the act of Congress approved July 2, 1864, so as to be segregated from the public lands of the United States.

"(*c*) Although it further appears from the pleadings and stipulations in said cause that the grantee, under the act of Congress approved July 2, 1864, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route,' was not entitled to patents for said lands at the time of the assessment and tax levies complained of.

"(*d*) Although it appears from the pleadings and stipulation in said cause that the United States possessed at the time of the assessment and tax levies complained of an interest in said lands, and each and all thereof, and that the said lands were subject to exploration for minerals as public lands of the United States.

"The said court failed and refused to hold that the lands described in the complaint were not at the time of the assessment and tax levy complained of subject to assessment or taxation.

"The said court entered an order reversing the decree of the United States circuit court for the district of Montana, and remanded said cause with an order to the United States circuit court for the district of Montana to enter a decree in favor of the above-named appellant."

Messrs. **C. W. Bunn, A. B. Browne,** and *A. T. Britton* for appellant.

Mr. **C. B. Nolan,** Attorney General of Montana, for appellee.

*Mr. Justice **McKenna** delivered the [596]
opinion of the court:

The averments in the bill of complaint and the stipulation *of facts show a controversy [597]
between the railroad company and the Interior Department as to the character of the

lands, whether mineral or nonmineral, taxed by the state of Montana; and the company avers "that at the time of said attempted assessments and tax levies said lands . . . had not been and are not now certified or patented to said railroad company, and the said lands were not ascertained or determined to be a part of the lands granted to said company, nor were they segregated from the public lands of the United States, and the said railroad company had and has but *a potential interest* therein." And part of the relief prayed for was "that the lands be adjudged not subject to assessment and taxation by said county of Jefferson or by the state of Montana for the year 1894, and until the United States shall issue to said railroad company patents therefor."

A similar claim was denied by the circuit court of appeals for the ninth circuit, in *Northern Pacific Railroad Co.* v. *Wright*, 7 U. S. App. 502, and by this court in *Central Pacific Railway Company* v. *Nevada*, 162 U. S. 512 [40: 1057]. It is, however, now conceded that the railroad has a taxable interest, counsel for appellant saying:

"The question for decision is not whether the railway company has any interest in its grant, or in the lands in question, which may be subjected to some form of taxation; but whether the *lands themselves* are taxable; whether the present assessment, which is on the lands themselves, can be sustained. We may well concede that the taxing power is broad enough to reach in some form the interest of the railway company in its grant; that interest becomes confessedly a vested interest upon construction of the road. It then becomes property, and may well be held subject to some form of taxation.

"But here the legislature authorizes a tax upon, and the assessor makes an assessment upon, the land itself by specific description; the whole legal title to each parcel being specifically and separately assessed. When the plain fact is, that neither the assessor nor the railway company can place its hand on a single specific parcel and say whether it belongs to the company or to the United States."

[598] *The question which was submitted, therefore, by the stipulation,—namely, "whether the lands described in the bill were subject to taxation under the laws of the United States and of the State of Montana,"—if not evaded by the concession of appellant, has changed its form; but even in the new form it seems to have the same foundation as the contention rejected in the Nevada case, *supra*, that because title may not attach to some of the lands it does not attach as to any. Whether it has such foundation we will consider.

In *Kansas P. Railroad Company* v. *Prescott*, 16 Wall. 603 [21: 373]; *Union P. Railroad Company* v. *McShane*, 22 Wall. 444 [22: 747]; and *Northern Pacific Railway Company* v. *Traill County*, 115 U. S. 600 [29: 477],—it was decided that lands sold by the United States might be taxed before they had parted with the legal title by issuing a patent; but this principle, it was said, must be understood to be applicable only to cases where the right to the patent was complete, and the equitable title was fully vested in the party without anything more to be paid or any act to be done going to the foundation of his right. In the first case the court said two acts remained to be done which might wholly defeat the right to the patent: (1) the payment of the cost of surveying; (2) a right of pre-emption which would accrue if the company did not dispose of the lands within a certain time. The dependency of the right of taxation on the first condition was affirmed with the principle announced in *Union P. Railway Company* v. *McShane*. The dependency of the right of taxation on the second ground was expressly overruled.

Embarrassment to the title of the United States by a sale of the land for taxes seems to have been the concern and basis of those cases. This embarrassment was relieved, and Congress permitted taxation by the act of July 10, 1886. By that act it is provided: "That no lands granted to any railroad corporation by any act of Congress shall be exempted from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*, *That any such land sold for taxes shall be [599]
taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect to such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become the preferred purchaser, and in such case the land sold shall be restored to the public domain and disposed of as provided by the laws relating thereto." 24 Stat. at L. 143, chap. 764.

This act was interpreted in *Central Pacific Railroad Co.* v. *Nevada, supra*. The lands involved were classified in the opinion as follows: (1) Those patented; (2) those unsurveyed; (3) those surveyed but unpatented, upon which the cost of surveying had been paid; and (4) like lands upon which the cost of survey had not been paid. Applying the statute, Mr. Justice Brown, speaking for the court, said: "The principal dispute is with regard to the fourth class. . . . In view of the statute, it is difficult to see how these lands, which are the very ones provided for by the statute, can escape taxation if the state chooses to tax them."

This case establishes that the state may tax the surveyed lands, mineral or agricultural, within the place limits of the grant, and there is nothing in the case or its principle which limits the assessment to an interest less than the title; that distinguishes the lands from a claim to them. The statute of Nevada defined the term "real estate" to include "the ownership of, or claim to, or possession of, or right of possession to, any

lands;" and the supreme court of the state had decided that to constitute a possessory claim actual possession was necessary, and, on this account, distinguished in some way surveyed from unsurveyed lands. It was urged that the distinction was not justified, and that the necessity of actual possession applied alike to both kinds and exempted both kinds from taxation, and hence it was
[600] insisted there was nothing to *tax unless the title was taxed, and that this could not be done under the decisions of this court. To this contention the opinion replied that how the interest of the railroad should be defined was not a Federal question, nor did inaptitude of definition by the supreme court of the state or in the application of the definition raise a Federal question. "Taxation of the lands by the state," it was said, "rested upon some theory that the railroad had a taxable interest in them. What that interest was does not concern us so long as it appears that, so far as Congress is concerned, express authority was given to tax the lands."

If this case leaves us any concern it is only to inquire what assessable interest passed by the grant. It is not necessary to detail the cases in which this court has held that railroad land grants are *in præsenti* of land to be afterwards located. Their principle reached the fullest effect and application in *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241 [35: 999], in which it was held that the legal title passed by such grants as distinguished from merely equitable interests, and an action of ejectment was sustained by a lessee of the Central Pacific Railroad Company before patent was issued. But in *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288 [38: 992], in a similar action, recovery was denied to the Northern Pacific Railroad Company on the ground that mineral lands were not conveyed by the grant to it, but were "specifically reserved to the United States and excepted from the operations of the grant."

The accommodation of these cases is not difficult. In the *Barden Case* there was a concession that the land was mineral, and there was an attempted recovery of valuable ores. In the *Deseret Case* there was no such concession, and the primary effect of the grant prevailed. In the case at bar there is no such concession, and the primary effect of the grant must prevail. There is no presumption of law of what kind of lands the grant is composed. Upon its face, therefore, the relation of the railroad to every part of it is the same, and on the authority of *Deseret Salt Co.* v. *Tarpey* ejectment may be brought for every part of it. The action, of course,
[601] may be *defeated, but it may prevail; and a title which may prevail for the company in ejectment surely may be attributed to it for taxation, to be defeated in the latter upon the same proof or concession by which it would be defeated in the former. An averment that there is a controversy about the character of lands not yielded to, an expression of doubt about it not acted on, is not sufficient. This view does not bring the railroad company to an unjust dilemma. The company has the title or nothing. In response to its obligations to the state it must say which. If it have the title to any of the lands, this title cannot be diminished to a claim or an interest because it has not or may not have title to others. If there is uncertainty, it must be resolved by the railroad. Suppose, to use the language of counsel, "Neither the assessor nor the railway company can place its hand on a single specific parcel, and say whether it belongs to the company or to the United States." We nevertheless say again, as we said by the Chief Justice in *Northern Pacific Railroad Co.* v. *Patterson*, 154 U. S. 130 [38: 934]: "If the legal or equitable title to the lands or any of them was in the railroad, then it was liable for the taxes on all or some of them; and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why the railroad should not determine whether the lands or some of them were worth paying taxes on or not."

That the *Barden Case* does not preclude state taxation of the lands is also manifest from its expression. Mr. Justice Field, who delivered the opinion of the court, in answer to the contention that its doctrine would have that effect, said: "So also it is said that the states and territories through which the road passes would not be able to tax the property of the company unless they could tax the whole property, minerals as well as lands. We do not see why not. The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property, excluding the minerals, could be as well estimated as its value *including them. The [602]
property could be taxed for its value to the extent of the title which is of the land."

The averment of the answer is that this was done; that the lands were assessed and taxed for their value as agricultural lands without including the minerals in them. The replication put this in issue, but the stipulation of facts does not explicitly notice it, but probably was intended to cover it by the agreement that the assessment was made in the manner and form required by the laws of Montana.

We are referred to the act of Congress of February 26, 1895, chap. 131, entitled "An Act to Provide for the Examination and Classification of Certain Mineral Lands in the States of Montana and Idaho" (28 Stat. at L. 683), as strengthening the contention of appellants. We do not think it does. It was passed after the time at which the validity of the assessment complained of must be determined. Besides, it does not purport to define the rights of the railway company in any particular with which we are now concerned. It furnishes the Secretary of the Interior with another instrumentality,—not bringing the lands to a different judgment, but to an earlier judgment.

Discovering no error in the decree of the Circuit Court of Appeals, it is affirmed.

Mr. Justice **Brewer**, Mr. Justice **Shiras**, Mr. Justice **White**, and Mr. Justice **Peckham** dissented.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,
v.
LINDA Y. SPRATLEY.

(See S. C. Reporter's ed. 602–622.)

Service of process upon agent of foreign corporation—what agent may be served—corporation doing business within the state—contract with the state.

1. Service of process upon an agent of a foreign corporation doing business in a state must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation; but an express authority to receive process is not always necessary.
2. A nonresident agent of a foreign insurance company, who comes into a state to investigate a claim for a loss, with power to compromise it within stated terms, leaving him certain discretion as to the amount, when he is not a mere special agent for that particular case, but is employed generally on a salary, to act in all cases of that kind, sufficiently represents the company for the service of process in an action on the claim he is investigating, where the company is doing business within the state.
3. A foreign insurance company which assumes to withdraw from a state in which it has been issuing policies, and thereafter refuses to take any new risks or issue any new policies therein, but continues to collect premiums on its outstanding policies and to pay losses arising thereunder, is still doing business within the state within the meaning of the statute respecting service of process upon an agent.
4. A foreign insurance company availing itself of the permission to do business within the state under the provisions of the Tennessee act of 1875 giving permission therefor on condition that the company appoint the secretary of state as its agent to receive process, does not thereby create a contract with the state which will prevent the state from thereafter passing another statute in regard to the service of process which will be applicable to such company.

[No. 183.]

Submitted January 3, 1899. Decided January 30, 1899.

IN ERROR to the Supreme Court of the State of Tennessee to review the judgment of that court reversing the decree of the Chancery Court of Shelby County, Tennessee, granting a perpetual injunction against the enforcement by Linda Y. Spratley of a judgment against the Connecticut Mutual Life Insurance Company. The judgment of the Supreme Court was in favor of said Spratley for the amount of the judgment against the insurance company, with interest and costs. *Affirmed.*

See same case below, 99 Tenn. 322.

The facts are stated in the opinion.

Messrs. **B. M. Estes** and *Francis Fentress* for plaintiff in error.

Messrs. **Thomas B. Turley** and **Luke E. Wright** for defendant in error.

*Mr. Justice **Peckham** delivered the **[603]**
opinion of the court:

The plaintiff in error filed its bill against the defendant in error in the chancery court of Shelby county, Tennessee, for the purpose of enjoining her from taking any proceedings under a judgment by default which she had obtained in the state of Tennessee, against the corporation, upon certain policies of insurance, and also for the purpose of obtaining a *decree pronouncing the judgment void **[604]**
and releasing the corporation therefrom.

The ground set forth in the bill, and upon which the complainant sought to have the judgment against it set aside, was that the complainant was a nonresident of the state of Tennessee, had no office or agent there at the time the process was served, and was doing no business in the state, and the person upon whom the process in the action had been served in behalf of the corporation was not its representative in the state, and no process served upon him was in any way effectual to give jurisdiction to the state court over the corporation. The bill also alleged that the judgment, if enforced, would result in taking complainant's property without due process of law, and would violate the Fifth and Fourteenth Amendments of the Constitution of the United States.

The defendant in error herein appeared and answered the bill, and alleged that the judgment she had obtained was a valid and proper judgment, and she denied the allegation in the bill that complainant was doing no business in the state at the time of the service of process, and alleged, on the contrary, that it was then doing business therein. She asked that the preliminary injunction theretofore granted should be dissolved.

The court of chancery upon the trial gave judgment in favor of the complainant, and decreed that the preliminary injunction granted in the cause should be made perpetual. The defendant appealed to the supreme court of the state, where the decree of the court of chancery was reversed, the injunction dissolved, and a judgment granted the defendant in error on the bond executed by the company in obtaining the injunction, for the amount of the original judgment, with interest from its date, together with the costs of the suit for the injunction. The complainant thereupon brought the case here by writ of error.

In addition to the objection that the person upon whom process was served was not such a representative of the company that service of process upon him was sufficient to give the court jurisdiction, the company alleges that under the act of 1875, which will be referred to hereafter, the company *ap- **[605]**
pointed an agent pursuant to its provisions, and that any act subsequently passed relating to the service of process upon any other than the person so appointed could not af-

fect the company, because such act would impair the contract which it alleges was created between the state and the company when it appointed an agent, by its power of attorney, pursuant to the provisions of such act of 1875.

The material facts are as follows: The corporation is a life insurance company incorporated under the laws of, and having its principal office in, the state of Connecticut. It did a life insurance business in the state of Tennessee from February 1, 1870, until July 1, 1894. On March 22, 1875, the state of Tennessee passed an act to regulate the business of life insurance in that state, and by section 12 of the act it was enacted that a company desiring to transact business by any agent or agents in the state should file with the insurance commissioner a power of attorney authorizing the secretary of state to acknowledge service of process for and in behalf of such company at any and all times after a company had first complied with the laws of Tennessee and been regularly admitted, even though such company may subsequently have retired from the state or been excluded; and it was made the duty of the secretary of state, within five days after such service of process by any claimant, to forward by mail an exact copy of such notice to the company. Pursuant to that statute the company duly filed a power of attorney as required, and appointed therein the secretary of state to receive service of process, and that power of attorney the company never in terms altered or revoked.

In 1887 the legislature of Tennessee passed an act, approved March 29, 1887, entitled "An Act to Subject Foreign Corporations to Suit in This State." The first section of this act provided that any foreign corporation found doing business in the state should be subject to suit there, to the same extent that said corporations were by the laws of the state liable to be sued, so far as related to any transaction had in whole or in part within the state, or to any cause of action arising therein, but not otherwise.

[606] *The second section provided that any corporation that had any transaction with persons or concerning any property situated in the state, through any agency whatever acting for it within the state, should be held to be doing business within the meaning of the act.

The third and fourth sections of the act are set forth in full in the margin.†

The company continued to do business in the state after the passage of this act, and on the 12th day of December, 1889, it insured the life of Benjamin R. Spratley, the husband of the defendant in error, for the term of his life, in the sum*of $5,000, for the [607] benefit of his wife, the defendant in error or, in case of her death before payment, to his children, etc. The company also insured the life of Mr. Spratley on the 25th day of February, 1893, in the sum of $3,000 in favor of his wife and for her sole use and benefit, with other conditions not material here. These policies were issued through the solicitation and by the procurement of the agent of the company for the states of Tennessee and Kentucky, and who had headquarters at Louisville, Kentucky. He came to Memphis and solicited Mr. Spratley to take the policies, and the application for them was taken by such agent at Memphis. The defendant in error alleges in her answer that the premiums were paid thereon in Tennessee up to the death of Mr. Spratley in February, 1896, but that fact does not otherwise appear. It does appear that all premiums had been paid at the time of the death of Mr. Spratley.

On July 1, 1894, the company ceased issuing any new policies in the state of Tennessee, and withdrew its agents from the state, and on July 21, 1894, notified the state insurance commissioner to that effect. It had, however, a number of policies, other than those issued on the life of Mr. Spratley, outstanding in the state at the time it withdrew (how many is not stated), and it continued to receive the premiums on these policies through its former agent for that state, and to settle, by payment or otherwise, the claims upon policies in that state as they fell due.

The former agent resided in Louisville when he received payment of the premiums, and it does not appear that after July, 1894, he was in the state of Tennessee when any payment of premiums was made to him by Tennessee policy holders. He received these payments as agent of the company, and it recognized such payments as sufficient.

Mr. Spratley died in the city of Memphis, in the state of Tennessee, on the 28th of February, 1896, leaving his widow, the defendant in error, surviving him. The two policies were in force at the time of his death. The company, being notified of the death of Mr. Spratley, sent its agent to Memphis to act under its instructions in the investigation and adjustment *of the claim. Mr. Chaffee [608] was the agent employed, and he had been employed in the service of the company since the first day of July, 1887. The writing under which he was employed stated that the com-

†Sec. 3. *Be it further enacted*, That process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of such an agent it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or, if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued and the process had been served as required by law; but, in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees for which shall be taxed as other costs. The clerk shall file with the papers in the cause a cetificate of

pany employed him "for special service in any matters which may be referred to you, with instructions, during the pleasure of the directors of the company and under the direction of the executive officers; to have your entire time and services except upon leave of absence; to pay the necessary traveling and hotel expenses incurred in the line of your duty, and to pay you for your time and services at the rate of $2,500 per annum; this agreement terminable on the part of the company at the pleasure of the directors, and on your part by thirty days' written notice."

The company sent Mr. Chaffee specially to the state of Tennessee for the purpose of investigating into the circumstances of the death of Mr. Spratley and into the merits of the claim made by Mrs. Spratley, and while there he was authorized by the company to compromise the claim made by her upon terms stated in a telegram from the vice president of the company. While Mr. Chaffee was engaged in negotiations with Mrs. Spratley and her brother in relation to her claims, and after she had refused to accept the compromise offered by him in behalf of the company, and on April 15, 1896, he was served, in Memphis, with process against the corporation in an action upon the policies above mentioned.

The attorneys for the plaintiff also sent a notice addressed to the president and directors of the company, together with a copy of the process issued out of the circuit court of Shelby county, which notice and copy of process were sent to Mr. Dunham, an attorney at law in the city and county of Hartford, in the state of Connecticut, who, on May 8, 1896, at Hartford, served them upon the company by leaving them in the hands of its vice president, and an affidavit of that fact was made by Mr. Dunham, and filed at the time of the entry of judgment by default in the clerk's office at Memphis. A copy of the writ was also sent by registered letter by John A. Strehl, clerk of the court, addressed
[609] to the Connecticut Mutual Life *Insurance Company, Hartford, Connecticut, and an acknowledgment of the receipt of such registered letter, signed by William P. Green on behalf of the Connecticut Mutual Life Insurance Company, was also filed with the judgment.

On July 2, 1896, judgment by default was entered against the defendant, and the judgment recited the above facts in relation to the service of process on Mr. Chaffee, the sending of the registered letter from the clerk of the court, and the notice and copy of process to the attorney, Mr. Dunham, and his service thereof upon the vice president of the company at its office in Hartford, Connecticut. It recited also the fact that the defendant was doing business in Shelby county, Tennessee, but that it had no office or agency therein, and that it had wholly failed to make any appearance, and thereupon the default was entered and judgment went against the defendant for the sum of $8,000, being the total amount due on the life insurance contracts or policies described in the declaration, and also for costs.

Upon these facts the question arises as to the validity of the judgment, to set aside which the company has filed this bill. Without considering, for the moment, the objection that there was a contract between the state and the company which could not be impaired, was the service of process upon Mr. Chaffee sufficient to give the court jurisdiction over the corporation?

When the process was served, the act of 1887, above mentioned, was in force.

The third and fourth sections of that act have already been set forth, and they provide that process may be served upon any agent of the corporation, found within the county where the suit is brought, no matter what character of agent such person may be. We are not called upon to decide upon the entire validity of this whole act. The Federal question with which we are now concerned is whether the court obtained jurisdiction to render judgment in the case against the company, so that to enforce it would not be taking the property of the company without due process of law. Even though we might be unprepared to say that a service of process upon *"any agent" found within the coun- [610]
ty, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether upon the facts of this case the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation. If it were, there was due process of law, whatever we might think of the other provisions of the act in relation to the service upon any agent of a corporation, no matter what character of agent the person might be. If the person upon whom process was served in this case was a proper agent of the company, it is immaterial whether the statute of the state also permits a service to be made on some other character of agent which we might not think sufficiently representative to give the court jurisdiction over the corporation. If the service be sufficient in this instance, the corporation could not herein raise the question whether it would be sufficient in some other and different case coming under the provision of the state statute.

In a suit where no property of a corporation is within the state, and the judgment sought

---

the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty (30) days after the date of such mailing.

Sec. 4. *Be it further enacted*, That it shall be the duty of the plaintiff to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same, stating the facts and with whom the notice was lodged, or else the plaintiff or his attorney shall make an affidavit that he has been prevented from serving such notice by circumstances which should reasonably excuse giving it, which circumstances the affidavit of the plaintiff or his attorney shall particularly state; and no judgment shall be taken until one or the other of these affidavits shall be filed and the court be satisfied that the notice has been given the defendant, or that the excuse for not doing so be sufficient.

is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state (*Goldey* v. *Morning News,* 156 U. S. 518 [39: 517]; *Merchants' Manufacturing Co.* v. *Grand Trunk Railway Co.* 13 Fed. Rep. 358), and if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation. An express authority to receive process is not always necessary.

We think the evidence in this case shows that the company was doing business within the state at the time of this service of process. From 1870 until 1894 it had done an active business throughout the state by its agents therein, and had issued policies of insurance upon the lives of citizens of the state. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the state, was simply a recall of its agents doing business therein, the giving of a notice to the state in-
[611] surance commissioner, and *a refusal to take any new risks or to issue any new policies within the state. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent.

The corporation alleged in its bill filed in this suit that the defendant herein was taking garnishee proceedings against its policy holders in the state for the purpose of collecting, as far as possible, the amount of the judgment she had obtained against the corporation, and it gave in its bill the names of some thirteen of such policy holders against whom proceedings had been taken by this defendant. It cannot be said with truth, as we think, that an insurance company does no business within a state unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis.

It is admitted that the person upon whom process was served was an agent of the company. Was he sufficiently representative in his character? He was sent into the state as such agent to investigate in regard to this very claim, and while there he was empowered to compromise it within certain stated terms, leaving him a certain discretion as to the amount. He was authorized to settle the claim for the amount of the reserve, "or thereabouts." He did not leave his character as agent when he entered the state. On the contrary, it was as agent, and for the purpose of representing the company therein, that he entered the state, and as agent he was *seeking a compromise of [612]
the claim by the authority of the company, and therein representing it. Why was he not such an agent as it would be proper to serve process upon? He had been appointed an agent by the company; his whole time and services were given to the company under an appointment made years previously; he received a salary from the company not dependent upon any particular service at any particular time. The company having issued policies upon the life of an individual who had died, and a claim having been made for payment in accordance with the terms of those policies, the company clothed him with authority to go into the state and in its behalf investigate the facts surrounding the claim, and authority was given him to compromise it upon terms which left to him discretion to some extent as to the amount of payment. He was not a mere agent appointed for each particular case. He was employed generally, by the company, to act in its behalf in all cases of this kind and as directed by the company in each case. Entering the state with this authority, and acting in this capacity, the company itself doing business within the state, it seems to us that he sufficiently represented the company within the principle which calls for the service of process upon a person who is in reality sufficient of a representative to give the court jurisdiction over the company he represents. In view of all the facts, we think it a proper case in which the law would imply, from his appointment and authority, the power to receive service of process in the case which he was attending to.

Taken in connection with the further fact of sending (as provided for in the statute) a copy of the process and notice thereof by registered letter to the home office of the company, and also the personal service upon the company of a copy of the process and notice thereof at its home office, it must be admitted that one of the chief objects of all such kinds of service, namely, notice and knowledge on the part of the company of the commencement of suit against it, is certainly provided for. We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service *on the agent in the state where suit was [613]
commenced, but we refer to it as a part of the facts in the case.

In *Lafayette Insurance Company* v. *French,* 18 How. 404 [15: 451], it appeared that a statute of Ohio made provision for service of process on foreign insurance companies in suits founded upon contracts of insurance there made by them with citizens of that state. One of those provisions was that service of process on a resident agent of a foreign corporation should be as effectual as though the same was served upon the

principal. In a suit commenced in Ohio against a foreign corporation by service upon its resident agent, the company objected to the validity of that service, and that question came before this court, and Mr. Justice Curtis, in delivering the opinion of the court, said:

"We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the state of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that state and fully subject to its laws; nor that proper means should be used to compel foreign corporations transacting this business of insurance within the state for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed. Nor do we think the means adopted to effect this object are open to the objection that it is an attempt improperly to extend the jurisdiction of the state beyond its own limits to a person in another state. Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent. Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which
[614]alone such business *could be there transacted by them; that condition being that an agent to make contracts should also be the agent of the corporation to receive service of process in suits on such contracts; and in legal contemplation the appointment of such an agent clothed him with power to receive notice for and on behalf of the corporation as effectually as if he were designated in the charter as the officer on whom process was to be served; or as if he had received from the president and directors a power of attorney to that effect. The process was served within the limits and jurisdiction of Ohio, upon a person qualified by law to represent the corporation there in respect to such service; and notice to him was notice to the corporation which he there represented and for whom he was empowered to take notice."

The act did not provide for an express consent to receive such service, on the part of the company. The consent was implied because of the company entering the state and doing business therein subject to the provisions of the act.

It is true that in the above case the person upon whom service of process was made is stated to have been a resident agent of the company; but the mere fact of residence is not material (other things being sufficient), provided he was in the state representing the company and clothed with power as an agent of the company to so represent it. His agency might be sufficient in such event, although he was not a resident of the state. It is also true that the agent in that case was an agent with power to make contracts of insurance in behalf of the corporation in that state, and from that fact, in connection with the statute, the court inferred the further fact of an implied power to receive service of process in behalf of the corporation. The agent had not, so far as the case shows, received any express authority from the company to receive service of process. The court does not hold, nor is it intimated, that none but an agent who has authority to make contracts of insurance in behalf of the company could be held to represent it for the purpose of service of process upon it. It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character *of [615]
agent employed. And while the court held that an agent with power to contract was, in legal contemplation, clothed with power to receive notice for and on behalf of the corporation as effectually as if he were designated in the charter as the officer upon whom process was to be served, we think it is not an unnatural or an improper inference, from the facts in the case at bar, to infer a power on the part of this agent, thus sent into the state by the company, to receive notice on its behalf in the same manner and to the same extent that the agent in the case cited was assumed to have. In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.

This case is unlike that of *St. Clair* v. *Cox*, 106 U. S. 350 [27: 103]. There the record of the judgment, which was held to have been properly excluded, did not (and there is no evidence which did) show that the corporation was doing business in the state at the time of the service of process on the person said to be its agent. Nor did it appear that the person upon whom the process was served bore such relations to the corporation as would justify the service upon him as its agent. In the course of the opinion in that case, Mr. Justice Field, speaking for the court, said:

"It is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or in the finding of the court—that the corporation was engaged in business in the state. The transaction of busi-

ness by the corporation in the state, generally or specially, appearing, and a certificate [616]of service of process by the proper officer *on a person who is its agent there, would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose."

Here we have the essentials named in the above extract from the opinion of the court in *St. Clair* v. *Cox*. We have a foreign corporation doing business in the state of Tennessee. We have its agent present within the state, representing it by its authority, in regard to the very claim in dispute, and with authority to compromise it within certain limits, and his general authority not limited to a particular transaction. On the contrary, as seen from his written appointment, his agency for the company was a continuous one, and had been such since 1887, although, of course, his agency was limited to a certain department of the business of the corporation.

The case does not hold that a foreign corporation cannot be sued in any state unless it be doing business there and has appointed an agent expressly that process might be served upon him for it. Speaking of the service of process upon an agent, the learned justice thus continued:

"In the state where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed, difficulties arise; it is not so easy to determine who represents the corporation there, and under what circumstances service on them will bind it."

This language does not confine the service to an agent who has been expressly authorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the cor-[617]poration, as, unless he had been so *authorized, he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient.

It was held in *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565], that a service by publication in an action *in personam* against an individual, where the defendant was a nonresident and had no property within the state, and the suit was brought simply to determine his personal rights and obligations, was ineffectual for any purpose. The case has no bearing upon the question here presented.

In *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S. 194 [37: 699], it was held that the person upon whom process was served in the state of Texas was not a "local agent" within the meaning of that term as contained in the Texas statute. It was also held that the special appearance of the company for the purpose of objecting that the service of process was not good did not, in the Federal courts, confer jurisdiction as in case of a general appearance. There is nothing in the case affecting this question.

In *Maxwell* v. *Atchison, T. & S. F. Railroad Company*, 34 Fed. Rep. 286, the opinion in which was delivered by Judge Brown, United States District Judge of Michigan, now one of the justices of this court, the decision was placed upon the ground that the business which the defendant carried on in Michigan was not of such a character as to make it amenable to suits within that jurisdiction, —especially where the cause of action in the case arose within the state of Kansas; and the court also held that the individual upon whom the process was served was not an officer or managing agent of the railroad company within the meaning of the act of the legislature, nor was *he even a ticket agent [618] of the company; that he was a mere runner, and that service of process upon him for a cause of action arising in Kansas gave no jurisdiction to the court.

In *United States* v. *American Bell Telephone Company*, 29 Fed. Rep. 17, Judge Jackson stated the three conditions necessary to give a court jurisdiction *in personam* over a foreign corporation: First, it must appear that the corporation was carrying on its business in the state where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the state.

In this case the company was doing business in the state. The agent was in the state under the authority and by the appointment of the company. He was authorized to inquire into and compromise the particular matters in dispute between the corporation and the policy holder, and he was no mere special employee engaged by the company for this particular purpose. And there was a local law, that of 1887, providing for service. It has been recently held in this court, that as to a circuit court of the United States, where a corporation is doing business in a state other than the one of its incorporation, service may sometimes be made upon its regularly appointed agents there, even in the absence of a state statute conferring such

authority. *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100 [42: 964].

Although the legislature by the act of 1875 provided for service of process upon a particular person—the secretary of state—in behalf of a foreign corporation, and the company had, pursuant to the provisions of the act, duly appointed that officer its agent to receive process for it, nevertheless the legislature provided by law in 1887 for service upon other agents, and the company continued thereafter to do business in the state. Continuing to do business, the company impliedly assented to the terms of that statute, at least to the extent of consenting to the
[619] service of process upon an *agent so far representative in character that the law would imply authority on his part to receive such service within the State. *Merchants' Manufacturing Co.* v. *Grand Trunk Railway Co.* 13 Fed. Rep. 358-359. When the service of which plaintiff in error complains was made, the act of 1875 had been repealed by chapter 160 of the Laws of 1895, and the company had never appointed an agent under chapter 166 of the laws of that year. There was, therefore, no one upon whom process could be served in behalf of the company, excepting under the act of 1887, unless the plaintiff in error be right in the claim that, by appointing the secretary of state its agent to receive process under the act of 1875, a contract was created and the secretary of state remained such agent, notwithstanding subsequent statutes regulating the subject or even repealing the act. We will refer to that claim hereafter. If by the statute of the state provision were made for the appointment of an agent by the company, upon whom process might be served, and the company had appointed such an agent, and there was no other statute authorizing service of process upon an agent of the company other than the one so appointed, we do not say that service upon any other agent of the company would be good. This is not such a case, and the question is not here open for discussion.

A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done out of which the dispute arises.

It was well said in *Baltimore & O. Railroad Company* v. *Harris,* 12 Wall. 65, at 83 [20: 354, at 359], by Mr. Justice Swayne, in speaking for the court, in regard to service on an agent, that: "When this suit was commenced, if the theory maintained by counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in
[620] another state. In many instances the *cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility." The court in view of these facts was of opinion that Congress intended no such result.

In holding the service of process upon this particular agent sufficient in this instance and so far as the character of the agent is concerned, we do not, as we have already intimated, hold that service upon any agent mentioned in the act of 1887 would be good. That question is not before us.

Upon the question relative to the alleged creation of a contract between the state and the company, by the appointment of the secretary of state as its agent under the act of 1875 to receive process for it, we have no doubt.

The act of 1875 stated the term upon compliance with which a foreign corporation should be permitted to do business within the state of Tennessee. There was, however, no contract that those conditions should never be altered, and when, pursuant to the provisions of the act of 1875, this power of attorney was given by the corporation, the state did not thereby contract that during all of the period within which the company might do business within that state no alteration or modification should be made regarding the conditions as to the service of process upon the company. When, therefore, in 1887 the legislature passed another act, and therein provided for the service of process, no contract between the state and the corporation was violated thereby, or any of its obligations in any wise impaired, for the reason that no contract had ever existed. Instead of a contract, it was a mere license given by the state to a foreign corporation to do business within its limits upon complying with the rules and regulations provided for by law. That law the state was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the state and the foreign corporation doing business within its borders under the former act.

*Statutes of this kind reflect and execute [621]
the general policy of the state upon matters of public interest, and each subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired, and protecting such rights from any illegal interference or injury. *Douglas* v. *Kentucky,* 168 U. S. 488 [42: 553]. The cases showing the right of a state to grant or refuse permission to a foreign corporation of this kind to do business within its limits are collected in *Hooper* v. *California,* 155 U. S. 648, at 652 [39: 297, at 299, 5 Inters. Com. Rep. 610].

Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the state is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the state,

but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a state to legislate upon those subjects from time to time as the public interests may seem to it to require.

As these statutes involve public interests, legislation regarding them are necessarily public laws, and as stated in *Newton* v. *Commissioners,* 100 U. S. 548, at 559 [25: 710, at 711].

"Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

[622] *The same principle is found in the following cases: *Northwestern Fertilizing Company* v. *Hyde Park,* 97 U. S. 659 [24: 1036]; *Butchers' Union S. H. & L. S. L. Company* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 [28: 585]; *Boyd* v. *Alabama,* 94 U. S. 645 [24: 302]; *Douglas* v. *Kentucky,* 168 U. S. 488 [42: 553].

When the legislature of Tennessee, therefore, permitted the company to do business within its state on appointing an agent therein upon whom process might be served, and when in pursuance of such provisions the company entered the state and appointed the agent, no contract was thereby created which would prevent the state from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the state. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the state under the provisions of the act of 1875.

Upon the case as presented in this record, we are of opinion that the service upon the person in question was a good service in behalf of the corporation. *The judgment of the Supreme Court of Tennessee is therefore affirmed.*

Mr. Justice **Harlan** did not sit in and took no part in the decision of this case.

FREDERICH HOENINGHAUS *et al.,*
Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 622-630.)

Tariff act of 1897—additional duty.

1. Under the provisions of ¶ 387 of the act of July 24, 1897 and § 7 of the act of June 10, 1890, as amended by § 32 of the act of July 24, 1897, imported woven fabrics composed of silk and cotton are subject to an ad valorem duty; or to a duty based upon or regulated in some manner by the value thereof.
2. The additional duty of 1 per centum of the total appraised value of such merchandise for each 1 per centum that such appraised value exceeds the value declared in the entry accrued on such articles when undervalued in the invoice according to the provisions of § 7 of the act of June 10, 1890, as amended by § 32 of the act of July 24, 1897.

[No. 341.]

Argued January 11, 1899. Decided January 30, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions of law to this court on an appeal to that court from a judgment of the Circuit Court of the United States for the Southern District of New York affirming the decision of the board of general appraisers affirming the decision of the collector that certain goods imported by Frederich Hoeninghaus *et al.* were subject to the additional duty imposed under § 7 of the act of June 10, 1890, as amended by § 32 of the act of July 24, 1897. *Questions answered in the affirmative.*

Statement by Mr. Justice **Shiras:**

*On September 15, 1897, Frederich Hoen- [623] inghaus and Henry W. Curtiss imported, at the port of New York, certain woven fabrics in the piece, composed of silk and cotton. Such fabrics were provided for in paragraph 387, schedule *d* of the tariff act of July 24, 1897, which contains an elaborate scheme of specific duties for goods of this character, the rates, varying from 50 cents to $4.50 per pound, depending upon the weight of the fabric, the percentage of silk contained in it, its color, its mode of manufacture, etc.; and concludes with a provision which reads as follows: "But in no case shall any of the foregoing fabrics in this paragraph pay a less rate of duty than 50 per centum ad valorem."

The appraiser returned the merchandise as manufactures of silk and cotton in the gum,—silk under 20 per cent; and the collector assessed upon the merchandise a duty of 50 cents a pound, under the paragraph above mentioned. On the last item of the invoice the appraiser increased the valuation made in the invoice to make market value, thus making the appraised value exceed the value thereof declared in the entry. Thereupon the collector levied an additional duty of 1 per centum of the total appraised value for each 1 per centum that said appraised value exceeded the value declared on said item in the entry, under the provisions of section 32 of the act of July 24, 1897, which is in the following terms:

"That the owner, consignee, or agent of any imported merchandise which has been actually purchased, may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make

such addition to the entry to the cost or value given in the invoice or *pro forma* invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from which the same has been imported; but no such addition shall be
[624]made upon entry to the *invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; *and if the appraised value of any article of imported merchandise subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof, shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of one per centum of the total appraised value thereof for each one per centum that such appraised value exceeds the value declared in the entry,* but the additional duties only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. *Such additional duties shall not be construed to be penal, and shall not be remitted,* nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: Provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: Provided, further,
[625]that all additional duties, *penalties, or forfeitures, applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a *pro forma* invoice or statement in the form of an invoice, and no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

Thereupon the importers filed a protest, claiming that said merchandise, having regard either to its invoice, entered, or appraised value, was not subject to an ad valorem duty, or to a duty based upon or in any manner regulated by the value thereof, but, on the contrary, was subject only to a specific duty.

The board of general appraisers, under the provisions of section 14 of the act of June 10, 1890, affirmed the decision of the collector, and held that such goods were properly subject to the additional duty imposed under section 7 of the act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897.

From this decision of the board of general appraisers the importers appealed to the circuit court of the United States for the southern district of New York, and after, in pursuance of an order of said court, the board of general appraisers had made a return of the record and proceedings before them, that court affirmed the decision of the board of general appraisers. From the judgment of the circuit court an appeal was taken to the circuit court of appeals for the second circuit; and that court thereupon certified to this court the following questions of law:

"First. Under the provisions of paragraph 387 of the act of July 24, 1897, and section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897, was the merchandise in suit subject to an ad valorem duty, or to a duty based upon or regulated in any manner by the value thereof.

"Second. Did the additional duty of one per centum of the total appraised value of said merchandise for each one per centum that such appraised value exceeded the value declared in *the entry, as applied to the par- [626]
ticular article in said invoice undervalued as aforesaid, accrue according to the provisions of section 7 of the act of June 10, 1890, as amended by section 32 of the act of July 24, 1897."

Messrs. **W. Wickham Smith** and *Charles Curie* for appellants.

Mr. **John K. Richards,** Solicitor General, for appellee.

*Mr. Justice **Shiras** delivered the opin- [626]
ion of the court:

The tariff legislation in question recognizes three classes of merchandise subject to duty. One is where the duties are purely specific, another where the duties are wholly based on valuation, and the third where the duties are "regulated in any manner by the value thereof."

All importations of merchandise must be accompanied with an invoice stating the cost or market value. The third section of the act of June 10, 1890 (26 Stat. at L. 131), provides that all such invoices shall have in-

dorsed thereon a declaration signed by the purchaser, manufacturer, owner, or agent, setting forth that the invoice is in all respects correct and true, and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, a true and full statement of the time when, the place where, the person from whom, the same was purchased, and the actual cost thereof, and, when obtained in any other manner than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from whence exported; that such market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade, in
[627] *the usual wholesale quantities; the actual quantity thereof; and that no different invoice of the merchandise mentioned has been or will be furnished to anyone; that, if the merchandise was actually purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser.

The seventh section as amended by section 32 of the act of July 24, 1897, provides that the importer, at the time he makes his entry, may make such addition to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise in the principal markets of the country from which imported; but no such addition shall be made to the invoiced value of any imported merchandise obtained otherwise than by actual purchase.

These and other provisions contained in the acts of June, 1890, and July, 1897, compel us to perceive the importance attached by Congress to the obligation put upon the importer to furnish the appraisers and the collector with a true valuation of the imported merchandise; and also the care taken to relieve the importer from a hasty or ill-considered valuation contained in the invoice, by giving him an opportunity to raise such valuation by voluntarily making such addition thereto as to bring the same to the actual market value, and by providing for an appeal by the importer, if dissatisfied with the appraisement, to the board of general appraisers, and from the decision of the board to the courts.

The contention on behalf of the importers is, in effect, that there are only two classes of merchandise to be considered,—one where the duties are purely specific, and where it is claimed no appraisement is required and none is made, and the other where the merchandise is subject to an ad valorem rate of duty; and that the merchandise in question in this case belongs to the former class.

Without deciding whether, even in the case of an importation of merchandise subject only to a specific duty, it is lawful to dispense with an appraisement, our opinion is that, in finding *the duty properly assess- [628]
able upon this merchandise, it was obligatory on the government officials to inquire into its value, and that therefore the duty was one regulated in some manner by the value thereof. The fact that it turned out, in the present case, that the goods did not pay a less rate of duty than fifty per centum ad valorem, did not relieve the appraiser from inquiring into and determining the value of the goods. And if it was the duty of the appraiser, in order to enable him to fix the duty, to inquire into the value of the imported merchandise, he was entitled to the aid afforded him in such an inquiry by the production of a true and correct invoice.

We cannot accept the contention of the importers that, where articles of merchandise are entered and appraised, the inquiry whether the appraised value exceeds the entered value is immaterial, unless, as a result of such inquiry, such articles have imposed upon them ad valorem duties.

The importers had no right to determine for themselves in advance whether a specific duty or an ad valorem duty should be levied. The duty was to be regulated by the value of the goods. A duty at least equivalent to an ad valorem duty of fifty per centum had to be levied, and to determine what duty was leviable it was necessary for the collector and appraisers to be truthfully advised of the value of the goods.

It is urged that, as specific duties were actually assessed in the present case, it therefore appears that the importers were not benefited by the undervaluation; that the revenue has not and could not suffer anything by the undervaluation; and that a mere difference of opinion between the importer and the appraisers as to the value of the goods should not subject the former to an additional duty.

But what might seem to be the hardship of such a case cannot justify the appraisers or the courts in dispensing with the requirements of the statutes. The meaning and policy of the tariff laws cannot be made to yield to the supposed hardship of isolated cases. Nor is it apparent that the enforcement of the statutory requirements can be justly termed a hardship to importers who take the risk of an undervaluation. The burden *of [629]
furnishing a true and correct invoice in such a case is no greater than that imposed on other importers where goods are confessedly within the category of goods subject to an ad valorem assessment.

The administration of such laws cannot be narrowed to a consideration of every case as if it stood alone, and as if the only question was whether there was an actual intention to defraud the government. Wide and long experience has resulted in the command that all importations of merchandise must be accompanied with a true and correct invoice stating the cost or market value. Like other importers, the present appellants must comply with this command, and if they have

failed to do so they must be held to be subject to the additional duty imposed by the statute. If the statutory regulations are found to be too stringent, the remedy cannot be found either in the courts, whose duty is to construe them, or in the executive officers appointed to carry them into effect, but in Congress.

We have been referred to no decision of this court directly applicable to the case in hand, but *Pings* v. *United States*, 38 U. S. App. 250, is cited. That was a case arising under the tariff act of October 1, 1890 (26 Stat. at L. 567), where gloves were imported into the port of New York and were dutiable at $1.75 per dozen, unless their value exceeded $3.50 per dozen, in which case they would be dutiable at fifty per centum ad valorem. The appraiser advanced their value in excess of ten per centum of the value declared in the entry and the propriety of this advance was not questioned. The appraised value, however, was not in excess of $3.50 per dozen. The collector held the merchandise liable to the additional duty prescribed by section 7 of the customs administration act of June 10, 1890. The importer's contention, that the additional duty should not be exacted because gloves of the kind imported pay a specific duty, and because the advance, although in excess of the ten per centum, was not sufficient to require him to pay the ad valorem duty exacted by the last proviso of paragraph 458 of the tariff act of October 1, 1890, was sustained by the board of general appraisers. But the circuit
[630] *court held otherwise, and on appeal the circuit court of appeals for the second circuit affirmed the decision of the circuit court. The court of appeals reviewing the provisions of the act of June 10, 1890, held that where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential, and that it is to be expected that the statute should require the importer himself to state the value of his goods faithfully and truthfully, and to enforce that requirement by appropriate penalties. The court said: "We see no reason for restricting the broad language of the statute, and concur with the judge who heard the case in the circuit court, that the statutes require that all imports be entered at fair value, and that the provision for increasing duties for undervaluations of more than ten percentum makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

This case was under another statute, in somewhat different terms, but the reasoning upon which that decision went is that which we have pursued in the present case, and meets with our approval.

Our conclusion is that *the questions certified* to us by the judges of the Circuit Court of Appeals *should be answered in the affirmative*, and it is so ordered.

Mr. Justice **Peckham** dissented.

NORTON MARSHALL, *Appt.*,
v.
PETER T. BURTIS.

(See S. C. Reporter's ed. 630-635.)

Appeal from supreme court of territory.

On appeal from the supreme court of a territory, if there is no finding of facts or statement of facts in the nature of a special verdict, it must be assumed that the judgment was justified by the evidence.

[No. 118.]

Submitted January 10, 1899. Decided January 30, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of that Territory in favor of the plaintiff adjudging that the plaintiff is owner of certain real estate in Maricopa County in that territory. *Affirmed.*

The facts are stated in the opinion.

Messrs. **L. E. Payson** and *Hamilton & Armstrong* for appellant.

Messrs. **A. H. Garland, R. C. Garland,** and *E. P. Budd* for appellee.

*Mr. Justice **McKenna** delivered the opinion of the court: [631]

This is a suit to quiet title to a lot in the city of Phœnix, Arizona, described as lot 8 in block 1 in Neahr's addition to said city. The appellee was plaintiff in the court below and the appellant was defendant, and we shall so designate them.

The plaintiff alleged that he was in possession as owner in fee, deriving it from one Friday Neahr, commonly known as Mary F. Neahr, an unmarried woman over twenty-one years of age, by a deed dated October 14, 1892. That the defendant, contriving to defraud him (the plaintiff) and cloud his title to the property, induced said Friday Neahr, by false and fraudulent pretenses, and without consideration, to sign and acknowledge an instrument in writing, the contents of which were unknown to her, which instrument was a conveyance to him from her of the property, and in which she was induced to fraudulently state that she was not of lawful age when she executed the deed to the plaintiff, and that said instrument was recorded in the office of the county recorder of Maricopa County, "all to the great injury of this plaintiff in the sum of five thousand dollars." Judgment was prayed that the instrument to Marshall be delivered up and canceled, and that plaintiff have damages in the sum of five thousand dollars, and for general relief.

The answer admits that Friday M. Neahr was seised in fee of the property, and executed a deed therefor to the plaintiff, and that he entered into and was in possession thereof, and that he (the defendant) obtained a deed therefor on the 25th day of October, 1894.

The answer puts in issue all other aver-

ments, and alleges by way of cross complaint that when Friday M. Neahr executed the deed to plaintiff she was under twenty-one [632]years, to *wit, nineteen years, which plaintiff knew. That Friday M. Neahr derived the property from her father by a deed of gift, in which it was expressly provided and limited that she should have no power of disposition of said premises until she arrived at the age of twenty-one years, which plaintiff knew. That she attained the age of twenty-one on the 7th of September, 1894, and on the 24th of October, 1894, she "executed, acknowledged, and delivered to this defendant, for a valuable consideration, then and there paid to her by the defendant, a deed of conveyance in writing, with full covenants of seisin and warranty, conveying to this defendant the lands and premises described in the plaintiff's complaint herein, and therein and thereby said Friday M. Neahr expressly revoked and disaffirmed the aforesaid attempted conveyance of said premises to the plaintiff, and this defendant thereupon became, ever since has been, and now is the lawful owner of said premises and the whole thereof, and entitled to possession thereof; that said plaintiff has no right, title, claim, or interest whatsoever in said premises, and the claim of the plaintiff to ownership thereof is without foundation and against the rights of this defendant, and is a cloud upon the title of this defendant to the said premises." Wherefore the defendant prayed that the deed to plaintiff be declared invalid and he be enjoined from setting up any claim to the property, and that defendant be adjudged the owner.

A trial was had on these issues before the court without a jury, and judgment was given for the plaintiff.

The judgment recited that—

"Evidence upon behalf of the respective parties was introduced and the cause was submitted to the court for its consideration and decision, and, after due deliberation, the court orders that plaintiff have judgment.

"Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that the plaintiff Peter T. Burtis is the owner of the following described real estate, situate in Maricopa County, Arizona Territory, to wit [describing it]; and that said defendant Norton Marshall is not the [633]owner of *said lot number eight (8) in block number one (1) of Neahr's addition or of any part thereof, and that the deed of said premises heretofore executed by Friday Mary Neahr to said Norton Marshall, of date October —, 1894, and recorded on the 29th day of October, 1894, in book 37 of deeds, page 55, in the office of the county recorder of said county of Maricopa, is invalid and of no effect, and the same is hereby annulled and canceled, and the said defendant Norton Marshall has acquired no claim, title, or right by virtue of said deed in or to the premises described therein, to wit, said lot number eight (8) in block number one (1) of said Neahr's addition to the city of Phœnix, and said defendant is hereby forever restrained and enjoined from asserting any claim or title to said premises or any part thereof by virtue of said deed.

"And it is further ordered, adjudged, and decreed that said defendant Norton Marshall take nothing by his cross complaint filed herein, and that said plaintiff Peter T. Burtis do have and recover of and from the said defendant Norton Marshall his costs and disbursements herein, taxed at $53.30."

A motion for a new trial was made and denied, and an appeal was then taken to the supreme court of the territory, which affirmed the judgment of the district court. To review the judgment of the supreme court this appeal is prosecuted.

There are fourteen assignments of error, some of which attribute error to the judgment, some to the supposed finding of the court of the validity of the deed to plaintiff and invalidity to that of defendant, and assigning ownership of the property to the former and nonownership to the latter. The second and third assignments of error are as follows:

2. "The said court erred in refusing to sustain the errors assigned on the appeal to it from the district court.

3. "The said court erred in refusing to reverse the said cause for the errors of the district court assigned."

Adverting to the errors assigned on appeal to the district court, those which were based on the action of the court other than the judgment were in refusing a new trial and "generally in admitting improper evidence offered by the *plaintiff, to which the [634] defendant duly objected and took exception, as appears fully in the bill of exceptions."

There is no other specification of error in the admission of testimony and there is no specification in the briefs as required by rule 21. *Lucas* v. *Brooks*, 18 Wall. 436 [21: 779]; *Benites* v. *Hampton*, 123 U. S. 519 [31: 260]. Indeed, error on admitting testimony is not urged at all and probably was not intended to be. The statement of counsel is:

"The errors assigned reach every possible phase of the case, and need not be specifically referred to here.

"The judgment appealed from, being general, requires an analysis of the case.

"The only possible questions may be said to be—

"1. That Neahr was of full age when she made the deed to Burtis, October 14, 1892.

"2. If not, that she failed to disaffirm within a reasonable time after attaining her majority.

"3. That she ratified her deed to Burtis before deeding to Marshall and after attaining majority.

"4. That she was estopped to disaffirm, by her own act in averring her majority in executing the Burtis deed.

"5. That she was bound to restore the consideration to Burtis before an effective disaffirmance.

"6. That Marshall, knowing the prior deed to Burtis, could not take title to himself in October, 1894.

"The first three propositions present pure-

ly questions of fact, and upon this record it is impossible that the court below could have based its judgment upon an affirmance of either of the three.

"The last three propositions present solely questions of law, and these it is confidently submitted are only to be resolved in favor of appellant."

We are not required, therefore, to review the rulings of the district court on admission or rejection of testimony. Does the record present anything else for our determination? In *Idaho & Oregon Land Improv. Co.* v. *Bradbury*, 132 U. S. 509 [33: 433], this court said, by Mr. Justice Gray, that "Congress has prescribed that the appellate jurisdiction of this
[635]court over *'judgments and decrees' of the territorial courts 'in cases of trial by juries shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified to by the court below,' and transmitted to this court with the transcript of the record. Act of April 7, 1874, chap. 80, § 2 (18 Stat. at L. 27, 28). The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite: 'We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us.' *Hecht* v. *Boughton*, 105 U. S. 235, 236 [26: 1018]." See also *Salina Stock Co.* v. *Salina Creek Irrig. Co.* 163 U. S. 109 [41: 90]; *Gildersleeve* v. *New Mexico Mining Co.* 161 U. S. 573 [40: 812]; *Haws* v. *Victoria Copper Mining Co.* 160 U. S. 303 [40: 436]; *San Pedro & Cañon Del Agua Co.* v. *United States*, 146 U. S. 120 [36: 912]; *Mammoth Mining Co.* v. *Salt Lake Foundry and Machine Co.* 151 U. S. 447 [38: 229].

There were no findings of facts by the district court or by the supreme court, hence no "statement of facts in the nature of a special verdict," and we must assume that the judgment of the district court was justified by the evidence, and *the judgment of the Supreme Court sustaining it is affirmed.*

---

[636] JOHN McQUADE, *Plff. in Err.*,
v.
INHABITANTS OF THE CITY OF TRENTON.

(See S. C. Reporter's ed. 636-640.)

Federal question.

An injunction by a state court against interference with the construction or maintenance of a sidewalk and curbing in front of defendant's premises, where he has forcibly interfered, claiming that his property is being taken without compensation, does not present a Federal question, when the court assumes his right to damages, but holds that he has mistaken his remedy and must resort to another proceeding for damages.

[No. 125.]

Argued January 12, 1899. Decided January 30, 1899.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a decree of that court dismissing the appeal in this case and remanding the case for an execution of the decree of the Court of Chancery of that state perpetually enjoining the defendant, John McQuade, in a suit by the inhabitants of the city of Trenton from interfering with or removing a sidewalk and curbing. *Writ of error dismissed.*

See same case below, 52 N. J. Eq. 669.

Statement by Mr. Justice **Brown:**

This was a bill in equity filed in the court of chancery of the state of New Jersey by the Inhabitants of the City of Trenton against John McQuade, to enjoin him from interfering with the relaying of a certain pavement and the resetting of the curb and gutter in front of his premises, in the city of Trenton.

The bill averred in substance that a change of grade on the street in front of the premises of the defendant was made by a city ordinance, at the special request of the Pennsylvania Railroad Company, upon an agreement by the latter to make the changes, to carry off all the surface water diverted or changed by the alteration, and to indemnify the city; but that the defendant, McQuade, who owned a lot upon the street in question, not only notified the workmen to desist from changing the grade, but forcibly interfered with their work by throwing hot and cold water on the men engaged in such work, and thus tried to prevent its being carried on; and that after the pavement had been relaid in front of his property he tore it up, and rendered it nearly impassable for pedestrians by digging a hole in the sidewalk in front of his premises, and keeping the same filled with water.

In his answer, defendant denied that the railroad company had provided means to carry off the surface water, and alleged that the provisions made were utterly inadequate, and that his property had been damaged by the overflow of water *into his cellar. He [637]
further averred that the change of grade authorized by the city ordinance was not a proper change of grade, but that the alteration related to the construction of approaches to an elevated bridge, and was a matter over which the common council could not exercise any legal authority whatsoever; that by the attempted alteration of the grades, the surface water, instead of passing through the street, was caused to accumulate immediately in front of the defendant's property, and was likely to overflow the sidewalk and into the defendant's cellar; that if the sidewalk in front of defendant's property were raised to the grade mentioned in the ordinance, the cellar windows of his house would be practically closed up and his free access to the street greatly impaired; that the alteration of the grade was a work

carried on at the expense of and for the sole benefit of the railroad company; that such company had no authority under the law to do the work and thereby damage defendant's property without first making compensation for the damage he would sustain by reason of such work; and that he had a right to prevent the completion of the work until he should have received full compensation for all damages he would sustain by such work, and hence that complainants were not entitled to the relief prayed for. Further answering, he insisted that under the Constitution of the state he had a right to free access to the street from his property and to the free admission of light and air; and that no alteration in the grade of the street could be lawfully made until a proper method of procedure should have been prescribed by the legislature for the exercise of the power of eminent domain, "whereby this defendant may receive proper and adequate compensation for the damage that will result to him by said alteration of grades and exclusion of light and air."

The case was heard upon the pleadings and proofs, and a decree rendered that the defendant be perpetually enjoined from interfering with the completion of the sidewalk and curbing, and from removing or interfering with the pavement, sidewalk, or curbing after the same shall have been completed.

[638] *In his opinion the vice chancellor put the case upon the grounds that the defendant had no right to take the law into his own hands and bid defiance to the city authorities; that the city being liable for damages sustained because of the want of repaired streets, and having undertaken to repair them according to the grade which had been prescribed, the court was justified in enjoining defendant from any interference; that the only question at issue was one with respect to the damages to which McQuade was entitled; that he might have ascertained these before the city or railroad company took any steps, but that he allowed the company to go on and make all the changes necessary without taking direct proceedings to compel them to ascertain the damages and compensate him; and that he has still an ample remedy for a redress of his grievances without interfering with the right of the public to the use of the street in front of his dwelling.

From this decree McQuade appealed to the court of errors and appeals upon the ground that under such decree the complainants were permitted to take and damage his property for public use without compensation, because no procedure for taking and injuring his property in the manner set forth had been prescribed by the legislature, and "because the decree is in sundry other respects contrary to the Constitution of the United States and to the law of the land." The petition of appeal was dismissed by the court of errors and appeals and the case remanded for an execution of the decree. No written opinion was delivered.

Mr. **David McClure** for plaintiff in error.
No counsel for defendants in error.

*Mr. Justice **Brown** delivered the opinion of the court: [638]

The principal contention of the plaintiff in error (the defendant below) is that, as he had never been compensated in *damages for [639] the injury to his property by altering the grade of the street in front of his lot, he had a right to abate the nuisance caused by the proposed changes, and that in the refusal of the state court to recognize this principle he had been deprived of his property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

But no such question was raised in the pleadings, unless the allegation of the answer that the plaintiffs had no right to make the alterations in question without first compensating defendant for his damages be treated as equivalent to an allegation that his property had been taken without due process of law. The right of the defendant to damages was, however, assumed in the opinion of the vice chancellor, who disposed of the answer by saying that the defendant had mistaken his remedy, and must resort to another proceeding against the city for his damages. This was beyond all doubt a ruling broad enough to support the decree regardless of any Federal question that might possibly have been raised from the allegation of the answer. In his petition for an appeal, defendant repeated his allegation that his property had been damaged without compensation, and averred generally that the decree was contrary to the Constitution of the United States, but made no specific allegation of any conflict therewith. As the court of errors and appeals delivered no opinion, it is impossible to state definitely upon what ground the decree of the vice chancellor was affirmed. The presumption is that it was satisfied with the opinion of the court below, and affirmed the decree for reasons stated in the opinion of the vice chancellor; but, however this may be, it is quite evident that a Federal question was not necessarily involved in the case, and hence that this court has no jurisdiction. *Kaukauna Water Power Company* v. *Green Bay & M. Canal Co.* 142 U. S. 254 [35: 1004]; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084]; *Eureka Lake & Y. Canal Co.* v. *Yuba County Super. Ct.* 116 U. S. 410 [29: 671].

We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question not Federal were also raised and decided against the plaintiff in error, and the decision thereof *be sufficient, notwithstanding the Federal question, [640] to sustain the judgment. Much more is this the case where no Federal question is shown to have been decided, and the case might have been, and probably was, disposed of upon non-Federal grounds. *Harrison* v. *Morton*, 171 U. S. 38 [43: 63]; *Bacon* v. *Texas*, 163 U. S. 207 [41: 132], and cases cited.

The writ of error in this case must therefore be dismissed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1898.

Vol. 173.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1898,

AND REPORTED HEREIN,

VOLUME 173,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 173 U. S.	Title.	Here in.
1–2	Pierce v. Tennessee Coal & I. Co. - - - -	591
2–5	" "	592
5–7	" "	593
7–9	" "	594
9–12	" "	595
12–14	" "	596
14–17	" "	597
17	Towson v. Moore - -	597
17–19	" " - -	598
19–21	" " - -	599
21–24	" " - -	600
24–25	" " - -	601
26	Lomax v. Pickering - -	601
27–29	" " - -	602
29–32	" " - -	603
32	Wilson v. Eureka City - -	603
32–35	" " -	604
35–37	" " -	605
37	" " -	606
38–40	McIntire v. Pryor - -	606
40–42	" " - -	607
42–45	" " - -	608
45–48	" " - -	609
48–51	" " - -	610
51–53	" " - -	611
53–56	" " - -	612
56–59	" " - -	613
59	" " - -	614
60–61	Calhoun v. Violet - -	614
61–64	" " - -	615
64–65	" " - -	616
65–66	Dunlap v. United States -	616
66–69	" " -	617
69–72	" " -	618
72–75	" " -	619
75–77	" " -	620
77–78	United States v. Navarre -	620
78–79	" " -	621
79–80	Collier v. United States -	621
80–83	" " -	622
83	"	623

Off. Rep. 173 U. S.	Title.	Here in.
84–86	Central Loan & T. Co. v. Campbell Commission Co.	623
86–88	" "	624
88–91	" "	625
91–94	" "	626
94–97	" "	627
97–99	" "	628
99	Sioux City Terminal R. & W. Co. v. Trust Co. of N. A.	628
100–102	" "	629
102–105	" "	630
105–108	" "	631
108–110	" "	632
110–113	" "	633
113	Bausman v. Dixon -	633
113–115	" " - -	634
116–118	Mullen v. Western Union Beef Co. - - -	635
118–121	" "	636
121–123	" "	637
123	Henrietta Min. & M. Co. v. Gardner - - - -	637
124–126	" "	638
126–129	" "	639
129–130	" "	640
131	Merrill v. National Bank -	640
131–134	" " -	641
134–137	" " -	642
137–140	" " -	643
140–143	" " -	644
143–145	" " -	645
145–148	" " -	646
148–151	" " -	647
151–154	" " -	648
154–156	" " -	649
156–159	" " -	650
159–162	" " -	651
162–165	" " -	652
165–168	" " -	653
168–170	" " -	654
170–173	" " -	655
173–176	" " -	656
176–178	" "	657

Off. Rep. 173 U. S.	Title.	Here in.
178–179	Merrill v. National Bank	658
179–181	Green Bay & M. Canal Co. v. Patten Paper Co.	658
181–184	" "	659
184–185	" "	660
185–186	" "	661
186–188	" "	662
188–190	" "	663
190	" "	664
191–193	New Orleans v. Quinlan	664
193	" "	665
193–196	Dewey v. Des Moines	665
196–199	" "	666
199–201	" "	667
201–204	" "	668
204–205	" "	669
205–206	First Nat. Bank v. Chapman	669
206–209	" "	670
209–212	" "	671
212–213	" "	672
213–216	" "	673
216–219	" "	674
219–220	" "	675
221	Henrietta Min. & M. Co. v. Johnson	675
221–224	" "	676
224–225	" "	677
225–226	Henrietta Min. & M. Co. v. Hill	677
226	Baltimore & O. R. Co. v. Joy	677
226–229	" "	678
229–231	" "	679
231	Covington v. Kentucky	679
232–234	" "	680
234–237	" "	681
237–240	" "	682
240–242	" "	683
242–243	" "	684
243	Lake County Comrs. v. Dudley	684
244–245	" "	685
246–250	" "	686
250	" "	687
250–253	" "	688
253–255	" "	689
255	Gunnison County Comrs. v. Rollins	689
256–257	" "	691
257–260	" "	692
260–263	" "	693
263–265	" "	694
265–268	" "	695
268–271	" "	696
271–273	" "	697
273–276	" "	698
276–279	Ohio v. Thomas	699
279–282	" "	700
282–284	" "	701
284–285	" "	702
285–286	Lake Shore & M. S. R. Co. v. Ohio	702
286–289	" "	703
289–292	" "	704
292–294	" "	705
294–297	" "	706
297–300	" "	707
300–302	" "	708
302–305	" "	709
305–308	" "	710
308–311	" "	711
311–313	" "	712
313–316	Lake Shore & M. S. R. Co. v. Ohio	713
316–319	" "	714
319–322	" "	715
322–324	" "	716
324–327	" "	717
327–330	" "	718
330–333	" "	719
333–335	" "	720
335–338	" "	721
338	Nugent v. Arizona Improv. Co.	721
338–340	" "	722
340–343	" "	723
343–346	" "	724
346–347	" "	725
348	Texas & P. R. Co. v. Clayton	725
349–350	" "	726
350–353	" "	727
353–356	" "	728
356–359	" "	729
359–361	" "	730
361–363	" "	731
363	United States v. Johnson	731
364–367	" "	732
367–369	" "	733
369–372	" "	734
372–375	" "	735
375–378	" "	736
378–380	" "	737
380–381	" "	738
381–383	United States v. Matthews	738
383–386	" "	739
386–388	" "	740
388–389	" "	741
389–391	Allen v. Smith Smith v. Allen	741
391–393	" "	742
393–396	" "	743
396–399	" "	744
399–402	" "	745
402–404	" "	746
404	St. Louis, I. M. & St. P. R. Co. v. Paul ("St. Louis, I. M. & S. R. Co. v. Paul")	746
404–406	" "	747
406–409	" "	748
409–410	" "	749
410–412	Price v. Forrest	749
412–415	" "	750
415–417	" "	751
417–420	" "	752
420–423	" "	753
423–425	" "	754
425–428	" "	755
428–430	" "	756
430–431	Smith v. Burnett	756
431–432	" "	757
432–434	" "	758
434–437	" "	759
437–439	" "	760
439	Yerke v. United States	760
440–442	" "	761
443–445	Remington Paper Co. v. Watson	762
445–448	" "	763
448–451	" "	764
451–452	" "	765

Off. Rep. 173 U. S.	Title.	Here in.
452–454	Ex parte Ward	765
454–456	" "	766
457–458	Third Street & S. R. Co. v. Lewis	766
458–460	" "	767
461–463	Turner v. Wilkes County Comrs.	768
463–464	" "	769
464–465	United States v. New York Indians	769
465–468	" "	770
468–471	" "	771
471–473	" "	772
473	Brown v. Hitchcock	772
474–476	" "	773
476–479	" "	774
479	" "	775
479–481	Allen v. Southern P. R. Co.	775
481–484	" "	776
484–487	" "	777
487–489	" "	778
489–492	" "	779
492	Medbury v. United States	779
492–493	" "	780
493–496	" "	781
496–499	" "	782
499–500	" "	783
501	Blythe v. Hinckley	783
501–504	" "	784
504–507	" "	785
507–508	" "	786
509	Nicol v. Ames Re Nichols Skillen v. Ames Ingwersen v. United States	786
510–511	" "	787
511–512	" "	788
513–515	" "	791
515–518	" "	792
518–521	" "	793
521–523	" "	794
523–526	" "	795
526–527	" "	796
528	Guthrie Nat. Bank v. Guthrie	796
528–532	" "	797
532–534	" "	798
534–536	" "	799
536–539	" "	800
539–540	" "	801
540–542	The Chattahoochee	801
542–543	" "	802
543	" "	803
543–546	" "	804
546–549	" "	805
549–552	" "	806
552–554	" "	807
554–555	" "	808
555–557	Cooper v. Newell	808
557–560	" "	809
560–563	" "	810
563–566	" "	811
566–569	" "	812
569–571	" "	813
571–573	" "	814
573–574	Pope v. Louisville, N. A. & C. R. Co.	814
574–576	" "	815
576–577	" "	816
577–580	" "	817
580–582	Pope v. Louisville, N. A. & C. R. Co.	818
582	Guarantee Co. v. Mechanics' Sav. Bank & T. Co.	818
582–585	" "	819
585–586	" "	820
587–588	Duluth & I. R. R. Co. v. Roy	820
588–589	" "	821
589–591	" "	822
591	" "	823
592–593	Henderson Bridge Co. v. Henderson	823
593–596	" "	824
596–599	" "	825
599–602	" "	826
602–604	" "	827
604–607	" "	828
607–610	" "	829
610–613	" "	830
613–616	" "	831
616–618	" "	832
618–621	" "	833
621–624	" "	834
624	Henderson Bridge Co. v. Henderson	835
624–626	Security Trust Co. v. Dodd	835
626–627	" "	836
627–629	" "	837
629–632	" "	838
632–634	" "	839
634–636	" "	840
636–637	Citizens' Sav. Bank v. Owensboro	840
637–640	" "	841
640–642	" "	842
642–645	" "	843
645–648	" "	844
648–651	" "	845
651–653	" "	846
653–656	" "	847
656–659	" "	848
659–662	" "	849
662	Deposit Bank v. Owensboro	850
663	Deposit Bank v. Daviess County	850
663–664	Farmers' & T. Bank v. Owensboro	850
664	Owensboro Nat. Bank v. Owensboro	850
664–666	" "	851
666–669	" "	852
669–672	" "	853
672–674	" "	854
674–677	" "	855
677–679	" "	856
679–682	" "	857
682–684	" "	858
684	Lake Shore & M. S. R. Co. v. Smith	858
685–686	" "	859
686–688	" "	860
688–690	" "	861
690–693	" "	862
693–696	" "	863
696–699	" "	864
699	" "	865
701–705	Memorandum Cases	1177
	" "	1188

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1898.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

[1] FRANK H. PIERCE, *Petitioner*,
v.
TENNESSEE COAL, IRON & RAILROAD COMPANY.

(See S. C. Reporter's ed. 1-17.)

Settlement of railroad company with employee for injuries—contract for permanent employment—damages for its breach.

1. When a railroad company promised to pay one of its employees, who had been injured by its cars, certain wages and to furnish him with certain supplies so long as his disability to do full work continued by reason of his injury, in settlement of his claim for such injury; and in consideration of these promises the employee agreed to do for the company such work as he was able to do and to release the company from all liability for damages for such injuries, which caused his disability,—the company cannot at its own will and pleasure cease to perform its obligations which were the consideration of the release.
2. Such contract is sufficiently definite as to time, and binds the railroad company to its performance so long as the employee shall be disabled by reason of such injuries, which, if he is permanently disabled, will be for life.
3. Where the railroad company after a time abandoned the contract and discharged the employee without cause, the latter may maintain an action, once for all, as for a total breach of the entire contract, and may recover all he would have received in the future, as well as in the past, if the contract had been kept, deducting any sum he might have earned in the past or might earn in the future, and any loss the company had sustained by loss of his services without its fault.

[No. 174.]

Argued and Submitted January 19, 20, 1899. Decided February 20, 1899.

CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court reversing a judgment of the United States Circuit Court for the Southern Division of the Northern District of Alabama in favor of Frank H. Pierce, the plaintiff, for the sum of $5,893. The plaintiff sued in the Circuit Court of Jefferson County, Alabama, which court sustained a demurrer to his complaint, but upon appeal to the Supreme Court of the State of Alabama the judgment was reversed and the case remanded to the County Court, and upon motion of the defendant the case was removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama. Judgment of the Circuit Court of Appeals and of the Circuit Court of the United States *reversed*, and the case remanded to said Circuit Court for further proceedings in conformity with the opinion of this court.

See same case below, 110 Ala. 533, 52 U. S. App. 355, 365.

Statement by Mr. Justice **Gray:**

This was an action brought January 22, 1892, in the circuit court of Jefferson county in the state of Alabama, by Frank H. Pierce, a citizen of the state of Alabama, against the Tennessee Coal, Iron, & Railroad Company, a corporation of the state of Tennessee, doing business in the state of Alabama, upon a written contract, signed by the parties, and in the following terms:

Pratt Mines, Ala., 4th June, 1890.

Whereas I. F. H. Pierce, while in the employ of the Tennessee Iron, Coal & Railroad Company, Pratt Mines Division, as a machinist, was seriously hurt by a trip of tram cars on the main slope of the mine known as Slope No. 2, and operated by the Tennessee Coal, Iron & Railroad Company, under circumstances which I claim render the said company liable to me for damages; but whereas they disclaim any liability for said accident or the injuries to me resulting from same; and both parties being desirous of settling and compromising said matter; and whereas the said Tennessee Coal, Iron & Railroad Company did make me a proposition on the —— day of November, 1888, said accident having occurred on the 21st

day of May, 1888, that they would furnish me such supplies from the commissary at No. 2 prison, as I might choose to take, pay me regular wages while I was disabled, and give me my coal and wood for fuel at my dwelling, and the benefit of the convict garden at No. 2; and whereas said proposition was accepted by me, and carried out by the said company; and whereas in May, 1889, after I had resumed work, a further proposition was made to me to give me work, such as I could do, paying me therefor the wages paid me before said accident, that is, $60 per month, and in addition free house rent [or in lieu of *house rent a certain amount of supplies from the convict commissary at No. 2 prison, which supplies were to amount to about the sum paid by me for house rent]; and whereas said agreement has been faithfully kept by both parties; and whereas on the 4th day of June, 1890, it is mutually agreed between myself and the said company that it will be better to give me the house rent than the supplies of about equal amount from the commissary; now therefore it is agreed, in view of the above propositions, which have been faithfully carried out, that my wages from this date are to be $65 a month, and in addition I am to have, free of charge, my coal and wood necessary for my household use at my dwelling, and the same benefit from the garden as is had by others who are allowed the garden privilege; and I on my part agree and bind myself to release the said company from any and all liability for said accident, or from the injuries resulting to me from it or from the effects of it, and agree that this is to be a full and satisfactory settlement of any and all claims which I might have against said company.

The complaint set out the contract, except the clause above printed in brackets; and alleged that by this contract the defendant became liable to pay the plaintiff monthly during his life the wages therein stipulated, and to furnish him with coal and wood and allow him the privilege of the garden, as therein agreed; that the plaintiff had always been ready and offered to do for the defendant such work given to him as he was able to do, and had labored at the same for such reasonable time as he was able to work and bound to work under this contract; that by the injuries received by him from the accident mentioned therein he was permanently disabled in the use of his legs and hands, and otherwise so injured as to be incapacitated to do more work than he had done and had offered to do; but that the defendant, without any reasonable ground for so doing, abandoned the contract and refused to carry it out, claiming that the defendant was under no obligation to pay to the plaintiff the wages therein stipulated longer than suited its pleasure; and had wholly and purposely disregarded and refused to abide by the ob-
[4] ligations of the contract *for the period of six months next before the commencement of the suit, and had entirely abandoned the contract and discharged the plaintiff from its service. The plaintiff claimed damages, in the sum of $50,000, for the defendant's breach and abandonment of the contract.

The defendant demurred to the complaint, upon the ground that the contract set out therein was one of hiring, terminable at the will of either party, and not one of hiring for life, as alleged in the complaint; and that it appeared from the obligations of the complaint, that the defendant, in terminating the contract of hiring, had only exercised its legal right under the contract. The court sustained the demurrer, and the plaintiff declining to amend his complaint, rendered judgment for the defendant; and the plaintiff on February 21, 1894, appealed from that judgment to the supreme court of Alabama.

The record transmitted to this court does not show any further proceedings in the supreme court of Alabama. But the official reports of its decisions show that at November term, 1895, it reversed that judgment, and remanded the case to the county court. *Pierce* v. *Tennessee Coal, I. & R. Co.* 110 Ala. 533. And the record before this court necessarily implies that fact, by setting forth that in March, 1896, on motion of the defendant, suggesting that from prejudice and local influence it would not be able to obtain justice in the state courts, the case was removed from the county court into the circuit court of the United States for the southern division of the northern district of Alabama; and a motion to remand the case to the state court was made by the plaintiff (on what ground did not appear in the record) and was overruled.

In the circuit court of the United States, on January 4, 1897, the following proceedings took place: The demurrer to the complaint was renewed by the defendant, and overruled by the court. The plaintiff then amended his complaint by inserting, in the copy of the contract set forth therein, the words above printed in brackets; and a demurrer to the amended complaint was filed and overruled. In answer to this complaint the defendant filed two pleas: 1st. A denial of each and every allegation of the complaint; 2d. "The defendant, *for further an- [5]
swer to the complaint, says that the plaintiff, under and by the terms of the contract set out in the complaint, contracted to perform for the defendant during the term thereof such service as he was able to perform, in consideration for the promises made by defendant therein; and the defendant avers that the plaintiff thereafter became able to perform service for the defendant, and did in fact perform such service for some time thereafter, and that, while engaged in the performance of such service, the plaintiff voluntarily and without excuse therefor refused to further perform such service as he was able to perform, and was in fact performing for the defendant, as required by said contract, and the defendant thereupon discharged the plaintiff from its service; and the defendant avers that the plaintiff failed to comply with the conditions imposed upon him by said contract." The plaintiff joined issue on the first plea; and demurred to the second plea, upon the ground that it did not

go to the whole consideration of the contract, and was no answer to the entire action; and the court sustained his demurrer. The defendant, for further answer, and by way of recoupment, pleaded that on May 3, 1891, the plaintiff, voluntarily and without excuse, refused to perform such labor as he was able to perform and was in fact performing for the defendant, as required by the contract; and since that time had continued to refuse to perform and had not in fact performed such service, or any part thereof; to the damage of the defendant in the sum of $50,000.

A bill of exceptions, tendered by the plaintiff and allowed by the court, showed that at the trial before the jury the following proceedings were had:

The plaintiff introduced and read in evidence the contract sued on, and introduced evidence tending to prove the allegations of the complaint. He also offered evidence that, at the time of his discharge by the defendant from its employment in May, 1891, he was fifty-five years of age, and that he was then and had since been in good health, and addicted to no habits of drinking or otherwise, affecting his health and expectancy of life; and introduced the American
[6] tables of mortality *used by insurance companies, showing his expectancy of life at the time of his discharge, and at the time of the trial.

But the court ruled that no recovery could be allowed on the contract, beyond the instalments of wages due and in default up to the date of the trial; and, upon the defendant's motion, excluded all evidence of the plaintiff's age, health, and expectancy of life, "on the ground that it was immaterial and irrelevant, and because damages for the expectancy of life was a matter too vague and uncertain to be allowed."

The plaintiff duly excepted to the ruling and to the exclusion of evidence; and, to present the same point, asked the court to give, and duly excepted to its refusal to give, the following instruction to the jury: "If the defendant, after making the contract sued on and before the suit, refused further to pay the plaintiff and to furnish the articles stipulated to be furnished, and refused to employ the plaintiff, and discharged him, the plaintiff is entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent, less such sum as the jury may find the plaintiff may be able to earn in the future, and may have been able heretofore to earn, and less such loss as the defendant may have sustained from the loss of the plaintiff's service without the defendant's fault."

The defendant also tendered and was allowed a bill of exceptions, presenting substantially, though in different form, the questions involved in the plaintiff's case, and the contents of which therefore need not be particularly stated.

The jury returned a verdict for the plaintiff in the sum of $5,893, upon which judgment was rendered. Each party sued out a writ of error from the circuit court of appeals for the fifth circuit.

That court was of opinion that the contract sued on was for "an employment by the month, and, therefore, like every other such employment, subject to be discontinued, at the will of either party, at the expiration of any month, or at any time for adequate cause; and consequently that there was error *in overruling the demurrer to the complaint; [7]
and upon that ground, without passing upon any other question in the case, reversed the judgment of the circuit court of the United States, and remanded the case to that court for further proceedings, Judge Pardee dissenting. 52 U. S. App. 355, 365. The plaintiff thereupon applied for and obtained a writ of certiorari from this court. 168 U. S. 709.

Mr. **W. A. Gunter**, for the petitioner:

On the total renunciation of a contract by a party thereto, the person against whom it is renounced, if in other respects entitled to damages, is entitled to recover full and final damages in one action.

Schell v. *Plumb*, 55 N. Y. 592; *Howard College* v. *Turner*, 71 Ala. 434; *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545, 30 L. ed. 257; *Shover* v. *Myrick*, 4 Ind. App. 7; *Pennsylvania Co.* v. *Dolan*, 6 Ind. App. 109; *Kentucky & I. Cement Co.* v. *Cleveland*, 4 Ind. App. 171.

The usual measure of damages upon a breach of a contract is "the amount that would have been received if the contract had been kept."

Benjamin v. *Hilliard*, 23 How. 149, 16 L. ed. 518.

The standard life and annuity tables, showing at any age the probable duration of life and the present value of a life annuity, are competent evidence.

Vicksburg & M. R. Co. v. *Putnam*, 118 U. S. 545, 30 L. ed. 257; *The D. S. Gregory*, 2 Ben. 226, Fed. Cas. No. 4,100; *Foster* v. *Hilliard*, 1 Story, 77, Fed. Cas. No. 4,972; *Cooke* v. *Cook*, 110 Ala. 567; *Sauter* v. *New York C. & H. R. R. Co.* 66 N. Y. 50, 23 Am. Rep. 18; *Parker* v. *Russell*, 133 Mass. 74; *Amos* v. *Oakley*, 131 Mass. 413; *Remelee* v. *Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Mullaly* v. *Austin*, 97 Mass. 30; *People* v. *Security L. Ins. & Annuity Co.* 78 N. Y. 128, 34 Am. Rep. 522.

Messrs. **Walker Percy** and *William I. Grubb*, for respondent:

The contract sued on was for an indefinite time, and terminable at the will of either party thereto.

Franklin Min. Co. v. *Harris*, 24 Mich. 115; Parsons on Contracts, 519; *Howard* v. *East Tennessee, V. & G. R. Co.* 91 Ala. 270; *Clark* v. *Ryan*, 95 Ala. 409; *De Briar* v. *Minturn*, 1 Cal. 450; *Tatterson* v. *Suffolk Mfg. Co.* 106 Mass. 56.

The wrongful quitting of the work imposed upon plaintiff by the terms of the contract sued on would justify the defendant in refusing to proceed with the contract, and in declining further to pay the compensation provided for in it. The facts as to plaintiff's quitting work were such as to make it a ques-

tion for the jury as to whether such quitting was with legal excuse.

Darst v. *Mathieson Alkali Works*, 81 Fed. Rep. 284; *Pape* v. *Lathrop*, 18 Ind. App. 633; *Norris* v. *Moore*, 3 Ala. 677; *Spain* v. *Arnott*, 2 Starkie, 256; *Lantry* v. *Parks*, 8 Cow. 63; *Winn* v. *Southgate*, 17 Vt. 355; *Posey* v. *Garth*, 7 Mo. 94, 37 Am. Dec. 183; *Renno* v. *Bennett*, 3 Q. B. 768; *Turner* v. *Mason*, 14 Mees. & W. 112; *Ford* v. *Danks*, 16 La. Ann. 119.

In an action which treats the contract as completely broken, and goes for damages for the breach of it *in solido*, the measure of damage is the loss suffered by the servant up to the time of the trial, deducting therefrom what wages he earned, or could by the exercise of reasonable diligence have earned, in the interim, in a similar character of employment.

Davis v. *Ayres*, 9 Ala. 293; *Fowler* v. *Armour*, 24 Ala. 194; *Strauss* v. *Meertief*, 64 Ala. 306, 38 Am. Rep. 8; *Wilkinson* v. *Black*, 80 Ala. 329; *Liddell* v. *Chidester*, 84 Ala. 508; *Everson* v. *Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *McDaniel* v. *Parks*, 19 Ark. 671; *Rogers* v. *Parham*, 8 Ga. 190; *Bassett* v. *French*, 10 Misc. 672; *Hamilton* v. *Love* (Ind.) 43 N. E. 873; *Zender* v. *Seliger Toothill Co.* 17 Misc. 126; *Gordon* v. *Brewster*, 7 Wis. 355; *Sutherland* v. *Wyer*, 67 Me. 64; *Prichard* v. *Martin*, 27 Miss. 305; *Darst* v. *Mathieson Alkali Works*, 81 Fed. Rep. 284.

[7] *Mr. Justice **Gray**, after stating the case as above, delivered the opinion of the court:

In the circuit court of the United States, a verdict and judgment were rendered for the plaintiff for a less amount of damages than he claimed; and each party alleged exceptions to rulings and instructions of the judge, and sued out a writ of error from the circuit court of appeals. That court held that the defendant's demurrer to the complaint should have been sustained, and therefore reversed the judgment of the circuit court, and remanded the case for further proceedings. A writ of certiorari to review the judgment of the circuit court of appeals was thereupon applied for by the plaintiff, and was granted by this court.

The fundamental question in this case is whether the contract in suit, made by the parties on June 4, 1890, is a contract intended to last during the plaintiff's life, or is a mere contract of hiring from month to month, terminable at the pleasure of either party at the end of any month.

The facts bearing upon this question, as appearing upon the face of this contract, are as follows: In May, 1888, the plaintiff, while employed as a machinist in the defendant's coal mine in Alabama, was seriously hurt by a trip of tram cars on the main slope of the mine, under circumstances which the plaintiff claimed, and the defendant denied, rendered it liable to him in damages. The parties were desirous of settling and
[8] *compromising the plaintiff's claim for damages for the injuries, and had repeated negotiations with that object. In November, 1888, they made an agreement (which does not appear to have been reduced to writing) by which the defendant was to pay the plaintiff regular wages while he was disabled, and also to furnish him with such supplies as he might choose to get from a commissary, and to give him coal and wood for fuel at his dwelling house, and the benefit of a garden belonging to the defendant. That agreement was carried out by the defendant until May, 1889, and was then, after the plaintiff had resumed work, modified by stipulating that the defendant should give the plaintiff such work as he could do, should pay him therefor wages of $60 a month, as before the accident, and should give him the rent of his house, or, in lieu of house rent, an equivalent amount of supplies from the commissary; and the agreement, as so modified, was faithfully kept by both parties until June 4, 1890. Finally, on that day, the parties entered into the written contract sued on, by which, after reciting the plaintiff's claim for damages and the earlier agreements, it was agreed "in view [evidently a misprint for "in lieu"] of the above propositions, which have been faithfully carried out," that the plaintiff's "wages from this date are to be $65 a month" (the increase of wages being apparently intended as an equivalent for the provision, now omitted, for house rent or supplies from the commissary), and that he was to have, free of charge, his fuel and the benefit of the garden; and the plaintiff, on his part, agreed to release the defendant from any and all liability for the accident, or for the injuries resulting to him from it or from the effects of it; and that this should be a full and satisfactory settlement of all claims which he might have against the defendant.

The effect of the provisions and recitals of the contract sued on may be summed up thus: The successive agreements between the parties were all made with a view to settle and compromise the plaintiff's claim against the defendant for personal injuries, caused to him by the defendant's cars while he was in its service as a machinist, and seriously impairing his ability to work. By each agreement, the defendant was *to pay him certain [9]
wages, and to furnish him with certain supplies. The supplies to be furnished were evidently a minor consideration, and require no particular discussion. The more important matter is the wages. The defendant at first agreed to pay the plaintiff "regular wages while he was disabled." The agreement, in that form, would clearly last so long as he continued to be disabled, and could not have been put an end to by the defendant without the plaintiff's consent. By the next succeeding agreement, made after the plaintiff had resumed work, the defendant was "to give him work, such as he could do, paying him therefor the wages paid before said accident, that is, $60 a month." That agreement must be considered as a mere modification of the first, requiring the plaintiff to do such work as he could do, but showing that he was still much disabled by his injuries. By the final agreement in writing of June 4, 1890, after reciting the plaintiff's claim for damages for these injuries, as well as the earlier agreements, his wages were increased by a stipulation that his "wages from this

date are to be $65 a month," and he expressly released the defendant from all liability for the injuries resulting to him from the accident or from the effects thereof, and agreed that this should be a full and satisfactory settlement of all his claims against the defendant.

The only reasonable interpretation of this contract is that the defendant promised to pay the plaintiff wages at the rate of $65 a month, and to allow him his fuel and the benefit of the garden so long as his disability to do full work continued; and that, in consideration of these promises of the defendant, the plaintiff agreed to do such work as he could, and to release the defendant from all liability upon his claim for damages for his personal injuries. An intention of the parties that, while the plaintiff absolutely released the defendant from that claim, the defendant might at its own will and pleasure cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed. *Carnig* v. *Carr*, 167 Mass. 544, 547 [35 L. R. A. 512].

[10] *The supreme court of Alabama, when the case at bar was before it on appeal from the county court, and before the removal of the case into the circuit court of the United States, expressed the opinion that "the contract is sufficiently definite as to time, and bound the defendant to its performance, so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life;" and upon that ground reversed the judgment of the county court sustaining the demurrer to the complaint, and remanded the case to that court. 110 Ala. 533, 536. As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case. See *Williams* v. *Conger*, 125 U. S. 397, 418 [31: 778, 788]; *Gardner* v. *Michigan Central Railroad Co.* 150 U. S. 349 [37: 1107]; *Great Western Teleg. Co.* v. *Burnham*, 162 U. S. 339, 344 [40: 991, 993], and cases cited; *Moulton* v. *Reid*, 54 Ala. 320.

It follows that the judgment of the United States circuit court of appeals in this case was erroneous, and must be reversed.

It appears to us to be equally clear that the circuit court of the United States erred in excluding the evidence offered by the plaintiff, in restricting his damages to the wages due and unpaid at the time of the trial, and in declining to instruct the jury as he requested.

Upon this point the authorities are somewhat conflicting; and there is little to be found in the decisions of this court, having any bearing upon it, beyond the affirmance of the general propositions that "in an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including, not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant," and "in order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the *probable duration [11] of life, and the present value of a life annuity, are competent evidence" (*Vicksburg & M. Railroad Co.* v. *Putnam*, 118 U. S. 545, 554 [30: 257, 258]); and that in an action for breach of contract "the amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." *Benjamin* v. *Hilliard*, 23 How. 149, 167 [16: 518, 522].

But the recent tendency of judicial decisions in this country, in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears by well-considered opinions in cases of agreements to furnish support or to pay wages, a few only of which need be referred to.

In *Parker* v. *Russell*, 133 Mass. 74, the declaration alleged that, in consideration of a conveyance by the plaintiff to the defendant of certain real estate, the defendant agreed to support him during his natural life; and that the defendant accepted the conveyance, and occupied the real estate, but neglected and refused to perform the agreement. The plaintiff proved the contract; and introduced evidence that the defendant did support him in the defendant's house for five years and until the house was destroyed by fire, and has since furnished him no aid or support. The jury were instructed that "if the defndant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contract as a whole; and that the plaintiff would be entitled to recover compensation for the past failure of the defendant to furnish him aid and support, and full indemnity for his future support." Exceptions taken by the defendant to this instruction were overruled by the supreme judicial court of Massachusetts. Mr. Justice Field, in delivering judgment, said: "In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the *date of the writ, [12] and not up to the time when the verdict is rendered. But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he so elects to treat it, the damages are assessed as of a total breach of an entire contract. Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract, they include damages for not performing the contract in the future, as well

as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite, because the duration of the life of the plaintiff is uncertain; but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life. When the defendant, for example, absolutely refuses to perform such a contract, after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready, at all times during his life, to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death. *Daniels* v. *Newton*, 114 Mass. 530 [19 Am. Rep. 384], decides that an absolute refusal to perform a contract, before the performance is due by the terms of the contract, is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract, after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." 133 Mass. 75, 76. It is proper to remark that the point decided in *Daniels* v. *Newton* was left open in *Dingley* v. *Oler*, 117 U. S. 490, 503, [29: 984, 988], and has never been brought into judgment in this court.

[13] *So in *Schell* v. *Plumb*, 55 N. Y. 592, the action was by a woman, for a breach of an oral contract, by which the defendant's testator agreed to support the plaintiff during her life, and she agreed to render what services she could towards paying for her support. The contract was carried out for some years; and the defendant then turned her away, and refused to support her. At the trial the judge, against the defendant's objection, admitted in evidence the Northampton tables of life annuities, to show the probabilities of life at the plaintiff's age; and instructed the jury that, if the plaintiff was turned out in violation of the contract, without any misconduct on her part, she was entitled to recover damages from the breach of the contract to the time of trial, deducting what wages she might have earned during that time; and also to recover for her future support and maintenance, as to which the jury were instructed as follows: "Your verdict is all she can ever recover, no matter how long she may live. That ends the contract between these parties; and you will decide, considering her age, her health, her condition in life, and the circumstances under which she is placed, how long she will probably live, and how much service she can probably perform in the future, and say how much more it will cost her to support herself than she will be able to earn, and allow her to recover for such sum." The verdict was for the plaintiff, and judgment was rendered thereon. The defendant appealed, contending that, if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or, at most, to the time of trial; and that, as to the future, it was impossible to ascertain the damages, as the duration of life was uncertain, and a further uncertainty arose from the future physical condition of the person. But the court of appeals, in an opinion delivered by Judge Grover, affirmed the judgment, saying: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract." "It may be *further [14]
remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount." 55 N. Y. 597, 598. See also *Remelee* v. *Hall*, 31 Vt. 582 [76 Am. Dec. 140]; *Sutherland* v. *Wyer*, 67 Me. 64.

In *East Tennessee, V. & G. Railroad Co.* v. *Staub*, 7 Lea, 397, the facts were singularly like those in the case at bar. The plaintiff, having, while in the employ of the defendant railroad company as an engineer, and in the discharge of his duties as such, received serious injuries by a collision between his locomotive engine and another train, and having brought an action to recover damages for those injuries, an agreement, by way of compromise, was entered into, by which, in consideration of the plaintiff's agreeing to dismiss his suit, the defendant agreed to pay the costs thereof and the plaintiff's attorney's fee and physician's bills; and further agreed to retain him in its employ, the plaintiff working when, in his own opinion he was able to do so, and performing only such services as in his disabled condition he might be able to perform; the defendant agreed to pay him a certain specified sum per day, regular wages paid to machinists, whether he labored or not; and the contract was to continue as long as the injuries should last. For some time after this agreement, the plaintiff continued, at intervals, to perform light work for the defendant, receiving pay, however, only for the time he actually worked; and the defendant then denied any liability under the agreement, and refused to allow the plaintiff to continue the service under it. The supreme court of Tennessee held that the plaintiff was entitled to recover in one action the entire damages, not only for wages already due and unpaid, but also damages to the extent of the benefit that he would probably have realized under the contract; and, speaking by Judge McFarland, said: "It is a mistake to suppose, as has been done in argument, that because, in estimating the damages, we look to the probable course of events after the suit is brought, we are therefore allowing damages

[15] that accrue after the action is *brought. The right to recover damages accrues upon the breach of the contract. But the rule of damages in such cases is what would have come to the plaintiff under the contract had it continued, less whatever the plaintiff might earn by the exercise of reasonable and proper diligence on his part; and, of course, in ascertaining this, we must look to a time subsequent to the breach, and in some cases to a time subsequent to the bringing of the suit. Nor is it any objection to the recovery, that in this case the damages are difficult to ascertain, depending upon contingent and uncertain events. There are many cases in which the damages are uncertain and difficult to ascertain, and, in fact, cannot be ascertained with certainty, but this has never been regarded as a sufficient reason for denying all relief." 7 Lea, 406.

These cases appear to this court to rest upon sound principles, and to afford correct rules for the assessment of the plaintiff's damages in the case at bar.

The legal effect of the contract sued on, as has been seen, was that the defendant promised to pay the plaintiff certain wages, and to furnish him with certain supplies, so long, at least, as his disability to work should continue; and the consideration of these promises of the defendant was the plaintiff's agreement to do for the defendant such work as he was able to do, and his release of the defendant from all liability in damages for the personal injuries which had caused his disability.

The complaint alleged, and the plaintiff at the trial introduced evidence tending to prove, that by those injuries he was permanently disabled; that he was always ready and offered to do for the defendant such work as he was able to do, and labored at that work for such reasonable time as he was able to work and bound to work under the contract; and that the defendant, without any reasonable ground therefor, denied its obligation to pay the plaintiff the stipulated wages longer than suited its pleasure, and, for six months before the commencement of the action, disregarded the contract, and refused to abide by it, and entirely abandoned the contract, and dismissed the plaintiff from its services.

[16] *If these facts were proved to the satisfaction of the jury, the case would stand thus: The defendant committed an absolute breach of the contract, at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision, and take him back into its service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater, in this action of contract, than they would have been if he had sued the defendant, in an action of tort, to recover damages for the personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on.

In assessing the plaintiff's damages, deduction should, of course, be made of any sum that the plaintiff might have earned in the past or might earn in the future, as well as the amount of any loss that the defendant had sustained by the loss of the plaintiff's services without the defendant's fault. And such deduction was provided for in the instruction asked by the plaintiff and refused by the judge.

The questions of law presented by the defendant's bill of exceptions, allowed by the circuit court of the United States, are substantially like those above considered, and require no further notice.

The result is that the judgment of the circuit court of appeals, sustaining the demurrer to the complaint, and reversing the judgment of the circuit court of the United States, must be reversed; that the judgment of the circuit court of the *United States [17]
must also be reversed, because of the rulings excepted to by the plaintiff; and that the case must be remanded to that court, with directions to set aside the verdict and to order a new trial.

Judgments of the Circuit Court of Appeals and of the Circuit Court of the United States reversed, and case remanded to said Circuit Court for further proceedings in conformity with the opinion of this court.

BLANCHE K. TOWSON, Edith G. Graham, Nannie C. Towson, J. C. Kennedy Campbell, Mary L. I. Campbell, and Mary Kennedy Campbell, Committee of William H. Campbell, *Appts.*,

v.

CHRISTIANA V. MOORE, Frederick L. Moore, Julia A. Russell, Alexander W. Russell, Gertrude Fry, and Edith Fry.

(See S. C. Reporter's ed. 17–25.)

Burden of proof or undue influence—gift from parent to child—recital in declaration of gift.

1. The burden of proving undue influence in a gift from an aged woman to daughters with whom she lives alternately rests upon the plaintiff who brings the action to set the gift aside.
2. In case of a gift from a parent to a child, the circumstances should be vigilantly and carefully scrutinized to ascertain whether there has been undue influence in procuring it; but it cannot be deemed prima facie void; and in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor.

3. A recital in a written declaration of gift to the donor's daughters, that it was made "voluntarily, without suggestion from anyone," and the failure to disclose the gift to other relatives, will not create a suspicion of undue influence, where the donor had previously learned of the charge by one of the other relatives, that she had been unduly influenced in making a will.

[No. 198.]

Argued January 25, 26, 1899. Decided February 20, 1899.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District dismissing a bill in equity of the plaintiffs, who are the appellants in this court. The bill was filed to set aside a certain gift made by Mary I. Campbell to her two daughters, Christiana V. Moore and Julia A. Russell, of United States bonds, worth about $15,000. *Affirmed.*

See same case below, 11 App. D. C. 377.

The facts are stated in the opinion.

Messrs. **Franklin H. Mackey, A. H. Garland,**† and *R. C. Garland,* for appellants:

Whenever any person stands in the relation of special confidence toward another, so as to acquire an habitual influence over him, he cannot accept from him a personal benefit without exposing himself to the risk, in a degree proportioned to the nature of their connection, of having it set aside as unduly obtained.

Adams, Eq. 7th Am. ed. 184; *Boyd* v. *De-La Montagnie,* 73 N. Y. 498, 29 Am. Rep. 197; Story, Eq. Jur. § 310.

The party taking a benefit under a voluntary settlement or gift containing no power of revocation has thrown upon him the burden of proving that there was no deception or undue influence.

Coutts v. *Acworth,* L. R. 8 Eq. 558; *Darlington's Appeal,* 86 Pa. 512, 27 Am. Rep. 726.

A gift obtained where a confidential relation exists is prima facie void, and the burden is on the donee to establish to the full satisfaction of the court that it was the free, voluntary, and unbiased act of the donor.

Brooke v. *Berry,* 2 Gill, 83; *Highberger* v. *Stiffler,* 21 Md. 338, 83 Am. Dec. 593; *Todd* v. *Grove,* 33 Md. 188; *Pairo* v. *Vickery,* 37 Md. 467; *Cherbonnier* v. *Evitts,* 56 Md. 276.

Mr. **Charles H. Cragin,** for appellees:

The two elements necessary to constitute a perfect gift are the intention to give and the delivery of the thing given.

Pickslay v. *Starr,* 149 N. Y. 432, 32 L. R. A. 703.

Where the gift is from the parent to the child, the presumption is that it was caused by the ordinary promptings of affection, and was an intended benefit.

Jenkins v. *Pye,* 12 Pet. 241, 9 L. ed. 1070; *Saufley* v. *Jackson,* 16 Tex. 579; *Yeakel* v. *McAtee,* 156 Pa. 600; *Sayre* v. *Hughes,* L. R. 5 Eq. 376; *Teegarden* v. *Lewis,* 145 Ind. 98.

From the relation of the parties, no such construction as claimed by the complainants is placed upon the acts of those who occupy somewhat similar relations with the donor to those which existed here.

Hunter v. *Atkins,* 3 Myl. & K. 113; *Sayre* v. *Hughes,* L. R. 5 Eq. 376; *Leddel* v. *Starr,* 20 N. J. Eq. 274; *Conley* v. *Nailer,* 118 U. S. 127, 30 L. ed. 112; *Mackall* v. *Mackall,* 135 U. S. 167, 34 L. ed. 84; *Murray* v. *Hilton,* 8 App. D. C. 281; *Hepworth* v. *Hepworth,* L. R. 11 Eq. 10; *Saufley* v. *Jackson,* 16 Tex. 579; *Millican* v. *Millican,* 24 Tex. 426; *Eakle* v. *Reynolds,* 54 Md. 305; *Muir* v. *Miller,* 72 Iowa, 585; *Orr* v. *Pennington,* 93 Va. 268.

*Mr. Justice **Gray** delivered the opinion of the court: [17]

*This was a bill in equity, filed April 16, 1896, in the supreme court of the District of Columbia, by children of Leonidas C. Campbell, the son of William H. Campbell, against the two daughters of William H. Campbell and against their husbands, who were also executors of the wills of William H. Campbell and of Mary I. Campbell, his widow and residuary devisee and legatee, to set aside a gift made by her to their two daughters, of thirteen United States bonds for $1,000 each (five bearing interest at four and a half per cent, and eight at four per cent) as having been obtained from her by undue influence of themselves and their husbands; and for an account, and for further relief. [18]

After the filing of answers fully and absolutely denying the undue influence charged in the bill, and of a general replication, the case was heard upon pleadings and proofs, and a decree was entered dismissing the bill. The plaintiffs appealed to the court of appeals of the District of Columbia, which affirmed the decree. 11 App. D. C. 377. The plaintiffs then appealed to this court. The leading and undisputed facts of the case were as follows:

William H. Campbell, an old resident of the city of Washington, died May 21, 1881, leaving a will dated March 16, 1878, and duly admitted to probate, by which, after reciting that he had provided for his son, Leonidas C. Campbell, by establishing him in business, he gave a legacy of $5,000 to each of his two daughters, Julia, wife of Alexander W. Russell, and Christiana, wife of Frederick L. Moore, and an annuity of $500 for life to his sister, Eloise A. Campbell; and devised and bequeathed all the rest and residue of his estate in fee to his wife, Mary I. Campbell, or, if she should not survive him, to his three children as tenants in common, the children of any child dying before him to take their parent's share; and appointed his son and his son-in-law Moore executors of his will. His son died August 15, 1878, and the testator, by a codicil dated September 7, 1878, and likewise admitted to probate, ratified and confirmed his will in all respects, except in appointing both his sons-in-law and one Maury executors thereof.

*His wife and daughters survived him. His [19]

†While arguing this case Mr. Garland was stricken with apoplexy and soon after died.

son had died intestate, and leaving a widow, Mary K. Campbell, and seven children, six of whom were the plaintiffs in this bill. The seventh child had died, leaving two children, who were made defendants, but were never served with process or otherwise brought into the case.

Upon the death of William H. Campbell, his executors for the purpose of paying the annuity bequeathed by him to his sister, set apart the aforesaid United States bonds, of the par value of $13,000, and kept them intact during the life of the annuitant. She died October 1, 1885, and the bonds then became part of the residue of the estate, bequeathed to his widow, Mary I. Campbell. On October 5, 1885, the bonds were transferred to her on the books of the Treasury Department; and on the next day, October 6, 1885, their market value then being about $15,000, she made a gift of them in equal shares to her two daughters, Mrs. Russell and Mrs. Moore.

After the death of her husband in 1881 Moore was her business agent; and she resided alternately with one or the other of her two daughters, living on affectionate and confidential terms with them and their husbands; and at the times of the gift in question, and of her death, was at the house of Mr. and Mrs. Moore, in Georgetown. She died August 6, 1893, aged ninety-one years, and leaving a will, dated May 26, 1882, and duly admitted to probate, by which, after some small legacies, she devised and bequeathed all the residue of her estate, in equal thirds, to her two daughters and the seven children of her deceased son, and appointed her sons-in-law, Russell and Moore, executors of her will.

It was contended by the plaintiffs that the court of appeals erred in holding that the burden of proving undue influence was upon them; and it was argued that by reason of the confidential relations between the donor and the donees the burden of proof was shifted upon the latter to prove the validity of the gift of the bonds. But the ruling of the court of appeals in this respect is supported by the decisions of this court, as will appear by an examination of those decisions.

[20] *In the leading case of *Jenkins* v. *Pye*, 12 Pet. 241 [9: 1070], in which this court, at January term, 1838, declined to set aside for undue influence a deed of real estate made by a daughter, shortly after coming of age, to her father, the court, speaking by Mr. Justice Thompson, said: "The grounds mainly relied upon to invalidate the deed were that being from a daughter to a father rendered it, at least prima facie, void; and if not void on this ground, it was so because it was obtained by the undue influence of paternal authority. The first ground of objection seeks to establish the broad principle that a deed from a child to a parent, conveying the real estate of the child, ought, upon considerations of public policy growing out of the relations of the parties, to be deemed void; and numerous cases in the English chancery have been referred to, which are supposed to establish this principle. . . . It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed prima facie void. It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child without consideration, on account of their relationship, is assuming a principle at war with all filial, as well as parental, duty and affection, and acting on the presumption that a parent, instead of wishing to promote the interest and welfare [of], would be seeking to overreach and defraud his child. Whereas the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view, and to presume the existence of circumstances conducing to that result." 12 Pet. 253, 254 [9: 1075].

Mr. Justice Story (who had concurred in that judgment) in the last edition of his Commentaries on Equity Jurisprudence, which underwent his revision, and which was published *in 1846, after his death, stated [21]
the doctrine on the subject as follows: "The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter; and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them,—especially where the original purposes for which they have been obtained are perverted or used as a mere cover. But we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort." And he supported this statement by large quotations from the opinion of Mr. Justice Thompson in *Jenkins* v. *Pye*. 1 Story, Eq. Jur. (4th ed.) § 309.

In *Taylor* v. *Taylor*, 8 How. 183 [12: 1040], decided at January term, 1850, after the deaths of Justices Thompson and Story, the opinion of Mr. Justice Thompson in *Jenkins* v. *Pye* and the passage in Justice Story's Commentaries (omitting the last clause, which was not in the earlier editions) were quoted by Mr. Justice Daniel as laying down the true rule upon the subject. While some expressions of that learned judge might seem to construe those authorities too strongly in favor of presuming undue influence, the decision in that case, setting aside a deed made by a daughter to her father soon after her coming of age, ultimately proceeded upon overwhelming proof of undue influence, derived in part from the testimony of witnesses to significant facts; in part from

evidence conclusively showing that nearly all the statements in the deed itself were utterly false, and in part from a letter written to the father by the daughter a few days before executing the deed and while they were living under the same roof, which, as the court declared, clearly appeared upon its face to be "a fabrication, designed to conceal the very facts and circumstances which it palpably betrays," and "not the production of an inexperienced girl, but of a far more practised and deliberate author."

It has since, more than once, been recog-
[22] nized by this court, *that "the influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands *in vinculis*." *Conley* v. *Nailor* (1886) 118 U. S. 127, 134 [30: 112, 115]; *Ralston* v. *Turpin* (1889) 129 U. S. 663, 670 [32: 747, 750]. See also *Mackall* v. *Mackall* (1890) 135 U. S. 167, 172, 173 [34: 84, 87].

In *Ralston* v. *Turpin*, just cited, in which the object of the bill was to set aside deeds made to an agent by his principal, this court, speaking by Mr. Justice Harlan, recognized the rule of law that "gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion," and conceded that in the case then before the court the agent held such relations, personal and otherwise, to the principal, as would enable him to exercise great influence over the latter in respect to the mode in which his property should be managed; that the principal trusted the agent's judgment as to matters of business more than the judgment of any other man; and that he had an abiding confidence in the agent's integrity, as well as in his desire to protect his interests. Notwithstanding all this, the bill was dismissed, because the plaintiff had failed to show that the deeds were obtained by undue influence, but, on the contrary, it appeared by the great preponderance of the evidence that "although their execution may have been induced, not unnaturally, by feelings of friendship for, and gratitude to, the defendant Turpin, the grantor acted upon his own independent, deliberate judgment, with full knowledge of the nature and effect of the deeds. It was for the donor, who had sufficient capacity to take a survey of his estate, and to dispose of it according to an intelligent, fixed purpose of his own, regardless of the wishes of others, to determine how far such feelings should control him when selecting the objects of his bounty." 129 U. S. 675-677 [32: 752].

In *Mackall* v. *Mackall*, above cited, in which it was attempted to set aside a deed from a father to his son, it appeared that for twenty years the father and mother had been separated, and this son had remained with the father, taking his part, and assisting him in his affairs, and the other children had gone with the mother and taken her part in
[23] the *family differences. This court, in the opinion delivered by Mr. Justice Brewer, speaking of the contention that the execution of the deed was induced by undue influence, said: "In this respect, reference was made to the long intimacy between father and son, the alleged usurpation by the latter of absolute control over the life, habits, and property of the former, efforts to prevent others during the last sickness of the father from seeing him, and the subjection of the will of the father to that of the son, manifest in times of health, naturally stronger in hours of sickness. A confidential relation between father and son is thus deduced, which, resembling that between client and attorney, principal and agent, parishioner and priest, compels proof of valuable consideration and bona fides in order to sustain a deed from one to the other. But while the relationships between the two suggest influence, do they prove undue influence?" In giving a negative answer to that question, the court affirmed the following propositions: "Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practised, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. . . . That the relations between this father and his several children, during the score of years preceding his death, naturally inclined him towards the one and against the others, is evident and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something *of that nature, [24]
must appear; otherwise, that disposition of property which accords with the natural inclinations of the human heart must be sustained." 135 U. S. 171-173 [34: 86, 87].

The principles established by these authorities may be summed up as follows: In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed prima facie void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor. The same rule as to the burden of proof applies with equal, if not greater, force to the case of a gift from a parent to a child, even if the effect of the gift is to confer upon a child with whom the parent makes his home and is in peculiarly close relations a larger share of the parent's estate than will be received by other children or grandchildren.

Applying these principles to the case at bar, it is beyond doubt that the relations in which Mary I. Campbell stood to her daughters and their husbands afford no ground for putting upon them the burden of disproving undue influence.

Upon the question whether undue influence was in fact exercised, the record contains a mass of conflicting testimony, which is satisfactorily considered in the opinion of the court of appeals, and which it would serve no useful purpose to discuss anew.

A series of decisions of this court has established the rule that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous. This rule, more often invoked in admiralty cases, is yet equally applicable to appeals in equity. *Dravo* v. *Fabel*, 132 U. S. 487, 490 [33: 421, 422]; *Stuart* v. *Hayden*, 169 U. S. 1, 14 [42: 639, 644]; *Baker* v. *Cummings*, 169 U. S. 189, 198 [42: 711,-716].

There is one document, however, in the record, which was the subject of so much ar-
[25] gument at the bar, that a brief notice *of it, and of the circumstances under which it was drawn up, will not be out of place.

The defendants, at the hearing, introduced in evidence a writing signed by Mary I. Campbell, and in the following terms: "Georgetown, D. C., October 6th, 1885. I have to-day voluntarily, without suggestion from anyone, given to my two daughters the 4½ and 4 per cent United States bonds coming to me from the estate of my husband, amounting to thirteen thousand dollars at par, thus equaling their share with the amount received by their brother and his family." There was evidence tending to show that this writing was drawn up and signed at the request of Mrs. Moore, and delivered to her, on the day of its date, and had since been kept by her.

It was argued, in behalf of the plaintiffs, that the procuring of this paper, containing the unusual and suspicious declaration that the gift of the bonds was made "voluntarily, without suggestion from anyone," together with the long concealment of the paper from the plaintiffs, was strong evidence of an intent to back up a fraudulent transaction.

But this argument is fully met by evidence that the reason for the execution of this paper was that, three or four years before, Mary K. Campbell, the mother of the plaintiffs, had made an unfounded charge that Mrs. Moore had by undue influence procured the insertion of the legacies to herself and her sister in her father's will, and had only desisted from that charge upon receiving from Mary I. Campbell a written statement that it was "false in every particular." Under such circumstances, no suspicion of undue influence can arise out of the execution of the writing of October 6, 1885, or out of its not having been disclosed to the plaintiffs, which may well have been in order to prevent stirring up anew a family quarrel. In this respect, as in most others, the case wholly differs from that of *Taylor* v. *Taylor*, 8 How. 183 [12: 1040], on which the plaintiffs rely.

Upon a careful examination of the whole evidence, aided by the able and thorough arguments of counsel, no sufficient ground appears for reversing the decree dismissing the bill.

Decree affirmed.

JOHN A. LOMAX, *Plff. in Err.*, [26]
v.
AQUILA H. PICKERING.

(See S. C. Reporter's ed. 26-32.)

Record of Indian's deed, when notice of title.

The record of a deed from an Indian without the approval of the President, which is necessary for a valid conveyance, constitutes notice of the title to subsequent purchasers, under the Illinois conveyancing act, § 30, making an unrecorded deed void as to creditors and subsequent purchasers.

[No. 123.]

Submitted January 12, 1899. Decided February 20, 1899.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Superior Court of Cook County in that State in favor of the plaintiff, Aquila H. Pickering, for the recovery of lands which had originally been granted by the United States to certain Indians under the treaty of Prairie du Chien. *Affirmed.*

See same case below, 165 Ill. 431: also see same case, 145 U. S. 310, 36 L. ed. 716.

Statement by Mr. Justice **Brown:**

This was an action of ejectment brought by Aquila H. Pickering against John A. Lomax and William Kolze to recover possession of two parcels of land in Cook county, Illinois, which had originally been granted by the United States to certain Indians under the treaty of Prairie du Chien, of July 29, 1829.

This case was before this court upon a former hearing (*Pickering* v. *Lomax*, 145 U. S. 310 [36: 716]), the report of which contains a full statement of the facts, which need not be here repeated. Upon that hearing the judgment of the supreme court of Illinois was reversed, and the case remanded for a new trial, which resulted in a judgment for Pickering, the plaintiff, and in an affirmance of that judgment by the supreme court of Illinois. *Lomax* v. *Pickering*, 165 Ill. 431. To review this judgment a second writ of error was sued out from this court.

Messrs. **John M. H. Burgett,** *James Maher*, and *A. W. Browne* for plaintiff in error.

Mr. **John P. Ahrens** for defendant in error.

[27] *Mr. Justice **Brown** delivered the opinion of the court:

The common source of title in this case was Alexander Robinson, an Indian, to whom the lands were patented by President Tyler, December 28, 1843, under the provisions of art. 4 of the treaty of Prairie du Chien (7 Stat. at L. 320), subject to the following proviso: "But never to be leased or conveyed by him" (the grantee), "them, his or their heirs, to any person whatever, without the permission of the President of the United States." The lands were subsequently allotted and set off to Joseph Robinson, one of the patentee's children, by a decree in partition of the Cook county court of common pleas.

Pickering claimed title through a deed from Joseph Robinson and wife to John F. Horton, dated August 3, 1858, recorded July 16, 1861, but without the approval of the President indorsed thereon. The deed was, however, submitted to and approved by the President, January 21, 1871, and a certified copy of the deed with such approval recorded March 12, 1873.

Lomax's title was by deed from Joseph Robinson to Alexander McClure, dated November 22, 1870, submitted to and approved by the President, February 24, 1871, and recorded March 11, 1871, in Cook county.

Upon the first trial, plaintiff's chain of title being proved, the defendant Lomax introduced no evidence, but at the close of plaintiff's testimony moved that the case be dismissed upon the ground that the deed of August 3, 1858, from Joseph Robinson and wife to Horton was made in direct violation of the terms of the patent, which required the approval of the President to the conveyance. This motion was granted, the court being of opinion that Robinson had no authority to convey without obtaining prior permission of the President, and that the subsequent approval of the deed was invalid. Thereupon judgment was rendered for the defendant, which was affirmed by the supreme court of Illinois. 120 Ill. 293.

The case was reversed by this court upon
[28] the ground that *the approval subsequently given by the President to the conveyance was retroactive, and was equivalent to permission before execution and delivery. The case went back for a new trial, when Lomax put in evidence the title above stated, relying upon a sentence in the opinion of this court to the effect that "if, after executing this deed, Robinson had given another to another person with the permission of the President, a wholly different question would have arisen." Judgment having been rendered for the plaintiff, the case was again taken to the supreme court of the state, which was of opinion that the defendant did not stand in the relation of a bona fide purchaser to the property.

It will be observed that the deed to Horton of August 3, 1858, antedated the deed to McClure of February 22, 1870, by more than twelve years, and was recorded July 16, 1861, while the deed to McClure was recorded March 11, 1871, nearly ten years thereafter. The deed to Horton also antedated the deed to McClure in the approval of the President by about a month, *viz.:* Horton, January 21, 1871; McClure, February 24, 1871.

Defendant, however, relies upon the fact that the McClure deed was recorded with the approval of the President indorsed thereon March 11, 1871, while plaintiff's deed with such approval was not recorded until March 12, 1873. The real question then is whether the recording of the Horton deed of July 16, 1861, without the approval of the President indorsed thereon, was notice of plaintiff's title to subsequent purchasers.

By section 30 of the conveyancing act of Illinois, it is provided that "all deeds, mortgages, and other instruments in writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice until the same shall be filed for record."

The supreme court of Illinois [165 Ill. 436] was of opinion that the deed to Horton was entitled to record, although it had not received *the approval of the President. In [29]
delivering the opinion of the court Mr. Justice Craig observed: "As respects the approval of the President, required by the treaty and the provision in the patent to render the deed effectual, we do not think the recording laws have any bearing upon it. There was a record of the approval of the President in the Department at Washington, and that record was notice to all concerned from the time it was made, and we do not think the recording laws of the state required a copy of that record to be recorded in the recorder's office where the land is located. A record of that character is similar to a patent issued by the President for lands that belong to the government, which is not required to be recorded in the county where the land is located."

Even if this be not a construction of the state statute binding upon us, and decisive of the case, we regard it as a correct exposition of the law.

The deed is an ordinary warranty deed upon its face, signed by the parties, and regularly acknowledged before a justice of the peace. There was nothing to apprise the recorder of any want of authority to convey, or to justify him in refusing to put the deed on record. Whether the grantors had authority to make the deed as between themselves and the grantees, or subsequent purchasers, is a matter which did not concern him. Though the deed might be impeached by showing that the grantor had no such authority, the record was notice to subsequent purchasers that they had at least attempted to convey their interests.

A deed may be void by reason of the infancy or coverture of the grantors, and yet may be, under the laws of the state, entitled to record and notice to subsequent purchasers. While the record of a void deed is of no greater effect than the deed itself, and is not such notice as will give protection to a

bona fide purchaser, yet it may, under certain circumstances, be a notice to intending purchasers, or third persons, that the grantor has intended and undertaken to convey his title. Thus, in *Morrison* v. *Brown*, 83 Ill. 562, a deed of trust executed by a married woman, her husband not uniting there-
[30] in, *to secure the purchase money of the property, though void as a conveyance, was nevertheless held to be an instrument in writing relating to real estate within the statute of Illinois, and, when recorded, constructive notice to all subsequent purchasers of the lien of the original vendor upon the same for the unpaid price. The court took the ground that while married women had no force or power to *create* a lien, subsequent purchasers occupied the same position as they would have done had the instrument been read to them before they became interested in the question.

So, in *Tefft* v. *Munson*, 57 N. Y. 97, the record of a mortgage prior to the acquisition of title by the grantor was held to be constructive notice to a subsequent purchaser in good faith, and, under the recording act, giving it priority to the title. See also *United States Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; *Alderson* v. *Ames*, 6 Md. 52; *Stevens* v. *Hampton*, 46 Mo. 404.

In this case, however, it appears from McClure's own statement that when Robinson came to him in 1870 to sell him his right to the land, he told him that he had already sold the premises, but without the approval of the President, and that McClure sent his own attorneys to examine the record. He thus had not only constructive, but actual, notice of the Horton deed.

The approval of the President was no proper part of the deed. The language of the restriction in the original patent was "but never to be leased or conveyed by him [the grantee], them, his or their heirs, to any person whatever, without the permission of the President of the United States." How that permission should be obtained or expressed is left undetermined by the proviso. We see no reason why it might not have been by a memorandum at the foot of the petition for approval, or even by a letter to that effect. The essential fact was that permission should be obtained and expressed in some form, of which, in all probability, a record was kept in the Department.

Indeed, we think it sufficiently appears that at the time the deed to McClure was approved by the President, February 24, 1871,
[31] *there was on file in Washington the approval of the President of the prior deed to Horton. There was put in evidence a certificate of the Commissioner of Indian Affairs, signed March 7, 1896, to a certified copy of the Horton deed, with an affidavit as to the loss of the original, a further affidavit that the sale was an advantageous one for Robinson, and the approval of the President, dated January 21, 1871. It does not directly appear when the approval of the President was put on file in the office of the Commissioner, but we think the presumption is that it was filed as of its date. There was nothing requiring that this approval should be filed in the recorder's office in Cook county, and when McClure took his deed of November 22, 1870, and obtained the approval of the President of February 24, 1871, he took it with the chance that the Horton deed had already been approved and that the power of the President had been exhausted. The approval by the President of his deed was doubtless an inadvertence, and, in view of the fact that he had already approved the Horton deed, a nullity. By his approval of the first deed the title of Robinson was wholly devested, and there was nothing left upon which a subsequent approval could operate, unless we are to assume that such subsequent approval in some way revested the title in Robinson and passed it to McClure. No new delivery was necessary to pass the title to Horton. *United States* v. *Schurtz*, 102 U. S. 378 [26: 167]; *Bicknell* v. *Comstock*, 113 U. S. 149 [28: 962]; *Gilmore* v. *Sapp*, 100 Ill. 297; *Gallipot, Bruner*, v. *Manlove*, 2 Ill. 156. No injustice was done to McClure, since he already had notice, both by the record and by Robinson's statement, that he had conveyed the land, and an examination of the record in Washington would doubtless have shown that the prior deed had received the approval of the President. The two deeds stand in the relation of two patents for the same land, the second of which is uniformly held to be void.

There is nothing in the fact that the partition proceedings, under which Robinson obtained title to the land in dispute, were not approved by the President. Not only were these partition proceedings set forth as a part of the record of the case at the time he approved the Horton deed, but as already
*held in the prior case (p. 316 [36: 719]), [32]
such approval was retroactive, and operated as if it had been indorsed upon the deed when originally given, and inured to the benefit of Horton and his grantee, "not as a new title acquired by a warrantor subsequent to his deed inures to the benefit of the grantee, but as a deed, imperfect when executed, may be made perfect as of the date when it was delivered."

The judgment of the Supreme Court of Illinois is therefore *affirmed*.

ROBERT G. WILSON, *Plff. in Err.*,

v.

EUREKA CITY.

(See S. C. Reporter's ed. 32–37.)

City ordinance, when not unconstitutional.

An ordinance requiring the written permission of the mayor or president of the city council, or, in his absence, of a councilor, before any person shall move a building on the streets, is not unconstitutional as a denial of the equal protection of the laws or of due process of law.

[No. 142.]

Submitted January 17, 1899. Decided February 20, 1899.

IN ERROR to the Supreme Court of the State of Utah to review a judgment of that court affirming a judgment of the Fifth Judicial District Court of the State of Utah, County of Juab, which affirmed the judgment of a Justice's Court of Eureka City, Utah, convicting plaintiff in error, Robert G. Wilson, of a violation of an ordinance of that city upon which he was sentenced to pay a fine. *Affirmed.*

See same case below, 15 Utah, 53.

Statement by Mr. Justice **McKenna:**

Section 12 of ordinance number 10 of Eureka City, Utah, provided as follows:

"No person shall move any building or frame of any building, into or upon any of the public streets, lots, or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councilor. A violation of this section shall, on conviction, subject the offender to a fine of not to exceed twenty-five dollars."

The plaintiff in error was tried for a violation of the ordinance in the justice's court
[33] of the city. He was convicted and *sentenced to pay a fine of twenty-five dollars. He appealed to the district court of the first judicial district of the territory of Utah.

On the admission of Utah into the Union the case was transferred to the fifth district court of Juab county, and there tried on the 24th of October, 1896, by the court without a jury, by consent of the parties.

Section 12, *supra*, was offered and admitted in evidence. Plaintiff in error objected to it on the ground that it was repugnant to section 1 of article 14 of the Constitution of the United States, in that it delegated an authority to the mayor of the city, or in his absence to a councilor.

There was also introduced in evidence an ordinance establishing fire limits within the city, providing that no wooden buildings should be erected within such limits except by the permission of the committee on building, and providing further for the alteration and repair of wooden buildings already erected. The ordinance is inserted in the margin.†

[34] *The evidence showed that the plaintiff in error was the owner of a wooden building of the dimensions of twenty by sixteen feet, which was used as a dwelling house. It was constructed prior to the enactment of the ordinances above mentioned. The evidence further showed that plaintiff in error applied to the mayor for permission to move the building along and across Main street in the city, to another place within the fire limits. The mayor refused the permission, stating that if the desire was to move it outside of the fire limits permission would be granted. Notwithstanding the refusal, the plaintiff in error moved the building, using blocks and tackle and rollers, and in doing so occupied the time between eleven A. M. and three P. M. At the place where the building stood originally the street was fifty feet from the houses on one side to those on the other—part of the space being occupied by sidewalks, and the balance by the traveled highway. The distance of removal was two hundred and six feet along and across Main street. Eureka City was and is a mining town, and had and has a population of about two thousand. It was admitted that the building was moved with reasonable diligence.

The plaintiff in error was again convicted. From the judgment *of conviction he appealed [35]
to the supreme court of the state, which court affirmed the judgment, and to the judgment of affirmance this writ of error is directed.

Eureka City has no special charter, but was incorporated under the general incorporation act of March 8, 1888, and among the powers conferred by it on city councils are the following:

"10. To regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same."

The error assigned is that the ordinance is repugnant to the Fourteenth Amendment of the Constitution of the United States, because "thereby the citizen is deprived of his property without due process of law," and "the citizen is thereby denied the equal protection of the law."

Mr. **J. W. N. Whitecotton** for plaintiff in error.

Mr. **P. L. Williams** for defendant in error.

*Mr. Justice **McKenna** delivered the [35]
opinion of the court:

Whether the provisions of the charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question,

†Section 1. That the following boundaries are hereby established as the fire limits of Eureka City, to wit: Commencing at a point on Main street of said city, where said street crosses the Union Pacific Railway track, and opposite or nearly opposite the Keystone hoisting works, thence running in an easterly direction along said Main street to a point where said street intersects the road or street easterly of the site now occupied by the M. E. Church building, the northerly and southerly boundaries of said fire limits to be two hundred feet on each side of said Main street for said distance.

Sec. 2. Every building hereafter within the fire limits of said city shall be of brick, stone, iron, or other substantial and incombustible material, and only the following wooden buildings shall be allowed to be erected, except as hereinafter provided, *viz.:* Sheds to facilitate the erection of authorized buildings, coal sheds not exceeding ten feet in height, and not to exceed one hundred feet in area, and privies not to exceed thirty feet in area and ten feet in height, and all such sheds and privies shall be separate structures: *Provided,* That any person desiring to erect a building of other material than those above specified within said fire limits, shall first apply to the committee on building within said fire limits of the city for permission so to do, and if the consent of the committee on building within said fire limits shall be given, they shall issue a permit, and it

and we are confined to the consideration of whether the power conferred does or does not violate the Constitution of the United States.

It is contended that it does, because the ordinance commits the rights of plaintiff in error to the unrestrained discretion of a single individual, and thereby, it is claimed, removes them from the domain of law. To support the contention the following cases are cited: *Matter of Frazee*, 63 Mich. 396; *State, ex rel. Garrabad*, v. *Dering*, 84 Wis. 585 [19 L. R. A. 858]; *Anderson* v. *City of Wellington*, 40 Kan. 173 [2 L. R. A. 110]; *Mayor of Baltimore* v. *Radecke*, 49 Md. 217 [33 Am. Rep. 239]; *City of Chicago* v. *Trotter*, 136 Ill. 430.

[36] *With the exception of *Baltimore* v. *Radecke*, these cases passed on the validity of city ordinances prohibiting persons parading streets with banners, musical instruments, etc., without first obtaining permission of the mayor or common council or police department. Funeral and military processions were excepted, although in some respects they were subjected to regulation. This discrimination was made the basis of the decision in *State, ex rel. Garrabad*, v. *Dering*, but the other cases seem to have proceeded upon the principle that the right of persons to assemble and parade was a well-established and inherent right, which could be regulated but not prohibited or made dependent upon any officer or officers, and that its regulation must be by well-defined conditions.

This view has not been entertained by other courts or has not been extended to other instances of administration. The cases were reviewed by Mr. Justice McFarland of the supreme court of California in *Re Flaherty*, 105 Cal. 558 [27 L. R. A. 529], in which an ordinance which prohibited the beating of drums on the streets of one of the towns of that state "without special permit in writing so to do first had and obtained from the president of the board of trustees," was passed on and sustained. Summarizing the cases the learned justice said:

"Statutes and ordinances have been sustained prohibiting awnings without the consent of the mayor and aldermen (*Pedrick* v. *Bailey*, 12 Gray, 161); forbidding orations, harangues, etc., in a park without the prior consent of the park commissioners (*Commonwealth* v. *Abrahams*, 156 Mass. 57), or upon the common or other grounds, except by the permission of the city government and committee (*Commonwealth* v. *Davis*, 140 Mass. 485); 'beating any drum or tambourine, or making any noise with any instrument for any purpose whatever, without written permission of the president of the village,' on any street or sidewalk (*Vance* v. *Hadfield*, [51 Hun, 620], 22 N. Y. S. R. 858, 1003, 4 N. Y. Supp. 112); giving the right to manufacturers and others to ring bells and blow whistles in such manner and at such hours as the board of aldermen or selectmen may in writing designate (*Sawyer* v. *Davis*, 136 Mass. 239, 49 Am. Rep. 27); prohibiting the *erecting or repairing of a wooden building [37] without the permission of the board of aldermen (*Hine* v. *The City of New Haven*, 40 Conn. 478); authorizing harbor masters to station vessels and to assign to each its place (*Vanderbilt* v. *Adams*, 7 Cow. 349); forbidding the occupancy of a place on the street for a stand without the permission of the clerk of Faneuil Hall Market (*Nightingale, Petitioner*, 11 Pick. 168); forbidding the keeping of swine without a permit in writing from the board of health (*Quincy* v. *Kennard*, 151 Mass. 563); forbidding the erection of any kind of a building without a permit from the commissioners of the town through their clerk (*Easton Commissioners* v. *Covey*, 74 Md. 262); forbidding any person from remaining within the limits of the market more than twenty minutes unless permitted so to do by the superintendent or his deputy (*Commonwealth* v. *Brooks*, 109 Mass. 355)."

In all of these cases the discretion upon which the right depended was not that of a single individual. It was not in all of the cases cited by plaintiff in error, nor was their principle based on that. It was based on the necessity of the regulation of rights by uniform and general laws—a necessity which is no better observed by a discretion in a board of aldermen or council of a city than in a mayor, and the cases, therefore, are authority against the contention of plaintiff in error. Besides, it is opposed by *Davis* v. *Massachusetts*, 167 U. S. 43 [42: 71].

Davis was convicted of violating an ordinance of the city of Boston by making a public address on the "Common," without obtaining a permit from the mayor. The conviction was sustained by the supreme judicial court of the commonwealth (162 Mass. 510 [26 L. R. A. 712]), and then brought here for review.

The ordinance was objected to, as that in

shall thereupon be lawful to erect such building under such regulations and restrictions as the committee on building within said fire limits may provide.

Sec. 3. Any wooden building already within said fire limits shall only be altered or repaired in such a manner that neither area nor height be increased without the consent of the said committee on building within said fire limits.

Sec. 4. The said committee on building within said fire limits shall have the power to stop the construction of any building, or the making of alterations or repairs on any building where the same is being done in violation of the provisions of this ordinance, and any owner, architect, or builder, or others who may be employed, who shall assist in violation or noncompliance with the provisions of this ordinance, shall be subject to a fine for every such violation or noncompliance, of not less than ten nor more than one hundred dollars.

Sec. 5. That there shall be a committee consisting of three members of the council appointed by the mayor and confirmed by the council, to be known as the "committee on building within the fire limits of Eureka City," and that said committee be appointed immediately upon the taking effect of this ordinance.

Sec. 6. This ordinance shall take effect and be in force from and after its first publication in the Tintic Miner.

Passed and approved June 4, 1894.

the case at bar is objected to, because it was "in conflict with the Constitution of the United States, and the first section of the Fourteenth Amendment thereof." The ordinance was sustained.

It follows from these views that *the judgment of the Supreme Court of Utah should be, and it is, affirmed.*

---

[38] EDWIN A. McINTIRE *et al.*, *Appts.*,
v.
MARY C. PRYOR.

(See S. C. Reporter's ed. 38-59.)

Principal, when liable for fraud of agent—laches, when not sufficient defense to action for fraud—excuses for delay in bringing action.

1. One who acquires title through an agent is chargeable with the latter's fraud in the transaction, the same as if he had committed it personally.
2. A delay of nine years and four months is not fatal to a suit to annul a foreclosure on the ground of fraud, where the plaintiff is an ignorant colored woman, defrauded by one in whom she placed entire confidence, who assumed to act as her agent and professed that the sale was in her interest, and who obtained title for little more than a nominal sum by the false personation of a fictitious person, when he still controls and probably owns the property, the situation of which has not materially changed, and there has been no rapid rise in value, or the intervention of the rights of any bona fide purchaser.
3. When the fraud is clearly proved the court will look with indulgence upon any disability of the plaintiff, which excuses his delay in bringing his action to assert his rights.

[No. 109.]

Argued January 4, 5, 1899. Decided February 20, 1899.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court in favor of the plaintiff, Mary C. Pryor, against the defendants, Edwin A. McIntire *et al.*, in a suit to obtain the nullification and avoidance for fraud of a certain foreclosure of real estate in the city of Washington. The decree of the supreme court set aside certain deeds which operated as a cloud upon plaintiff's title, etc. *Decree of the Court of Appeals affirmed.*

See same case below, 7 D. C. App. 417, 10 D. C. App. 432.

Statement by Mr. Justice **Brown:**

This was a bill in equity filed in the supreme court of the District of Columbia by Mary C. Pryor against Edwin A. McIntire, Martha McIntire, and Hartwell Jenison to obtain the nullification and avoidance, upon the ground of fraud, of a certain foreclosure of real estate in the city of Washington.

The facts were in substance that, in May, 1880, the plaintiff Mary C. Pryor, being the owner of parts of lots twenty-one and twenty-two in square numbered 569, conveyed the same by trust deed to Edwin A. McIntire to secure the defendant Hartwell Jenison in the sum of $450 for money advanced by Jenison, which was represented by a note made by the complainant and her husband, Thomas Pryor, since deceased, payable one year after date, with interest at the rate of eight per cent, payable quarterly.

Default having been made in payment of the note, the property was regularly advertised for sale under the deed of trust, and, after a week's postponement on account of the weather, was sold on June 17, 1881, and bought in nominally by Jenison for $806, the difference between $450, the amount of the Jenison loan, and $806, the amount for which the property *was sold, being the taxes which [39]
had accrued on the property, together with the expenses and commissions attending the sale, which amounted all told to $839.19. In this connection the plaintiff averred that the defendant McIntire had represented to her husband, Thomas Pryor, that the sale would be only a matter of form, and that he, Pryor, could buy in the property, and that time would be given him to pay the indebtedness; that the sale was made without the knowledge of Jenison, the holder of the note secured by the deed of trust; that as had been previously agreed, Pryor, the husband of the plaintiff, did in fact become the purchaser at the trustee's sale for the sum of $700, and the property was struck off to him; that they were not disturbed in the possession of the property for some time, when McIntire called on them and told them that they might pay rent to him, and that it would be applied to the payment of the principal of the debt, and that accordingly they paid rent until September, 1884, at the rate of $6 per month, with the understanding that this would be applied to the liquidation of the note, and that when the same was paid the property would be reconveyed to the plaintiff. On June 29, 1881, a few days after the sale, a deed was executed to Jenison for the nominal consideration of $806, and on the same day Jenison gave a new note to one Emma Taylor for the sum of $425, and secured the same by a deed of trust on the same property, the note being payable one year after date, with eight per cent interest. Subsequently, and on April 21, 1882, Jenison conveyed the property outright to Emma Taylor on receiving the $425 note.

Subsequently, and in May, 1884, Emma Taylor conveyed the property to Martha McIntire, the sister of the defendant Edwin A. McIntire. By reason of some supposed defect in the deed from Jenison to Taylor, Jenison subsequently, and on September 27, 1887, made a quitclaim deed of his interest in the property to Martha McIntire, who, in October, 1886, built four houses upon the property, two fronting on F street and two in the rear facing an alley, of which she has had the use and enjoyment ever since.

*Plaintiff's averments in this connection [40]
were that the sale by McIntire under the Jenison deed of trust was made in his own

interest, with the fraudulent intent of getting possession of the property; that the $425 note given by Jenison to Emma Taylor, secured by a deed of trust, was fictitious and a part of the same scheme; that Emma Taylor was a fictitious person; that the deeds to her were void; that the deed from her to Martha McIntire was also fictitious, and that the subsequent deed from Jenison to Martha McIntire of September 27, 1887, was procured by the fraudulent representations of Edwin A. McIntire.

The prayer was that the sale under the deed of trust be set aside; that an account be taken of what was due by the plaintiff upon the note for $450, and upon the payment of the same that the plaintiff be declared the owner of the property, and that the trustees be required to account to her for rents, issues, and profits received by them on account of such property since the foreclosure sale.

The answer of Edwin A. McIntire denied all allegations of fraud and deceit; averred that the sale was bona fide in all respects; that he had no interest whatever in the property, and that it belonged to his sister Martha McIntire, who bought it in the regular course of business, and who, in her answer, denied that she participated in or had anything to do with any fraudulent scheme to get possession of the property, or that she had knowledge of any fraud on the part of her brother, and alleged that she was a true and bona fide purchaser of the property in dispute.

Jenison also answered the bill, stating that he had directed the sale to be made and the property bought in for him, if necessary for his protection; that he made the deed to Emma Taylor, as well as the quitclaim deed to Martha McIntire, and that he knew nothing whatever of any fraud on the part of Edwin A. McIntire.

Upon a hearing upon pleadings and proofs, the supreme court rendered a decree dismissing the bill upon the ground of laches. Plaintiff appealed to the court of appeals, which reversed the decree of the court below;
[41] remanded the case to *the supreme court of the District of Columbia, with instructions to take an account of the indebtedness due by the plaintiff to Jenison, together with an account of the rents and profits collected by the defendants, and directed that upon the coming in of such report a final decree be passed annulling each and all of the several trust deeds that clouded the title to said premises, and awarding possession thereof to plaintiff upon her paying the amount due Jenison, and to the defendant Martha McIntire, upon the statement of the account. 7 D. C. App. 417.

In compliance with these instructions the supreme court subsequently entered a final decree in favor of the plaintiff for $1,664.93, and set aside the deed of trust from plaintiff and her husband to Edwin A. McIntire, and all the subsequent deeds, six in number, which operated as a cloud upon plaintiff's title.

Another appeal was taken from this decree to the court of appeals, which affirmed the decree of the supreme court (10 D. C. App. 432), whereupon Edwin A. McIntire and Martha McIntire took an appeal to this court.

Shortly after the commencement of this suit, four other suits were begun by Elizabeth Brown, Annie Ackerman, John Southey *et al.*, and Joseph Hayne and wife, for similar purposes as the above, to procure the annulment of certain deeds of real estate to and from Emma Taylor, based upon her supposed fictitious character. The details of the fraud set forth in these bills were different, but in all of them the fictitious character of Emma Taylor was charged, and in all of them, but one, Martha McIntire purported to have become the owner of the property. For the purpose of saving the expense of repeating testimony, it was stipulated that the testimony in each of the cases, so far as relevant, might be read and considered by the court as having been taken in each of the other cases. The court of appeals entered a decree in each of these cases, except one, which was dismissed on the ground of laches, granting the relief prayed. The amount involved in the other cases, except the *Pryor Case*, was insufficient to give this court jurisdiction; but upon the appeal to this court the *testimony in each of the other cases was [42]
brought up under the stipulation in the *Pryor Case.*

Messrs. **Frank T. Browning,** *Enoch Totten,* and *William H. Dennis* for appellants.

Mr. **Franklin H. Mackey** for appellee.

*Mr. Justice **Brown** delivered the opinion of the court: [42]

Two questions are presented by the record in this case: First, that of fraud in the sale and subsequent manipulation of the property in suit; and, second, that of laches in instituting these proceedings.

1. The question of fraud necessarily involves the examination of a large amount of testimony, and a scrutiny of the successive steps taken, which finally resulted in the transfer of the property from its original owner, Mary Pryor, to its present owner of record, Martha McIntire.

The bill avers and the answer admits the execution of a deed of trust May 2, 1880, by the plaintiff and her husband to Edwin A. McIntire as trustee, to secure a note for $450, payable to Hartwell Jenison one year after date, with interest at eight per cent. The transaction originated four years previously (May 2, 1876), when the plaintiff and her husband placed upon the same property a deed of trust in which Brainard H. Warner and Henry McIntire were named as trustees, to secure a note of $500, payable to George E. Emmons two years after date, with interest at ten per cent. This loan had been made through the agency of B. H. Warner & Co., real-estate agents, and the note appears to have been purchased as an investment by Jenison, who was then a clerk in the Treasury Department. Upon the maturity of this note, May 2, 1878, $25 were paid by way of interest, and $50 on account of the principal,

but nothing was done until 1880, when the deed of trust for $450 was given. Jenison appears to have purchased the first note at [43] *the suggestion of Henry McIntire, a brother of Edwin A., who was also a clerk in the Treasury Department. Jenison states that Edwin A. collected what was paid upon the note and attended to the second deed of trust himself, in which his name was substituted as trustee in the place of the trustees named in the first deed. Jenison appears never to have seen the Pryors, or their property, having entire confidence in McIntire's integrity. The property seems to have been worth at that time from $1,800 to $2,400, and was occupied by the plaintiff's husband as a wood and coal yard. Both the Pryors were uneducated colored people, Pryor making his living by whitewashing, sawing wood, and selling coal, and his wife by taking in washing. The husband died about three months before this suit was begun.

The note fell due May 2, 1881. Neither principal nor interest was paid, and upon the following day, May 3, a warranty deed appears to have been executed by plaintiff and her husband to Martha McIntire, a sister of the principal defendant, for the nominal consideration of $5. It does not clearly appear why this deed was executed, as it was never recorded. Upon its face it is an ordinary warranty deed, and although the Christian name of the grantee, Martha, is obviously written over an erasure, attention is called to this fact in the testamentary clause. The grantors' signatures are probably genuine, although the deed appears to have been procured of the plaintiff in total ignorance of its contents or purport. Indeed, she had never seen Martha McIntire and knew absolutely nothing about her. Edwin A. McIntire's explanation is that Pryor came to him; said that he could not pay the note, and asked him whether he could get a purchaser of the property who would take it off his hands and assume the encumbrance and taxes, which he represented to be twenty or thirty dollars; that he offered it to his sister as an investment; had the deed made to her for a nominal consideration, with the understanding that she would assume the encumbrance and give Pryor a lease on the property for a year. He afterwards ascertained that the taxes were ten times the amount he [44] had supposed, and reported the *fact to his sister, who thereupon declined to take the property, which accordingly went to a foreclosure. In explanation of the erasure he said the deed was first made to his uncle David McIntire, who was looking out for bargains in real estate, and then altered to Martha McIntire and noted on the deed itself.

It seems somewhat singular that neither of these parties should have been willing to give $5 for a piece of property worth at least $1,800, and subject only to the lien of a mortgage of about $475, and $250 of special taxes; and equally singular that the Pryors should have been willing to dispose of their equity in the property for so small a sum. Indeed, it is difficult to believe that they knew what they were doing when they signed the deed.

But as nothing has ever been claimed by virtue of this deed, it is practically out of the case, except so far as it tends strongly to show an original design on the part of Edwin A. McIntire, who had entire charge of the transaction and witnessed the deed, to vest the title to the property in some member of his family, whom the other evidence in the case shows him to have used as a mere catspaw for himself.

Failing to induce his sister to take the property, McIntire, as trustee, obtained written authority from Jenison to sell upon foreclosure of the deed of trust, advertised the property for sale upon June 10, and after a postponement sold the same on June 17, but to whom the property was struck off, and who was the real purchaser, is somewhat uncertain. There is a wide divergence in the testimony on this point. Plaintiff swears that the first intimation she had of the sale was the display of the auctioneer's flag in front of the property, which was then occupied as a coal yard. Not understanding what it meant, her husband went to see McIntire, who came down that day, and "said that the trustee was pushing him, and he was compelled to put the flag up and have a sale, but that he would allow my husband to bid it in and would knock it down to him." Three or four witnesses, who were present at the sale, swore that the property was struck off to Pryor. Plaintiff swore to the same effect, but she was so far from where the auctioneer stood that it was very doubtful whether she *could have heard it. She [45]
also swore to an agreement that she was to pay a rent of $6 a month for the property, which was to be applied on the purchase money. Certain it is that rent was paid for the property after the sale and until some time in 1883, sixteen receipts for which, signed by McIntire, are produced. This testimony with regard to the sale and the arrangement for payment is wholly denied by McIntire, who produces a bill for auctioneer's services, showing the sale of the property to Jenison, to whom on June 29, 1881, McIntire executed a deed of the property in alleged pursuance of the foreclosure sale, upon an expressed consideration of $806, but kept the same from record unknown to Jenison for a period of nearly ten months, and until April 21, 1882, when he caused the same to be recorded. Did the case stand upon this testimony alone we should entertain grave doubts whether the oral evidence was sufficiently definite and credible to overcome the testimony of McIntire, the documentary evidence of the receipts for rent and the deed to Jenison in pursuance of the sale; but all doubts in this particular are fully resolved by the subsequent conduct of McIntire with reference to the property.

It seems that Jenison, being unable or unwilling to pay the expenses of foreclosure, which amounted to $87.88, and accumulated taxes to the amount of $278.81, for the purpose of raising money to pay these, executed a note to one Emma Taylor for $425, payable in one year, and secured the same by

a deed of trust upon the property to the defendant McIntire as sole trustee. This deed was also executed on June 29, 1881, and was of even date with the deed executed by McIntire to Jenison in pursuance of the foreclosure.

The testimony in this case turns largely upon the existence and identity of Emma Taylor. It is charged in the bill that she is a fictitious person, and that a sister of McIntire's, whose name was Emma T. McIntire, was represented and held out by him as Emma Taylor. Certainly, so far as witnesses have sworn to having seen Emma Taylor, they might easily have been led into supposing that his sister was this person. All that we know definitely of Emma Taylor is
[46] that from April 1, 1881, *to September 6, 1884, her name appears as grantor or grantee in seventeen different deeds, having an aggregate consideration of some $13,000. Copies of nine of these deeds appear in the record, in all but one of which she is described as of the city of Philadelphia, although all of these deeds, both to and from herself, were executed in Washington and acknowledged before the same magistrate. No letters written by her are produced, and but one addressed to her. This bears date September 19, 1887, and was written by McIntire, asking for her address. The letter seems to have been addressed simply to "Pittsburg, Penn.," on some information of her being there, and to have been returned to the writer. This letter was probably a subterfuge. The transactions in which she appears as a party all seem to have been carried on through McIntire as agent, who collected rents and other moneys, paid taxes, and made repairs on her account. She seems then to have disappeared as suddenly as she originally appeared, and McIntire professes himself entirely unable to find her, or learn of her present whereabouts. This is certainly a feeble and suspicious explanation. In view of the number and magnitude of the transfers to which she was a party, we should have reason to expect that her existence could be established beyond the shadow of a doubt. If she were a resident of Philadelphia, as now claimed, McIntire could hardly have failed to have had correspondence with her, to have known her address, and to have been able to find dozens of her friends, relatives, or neighbors, who could have proved that she was a living person. If she were a resident of Washington during these years, where did she live? In what bank did she keep the money she invested in real estate? Who were her acquaintances and why did she vanish so suddenly after these large transactions? She could scarcely have failed to leave a correspondent here, and that correspondent could scarcely have failed to be McIntire himself. It is incredible that a woman so well off and so alert in matters of business should have disappeared at the moment when her presence was indispensable, and left no trace behind her.

What have we in lieu of what we might
[47] naturally have expected? *A few witnesses who swear they saw her once, and saw her under circumstances which indicated that they had seen a woman who passed under that name, and who might have been a wholly different person,—one who took a deed from her, and after testifying that he had never seen her, on being recalled said that he "somehow had the impression" that upon one occasion she had been pointed out by McIntire's clerk in his office as Emma Taylor. The clerk himself, who was in McIntire's employ five years, has no recollection of ever meeting her, but had heard her name mentioned, and thinks he must have seen her from the fact that he witnessed a deed purporting to have been signed by her. Another, who kept an ice cream parlor on G street from 1876 to 1879, saw her once or twice in McIntire's office, and heard her called Emma Taylor by a lady who used to come to his parlor with her. Another, who used to visit McIntire's office every day in 1879, saw a lady frequently come there, whom he was informed was Emma Taylor, and that she talked about buying real estate. It appears, however, that there was no deed to her prior to April 1, 1881. Another, who had her studio on F street, used to take her meals at the same dining-room, heard her spoken of as Miss Taylor, but never spoke to her herself, and did not know whether her name was Emma Taylor or not. Another, named Atkinson, who was with McIntire until the latter part of 1880, testified that he saw a woman a number of times in the office whose name he understood was Emma Taylor, and that she was a different person from Emma T. McIntire. Another testified that he had met her at the office of the magistrate before whom she made her acknowledgments.

In addition to this most indefinite testimony, we have only the testimony of Edwin A. McIntire, Martha McIntire and Emma T. McIntire, two of whom are parties to this suit and strongly interested in the result. Emma T. McIntire testifies that she was never called Emma Taylor, and that her middle name was not Taylor, and that she never executed any of the deeds purporting to have been signed by Emma Taylor. Neither she nor her sister seems to have met her more than *three or four times. It further appears that all the deeds to Emma Taylor, [48]
even from McIntire himself, carried to the recorder's office for record, were returned to McIntire, though this was denied by him, and that rents due to Emma Taylor were all paid to him. It seems, too, that he paid all the taxes upon her property, though he swears he has no recollection of doing so.

We give but little weight to the certificate of the magistrate who was not sworn as a witness, that Emma Taylor appeared before him and acknowledged the deeds to which her name was appended as grantor, since it would have been practically easy for McIntire to represent another person as Emma Taylor.

The testimony of McIntire himself with regard to Emma Taylor is extremely unsatisfactory. Notwithstanding the number and magnitude of the transactions in which he took part and acted as her agent, he has no explanation of the manner in which the

consideration for these deeds was paid or received by her, the bank in which it was deposited, or from which it was drawn, and is unable to produce a single check or letter signed with her name. His memory is excellent where he cannot be contradicted and as to unimportant details, but fails him utterly as to the leading facts of the transactions. While for three years his relations with her must have been constant and confidential, collecting and disbursing moneys for her, and looking out for real-estate investments, yet he produces no account with her, and professes to have completely forgotten that he ever collected rent for her at all. One Alfred Brown, who bought property from her in May, 1883, gave $200 in cash and twelve notes of $75 each, payable at intervals of three months, the last maturing in May, 1886, swears that he paid every one of them as they fell due to McIntire personally; yet McIntire swears he has no recollection of collecting these notes, and that Emma disappeared from Washington about 1884. He tells us that she was a woman who was constantly looking out for bargains in real estate, yet the records show that all her transactions were with him or through his agency,
[49] and in every case in *which she became the purchaser of lands the title ultimately became vested in his sister Martha. In this connection it is a suspicious circumstance that whenever she made a conveyance the deed was not usually recorded for years afterwards, when the necessity of making a complete chain of title required it to be put on file. Upon the other hand, the deeds made to her as grantee were immediately placed on record. None of the parties to whom she gave or from whom she received deeds of property ever met her, nor did the clerk in McIntire's office during these years recollect that he had ever seen her.

He accounts for his inability to produce letters, receipts, accounts, or written evidences of any sort, showing his transactions with her, by an utterly improbable story of a fire in his office, which seems to have conveniently consumed all these documents, including a large ledger, in which her accounts were contained, and to have spared everything else, leaving no mark of fire or even the stain of smoke upon documents showing his relation to others. He professes to have thought that Emma Taylor was engaged in one of the departments, because she came down F street after the hour the departments would close, but never asked her in what department she was employed, and the compiler of the "Blue Book" swears that no such person was in the employ of the government in Washington at that time. All the witnesses who testified to having seen a person of that name fixed the time as prior to the date of her first deed, April 1, 1881; and not one of them, except the McIntires, is able to identify her as *the* Emma Taylor who signed the deeds in question.

There is strong evidence tending to establish the identity of Emma Taylor and Emma T. McIntire. A niece of McIntire's swears that she always understood that the initial in the name of Emma T. McIntire stood for Taylor, and that she was always called Emma Taylor to distinguish her from witness's sister Emma V. McIntire. This witness is corroborated by the production of the family Bible, from which it appears that Emma T. McIntire's father was named Edwin Taylor McIntire. Her own explanation,
that her middle initial stood *for Tinsey Ush [50]
or Tots—a pet name given her in infancy by her father—does not seem plausible in the face of this testimony. In addition to this, a large number of documents, signed both by Emma Taylor and Emma T. McIntire, were introduced in evidence for other purposes, and a comparison of the signatures shows a resemblance between some of them which is difficult to account for, except upon the theory that they were written by the same person, although the later ones signed by Emma Taylor show an evident attempt to disguise her hand.

But it is useless to pursue this subject further. The testimony of the three McIntires is too full of contradictions and absurdities to be given any weight. While under certain circumstances the other testimony for the defendant might be sufficient to prove that there was such a person as Emma Taylor, when considered with reference to what we have a right to expect in a case of this kind, it falls far short of it, and when read in connection with plaintiff's testimony upon the same point, we are left in no doubt that Emma Taylor was a clumsy fabrication. If the person put forward by McIntire to personate her were not his own sister, it was someone whom he used for that purpose. Under whatever view we take we are satisfied that Emma Taylor was a creation of McIntire's brain, born of the supposed necessities of his case, and bolstered up by the false testimony of himself and his sisters. *Stat nominis umbra.*

The subsequent proceedings in the case show a consummation of the fraud by which the property was ultimately vested in Martha McIntire. The deed of trust given by Jenison to Emma Taylor was never formally foreclosed. It seems that McIntire had promised Jenison that he would try and find a purchaser of the property before the note fell due on June 29, 1882, so that he might get back a part of the $450 loaned to Pryor, none of which he had received; but professed himself unable to do so, and so informed Jenison, a man of perfect integrity but of little experience and much unwisdom in business methods, who seems to have had entire confidence in him, and on April 13, 1882, addressed him a note, in which he
*stated that he was not in a condition to carry the property; that he should doubtless [51]
have to submit to a sacrifice by a forced sale, and requested him to advertise and do the best he could in its disposition. Considering that the property was worth from $1,800 to $2,400, when the mortgage to Emma Taylor was only $425, the interest on which was less than $40 per year, while the Pryors were paying $6 a month rent, it would appear that Jenison was completely hoodwinked as to its actual value.

After some futile efforts to induce McIn-

tire to put the property up at auction, he was finally persuaded, on April 19, 1882, more than two months before the Emma Taylor note was due, to deed the property to Emma Taylor. This deed was recorded immediately and at the same time with his deed upon foreclosure to Jenison, which had been executed ten months before. Both of these deeds, after being recorded, were returned to McIntire. This was the last step necessary to consummate the fraud by which the plaintiff lost her property, and Jenison lost the money he had loaned her upon the deed of trust. Had McIntire been content to defraud the Pryors of their property, he might, after his duties as trustee had been fully discharged, have purchased of Jenison, who doubtless would have been glad to sell for the amount of his mortgage and interest; but his desire also to defraud Jenison of this amount made it necessary for him to introduce another party to purchase Jenison's interest, from whom his sister Martha (that is, himself) might pose as a bona fide purchaser. In this he overreached himself.

The title remained of record in Emma Taylor until May 31, 1884, when she made a warranty deed to the defendant Martha McIntire for the expressed consideration of $2,500. Subsequently, and on September 27, 1887, Jenison and wife made a quitclaim deed, apparently of further assurance, to Martha McIntire, for a consideration of $100, paid by the check of Edwin A. McIntire. The answer avers this deed to have been made to cover and cure a defect in the deed from Jenison to Taylor, but on its face it purported to pass to the grantee, Martha McIntire, all claims for drawback or rebate
[52] on account *of special taxes upon the property, and it is probable that this was its main object.

We do not care to discuss the question whether Martha McIntire was a bona fide purchaser of this property. So far as it turns upon her ability to pay the $2,500 named as a consideration, it is at least doubtful. So far as it turns upon her actual payment of this consideration, it is more than doubtful. If Emma Taylor were a fictitious person, and the deed from her a forgery, the title of Martha McIntire falls to the ground, except so far as it depends upon the quitclaim deed of Jenison to her of September 27, 1887, which it is not improbable was procured by Edwin A. McIntire for the very purpose of giving a semblance of title in case Emma Taylor were eliminated from the case. But whatever was done by Martha McIntire to this property, whatever title she acquired was through the agency of her brother, and she is as chargeable with his frauds as if she had committed them personally. *United States* v. *State Bank*, 96 U. S. 30 [24: 647]; *Griswold* v. *Haven*, 25 N. Y. 595 [82 Am. Dec. 380]; *Reynolds* v. *Witte*, 13 S. C. 5 [36 Am. Rep. 678]. It was held by this court in the case of *The Distilled Spirits*, 11 Wall. 356 [20: 167], that the rule that notice of fraud to an agent is notice to the principal applies, not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him as agent in a prior transaction for the same principal, and present to his mind at the time he is acting as such agent. Much more is this the case where the fraud is committed by the agent himself in obtaining the title to the property for the benefit of his principal. But, further than this, we have little doubt that the property was really purchased for the benefit of McIntire himself. While Martha McIntire signed the contract for the construction of the house upon these lands, the testimony of the contractors shows that they supposed they were doing the work for McIntire himself; that they had no dealings with Martha; that they were paid by checks signed by McIntire himself, although she came down and looked at the houses, and seemed to be pleased with them.

We agree with the court of appeals that in view of their strong pecuniary interest in the case, the improbability of *many of their [53]
statements, the obvious fabrication of the Emma Taylor story, and the manifest subservience of the sisters to their brother's schemes, no confidence whatever can be placed in the testimony of either member of the family. This conviction is strengthened by a circumstance appearing in the testimony, although not directly relevant to the issue, that there was another sister, Sarah I. McIntire, who died in Philadelphia, January 10, 1881, leaving a deposit of $1,196.60 in the Philadelphia Savings Fund Society. To obtain this money a power of attorney, bearing date April 19, 1881, was prepared by McIntire, purporting to be signed by Sarah I. McIntire, though she had been dead three months, and acknowledged before a notary public in Washington. It was also signed by McIntire as a subscribing witness, and by virtue of its authority Martha McIntire drew the money from the bank.

2. The question of laches only remains to be considered. The sale was made under the foreclosure of the Jenison mortgage, June 17, 1881. The bill was filed October 21, 1890, a delay of nine years and four months. Upon the theory of the plaintiff, however,—and it is upon her allegations and proofs that the question of laches must be determined,—the sale was made in her interest. The rent paid by her was to be applied by McIntire toward the extinguishment of the Jenison mortgage, and there was nothing definite to apprise her to the contrary until the fall of 1886, when she saw the contractors beginning to build, and notified them that the property belonged to her, and not to McIntire. But four years elapsed from this time and the property is not shown to have greatly increased in value except by the improvements, which were allowed to the defendants upon final decree.

We have a right to consider in this connection that the plaintiff is an ignorant colored woman; that she has been wheedled out of her property by an audacious fraud committed by one in whom she placed entire confidence and who assumed to act as her agent; that this agent procured the title to the property to be taken in his own interest, for little more than a nominal sum, by the false personation of Emma Taylor; that the prop-

[54] erty is still controlled and probably *owned by himself; that the position of the property and of the parties to the suit has not materially changed during the time the plaintiff has been in default, nor the property shown to have rapidly risen in value, and that the rights of no bona fide purchaser have intervened.

We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, in which we have held that where the fraud is constructive, or is proved by inconclusive testimony, or by evidence falling short of conviction, and the property has greatly increased in value, great diligence will be required in the assertion of the plaintiff's rights. But these were all cases either of bills to establish a trust, to open settled accounts, bills not involving fraud, or where the fraud was not clearly proved, or where, with knowledge of the facts the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where the property had passed into the hands of persons innocent of the fraud, or with no actual notice that a fraud had been committed.

Granting all that may be fairly claimed of these cases, there is another class having a different bearing, in which it has been held that in case of actual fraud a delay even greater than that permitted by the statute of limitations is not fatal to the plaintiff's claim. The leading case is that of *Michoud* v. *Girod*, 4 How. 503 [11: 1076], which was a case of actual fraud committed by trustees of real estate against their *cestui que trust.* A bill filed thirty-six years after the commission of the fraud was held not to have been too late. In that case a purchase by an executor through a third person, of property of the testator, was held to be fraudulent and void, though the sale was at public auction, judicially ordered, and the result of the evidence was that a fair price was paid. Said Mr. Justice Wayne, in delivering the opinion of the court (page 560 [11: 1101]): "In a case of actual fraud, courts of equity give relief after a long lapse of time, much longer than has passed since the executors, in this instance, purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not

[55] to *exclude relief. . . . There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

So, in *Prevost* v. *Gratz*, 6 Wheat. 481 [5: 311], it was said by Mr. Justice Story: "It is certainly true that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief."

In *Baker* v. *Whiting*, 3 Sumn. 475, one Tidd, being the owner of certain land, employed the defendant Whiting as his agent to care for the same, pay all taxes, etc. Whiting allowed the land to be sold for taxes in 1821, and bought it in himself, keeping the plaintiff uninformed of the facts. The bill was filed in 1837 by the heirs of Tidd, who died shortly after his employment of Whiting. In delivering the opinion, Mr. Justice Story remarked: "Then it is said the plaintiffs are barred from any right in equity by the mere lapse of time. . . . But what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill; and I apprehend that, in case of a trust of lands, nothing short of the statute period which would bar a legal estate or a right of entry would be permitted to operate in equity as a bar of the equitable estate."

In *Allore* v. *Jewell*, 94 U. S. 506 [24: 260], which was a bill to cancel a conveyance of land alleged to have been obtained from the grantor a few weeks before her death, when from her condition she was incapable of understanding the nature or effect of the transaction, it was held that a lapse of six years before bringing suit to cancel the conveyance could not avail the *defendant, where he [56]
had possession of the land, and a reasonable rent therefor was equal to the value of his improvements, and there had been no loss of evidence preventing a full presentation of the case.

In *Meador* v. *Norton*, 11 Wall. 442 [20: 184], three sisters obtained in 1839, from the governor of California, a tract of land which was approved by the departmental assembly, and possession delivered. Some years after, the husband of one of the sisters, named Bolcoff, suppressed or destroyed this grant, and fabricated a pretended grant to himself, and also certain other papers intended to prove the genuineness of such fabricated grant. Upon these papers the sons of Bolcoff, he having died, obtained a confirmation of their claim to the land, the land commissioners supposing that the fabricated papers were genuine; and upon such decree a patent issued to the claimants. The fabricated character of these papers being discovered, the grantee of the rights of the three sisters brought a suit in equity to have the defendant holding under the patent declared trustee of the legal title, and compel a transfer of that title to him. Held, that the suit, which was begun in 1865, would lie, and that laches could not prevail as a defense where the relief sought was granted on the ground of secret fraud, and it appeared that the suit was commenced a reasonable time after the fraud was discovered.

In *Connecticut General L. Ins. Co.* v. *Eldredge*, 102 U. S. 545 [26: 245], a deed of trust of lands to secure a promissory note

was released without the surrender or payment of the note, and without express authority of the holder. It was held that a subsequent purchaser with notice took the land subject to the equitable rights of such holder. The extent of the delay does not clearly appear in the report, but in the opinion of the court it is said by Mr. Justice Field: "The company, as already stated, must be deemed to have known of the want of power in the trustee to release the property from the Coburn deed, and it does not lie in its mouth to object that the complainant did not sooner seek to set aside the priority of lien thus gained; nor can it aver that his claim to have the instrument canceled, by which this priority was secured, is a stale
[57] one, *when asserted within the period allowed by law, and no rights of third parties as bona fide purchasers have intervened to render inequitable the assertion of his original lien."

In *Bowen* v. *Evans*, 2 H. L. Cas. 257, a bill filed to set aside a sale of lands made nearly fifty years before under a decree, on the ground of irregularities in the proceedings and fraud in the sale, it was held that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable; but in delivering the opinion Lord Chancellor Cottenham observed: "So, when much time has elapsed since the transactions complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the fruits of their plunder."

The case of *Hammond* v. *Hopkins*, 143 U. S. 224 [36: 134], a leading case in this court, is not to the contrary. In this case two partners owned real estate in common, some of which was used in the partnership business. One died, making the other by his will a trustee for the testator's children, with power of sale of all the real estate, and directing that the business be continued. After carrying on the business for some time the trustee sold the real estate by auction, and bought portions of it in through a third person, and accounted for half of the net proceeds. The transaction was open and known to all the *cestuis que trust*, and was objected to by none of them. It was held that there was nothing in this to indicate fraud; that the purchase was not absolutely void, but voidable, and might be confirmed by the parties interested, either directly, or by long acquiescence, or by the absence of an election to avoid the conveyance within a reasonable time after the facts came to their knowledge. There was a delay of nearly twenty years in this case. In delivering the opinion the Chief Justice said: "Each case must necessarily be governed by its own circumstances, since, though the lapse
[58] of a few years may be *sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like." A bare statement of these facts will show that it has no application to the case now under consideration.

So in *Felix* v. *Patrick*, 145 U. S. 317 [36: 719], where a bill was filed after a lapse of twenty-eight years to impeach a title fraudulently acquired through the location of certain land scrip, and the land was shown to have increased enormously in value by being taken within the limits of a city, and to have been largely occupied by persons who had bought on the strength of the apparent title, and erected buildings of a permanent character, it was held that the complainant was barred by laches, but in the opinion of the court it is said: "The law pronounces the transaction a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. If there had been a deliberate attempt on his part by knavish practices to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief at any time during the life of either of the parties; but as the case stands at present justice requires only what the law, in the absence of the statutory limitation, would demand,—the repayment of the value of the scrip, with legal interest thereon."

In *Norris* v. *Haggin*, 136 U. S. 386 [34: 424], plaintiff filed his bill in 1884, alleging an actual fraud committed against him by his two attorneys in 1859, twenty-five years previously, and that he had only discovered the fraud a short time before commencing his suit. The case was heard on demurrer to the bill, and the court found that "there are many things about the bill which are peculiar and calculated to throw suspicion on the claims." It also found that the statement that the complainant had only come to a knowledge of the alleged fraud within a short time of the filing of the bill was shown by the *statements in the bill it- [59]
self to be false, and that he had known of the alleged fraud for over fifteen years, and that a number of other matters alleged in the bill and amended bill were shown by other contradictory statements to be false, and thereby the whole claim was rendered suspicious; that there were ambiguities in the bill, etc. Taking the whole case as stated by the complainant himself, the court thought that the bill had properly been dismissed by the court below. It is evident that the bill was dismissed upon the ground that the fraud was doubtfully or ambiguously alleged, the claim suspicious, and that knowledge of the fraud had existed for a long time.

We do not wish to be understood as holding that the plaintiff, even in a case of actual fraud, may wait an indefinite time, or always so long as the statute of limitations

would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proved the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay. As was said in *Townsend* v. *Vanderwerker*, 160 U. S. 171, 186 [40:383, 388]: "The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

The circumstances of this case are so peculiar; the fraud so glaring; the original and persistent intention of McIntire through so many years to make himself the owner of the property so manifest; the utter disregard shown of the rights of the plaintiff, as well as of Jenison, the mortgagee, upon whose ignorance in the one case and whose confidence in the other he imposed so successfully; the false personation of Emma Taylor, and the fact that the decree in favor of the plaintiff can do no possible harm to any innocent person,—demand of us an affirmance of the action of *the Court of Appeals. Its decree is accordingly affirmed.*

---

[60] CALVIN A. CALHOUN, *Appt.*,
v.
OSCAR H. VIOLET.

(See S. C. Reporter's ed. 60-65.)

Decisions of Land Department, when followed by this court—right of discharged soldier to enter lands in Oklahoma.

1. This court will determine for itself the correctness of legal propositions upon which the Land Department of the government may have rested its decisions, but it will not, in the absence of fraud, re-examine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings had in the lawful administration of the public lands.
2. An honorably discharged soldier was not entitled to go into the territory of Oklahoma before the designated time, and make a valid entry of a homestead therein, notwithstanding the proviso in the act of March 2, 1889, that the rights of honorably discharged Union soldiers and sailors shall not be abridged.

[No. 180.]

Submitted January 20, 1899. Decided February 20, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Oklahoma affirming a judgment of the District Court for the Third Judicial District sitting in the County of Oklahoma, which last-named judgment sustained the demurrer of the defendant, Oscar H. Violet, to the petition of the plaintiff, praying that the defendant be decreed to convey to him certain lands situate in the Territory of Oklahoma and which the plaintiff claimed to have acquired title to under U. S. Rev. Stat. §§ 2304 *et seq. Judgment affirmed.*

See same case below, 4 Okla. 321.

The facts are stated in the opinion.

Mr. **Calvin A. Calhoun,** appellant, *pro se.*

No counsel for appellee.

*Mr. Justice **White** delivered the opinion of the court: [60]

The plaintiff sued to recover a described piece of land upon the assumption that the defendant held it in trust for him. The prayer of the petition was that the trust be recognized and the defendant be decreed to make conveyance of the land. A demurrer was interposed, which was sustained by the trial court, and the suit was thereupon dismissed. On appeal to the supreme court of the territory, the action of the trial court was affirmed. The present appeal was then taken, and the issue which arises is this: Did the court below err in deciding that the petition of the plaintiff did not state a cause of action?

The facts alleged in the petition and shown by the exhibits which were annexed to it are as follows: The plaintiff Calhoun, an honorably discharged soldier, who was in all general respects qualified to claim a homestead under the law (U. S. Rev. Stat. §§ 2304 *et seq.*), seeking to avail himself of his right, entered on April 23, 1889, at the United States land office at *Guthrie, Okla- [61]
homa, "lots 6, 7, 8, 9, and 10 of section 3, township 11 north, range 3 west, in the aforesaid land district." The petition alleged that Calhoun had performed all the subsequent acts required by law to make the entry valid. On May 21, 1889, Theodore W. Echelberger contested the entry on the ground that Calhoun had come into the territory of Oklahoma before the time when by law he had a right to do so, in violation of the statute of the United States and of the proclamation of the President issued in pursuance thereof. (25 Stat. at L. 980, 1004, chap. 412; *Payne* v. *Robertson*, 169 U. S. 323 [42:764]; *Smith* v. *Townsend*, 148 U. S. 490 [37:533].) On the 27th of May, 1890, James McCornack also filed a contest against both Calhoun and Echelberger, alleging that they were both disqualified because they had during the prohibited period entered the territory. On June 29, 1890, contest was also filed by Thomas J. Bailey, charging the illegality of the claims of Calhoun, Echelberger, and McCornack, averring that he, Bailey, was the first legal settler on the land and entitled to it. On January 25, 1890, one Linthicum filed a contest against lot No. 10, embraced in the entry made by Calhoun, on the ground that that lot was on a different side of the Canadian river from the balance of the land embraced in the entry, and as the Canadian river was a meandering stream, the entry could not lawfully cover land situated on both sides thereof; hence lot 10 had been illegally included in the Calhoun entry.

In February, 1890, the Commissioner of the General Land Office instructed the local land office to suspend, among others, the entry made by Calhoun, because the land covered by it was on both sides of a meandering stream, and hence entry thereof had been improperly allowed. The instruction transmitted to the local officer concluded as follows: "You will notify the claimant of this fact" (that is, of the suspension of his entry), "and allow him thirty days from receipt of notice in which to elect which portion of his claim he will relinquish, so that the land remaining will be confined to one side of such stream. Should any of the parties desire to do so, he may relinquish his entire entry; in which event an application
[62] *to make a second entry of a specific tract will receive due consideration. If any of the entrymen fail to refuse to take action within the time specified, his entry will be held for cancelation. Notify the parties in accordance with circular of October 28, 1886 (5 L. D. 204), and in due time transmit the evidence of such notice, with the report of your action, to this office." Conforming to this notice, Calhoun, on the 17th of March, 1890, filed in the local office a formal relinquishment of "all that portion of land on the right bank of the North Canadian river known and designated as lot No. 10 (ten) in the N. W. quarter of section 3, township 11 N., range 3 west, Guthrie land district, the same having been embraced within my original entry No. 19, dated April 23, A. D. 1889."

On the 30th of October, 1890, all the contests above referred to were duly heard before the register and receiver of the local office, and it was decided that both the plaintiff and Echelberger were disqualified from taking the land because they had gone into the territory before the time fixed by law, and that McCornack was entitled to enter the land. The claims of Bailey and Linthicum were rejected. From this decision the contests were carried to the Commissioner of the General Land Office, by whom the action of the local officers was affirmed, and thereupon an appeal was prosecuted to the Secretary of the Interior, with a like result. Subsequently, in 1894, on a petition for review by Calhoun and another of the parties, the Secretary of the Interior reiterated the previous ruling, affirming the action of the Commissioner of the General Land Office in rejecting the claims of Calhoun and others on the ground that they had been made in violation of law. Pending the appeals and decisions thereon as above stated, Calhoun filed with the Commissioner of the General Land Office an application complaining of the order which had compelled him to elect to which side of the river he would confine his entry, asserting that the action of the department was illegal, as the stream was not a meandering one, and asking a revocation of the order.

The petition filed in the court below,
[63] moreover, contained an *averment that the rulings of the local land officers, of the Commissioner of the General Land Office, and of the Secretary of the Interior, above stated, were null and void, because all these officers had misconceived the evidence and disregarded its weight, and was in violation of law, because the section of the act of 1889, forbidding the going into the territory before a named date of persons desirous of taking land therein, had no application to honorably discharged soldiers entitled as such to make a homestead entry. The land as to which it was averred the trust existed and a conveyance of which was sought was lot 10, as to which the relinquishment had been filed under the circumstances above mentioned. It was charged that, despite the protest of Calhoun, a final certificate for this lot had been issued to the defendant, with full knowledge on his part of the claim of Calhoun; hence, it was asserted, the trust arose and the obligation to convey resulted.

The court below held that it was bound by the action of the Land Department in so far as that department had decided as a matter of fact that Calhoun had made entry of his land by going into the territory contrary to the restrictions imposed by the act of Congress, and that, in so far as the ruling of the Land Department rested upon a matter of law, it had been correctly decided that Calhoun, as a discharged soldier, was not entitled to go into the territory contrary to law and thereby acquire a priority over other citizens.

The first of these rulings was manifestly correct. It is elementary that, although this court will determine for itself the correctness of legal propositions upon which the Land Department of the government may have rested its decisions, it will not, in the absence of fraud, re-examine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings had in the lawful administration of the public lands. *United States* v. *Minor*, 114 U. S. 233 [29: 110]; *Lee* v. *Johnson*, 116 U. S. 48 [29: 570]; *Sanford* v. *Sanford*, 139 U. S. 647 [35: 292].

The fact that the plaintiff had entered the territory prior to the time fixed by the statute and the proclamation of the President having been conclusively determined,
it follows inevitably, *as a legal result, that [64]
an entry of land made under such circumstances was void, and that the ruling by the Land Department so holding was correct. This leaves only open for our consideration the legal question whether Calhoun, because he was an honorably discharged soldier, was entitled to go into the territory before the designated time, and make a valid entry of a homestead therein. The claim that he was authorized to do so is based on a proviso contained in section 12 of the act of March 2, 1889, chap. 412 (25 Stat. at L. 980, 1004), which is as follows:

"And provided further, that the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections 2304 and 2305 of the Revised Statutes shall not be abridged."

The sections of the Revised Statutes to which this proviso relates simply invest honorably discharged soldiers with the right to enter a homestead.

The proviso in question is immediately succeeded by the following:

"And provided further, that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof; but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

It is manifest from the context of the act that the proviso relied upon was intended only to give to honorably discharged soldiers and sailors an equal right with others to acquire a homestead within the territory described by the act, and the proviso was thus intended simply to exclude any implication that they were, in consequence of the prior provisions of the act, not entitled to avail themselves of its benefits. The proviso therefore in no way operated in favor of honorably discharged soldiers and sailors to relieve them from the general restriction as to going into the territory, imposed upon all persons by the subsequent provisions of the
[65] law. To hold the *contrary would compel to the conclusion that the law, while allowing honorably discharged soldiers and sailors to take advantage of its provisions, had at the same time conferred upon them the power to violate its inhibitions. The purpose of Congress in allowing those named in the proviso to reap the benefits of the law was not to confer the power to do the very thing which the act in the most express terms sedulously sought to prevent.

Affirmed.

ROBERT DUNLAP, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 65–77.)

Right to rebate of tax on alcohol.

Under the act of Congress of August 28, 1894, a rebate or repayment of the tax on alcohol used in the fine arts by a manufacturer can be made only when it is used under regulations prescribed by the Secretary of the Treasury, and in the absence of such regulations the right to such rebate or repayment could not vest so as to create a cause of action, by reason of the unregulated use.

[No. 218.]

Argued November 29, 30, 1898. Decided February 20, 1899.

APPEAL from a judgment of the Court of Claims dismissing the petition of the appellant, which petition was filed to recover a rebate under the act of Congress of August 28, 1894, on internal revenue taxes paid by the claimant upon domestic alcohol which he used in his business. *Judgment affirmed.*

See same case below, 33 Ct. Cl. 135.

Statement by Mr. Chief Justice **Fuller:**

Dunlap was, and has been for many years, "engaged in the manufacture of a product of the arts known and described as 'stiff hats,'" in Brooklyn, New York. Between August 28, 1894, and April 24, 1895, he used 7,060.95 proof gallons of domestic alcohol to dissolve the shellac required to stiffen hats made at his factory. An internal revenue tax of ninety cents per proof gallon had been paid upon 2,604.17 gallons before August 28, 1894, making $2,344.40, and a tax of one dollar and ten cents per proof gallon had been paid upon the remaining 4,456.78 gallons after August 28, 1894, making $4,900.81 or $7,245.21 in all. In October, 1894, Dunlap notified the collector of internal revenue of the first district of New York that he was using domestic alcohol at his factory, and that under section 61 of the act of August 28, 1894, chap. 349 (28 Stat. at L. 509, 567), he claimed a rebate of the internal revenue
*tax paid on said alcohol, and he requested [66]
the collector to take such official action relative to inspection and surveillance as the law and regulations might require. Subsequently he tendered to the collector affidavits and other evidence tending to show that he had used the aforesaid quantity of alcohol in his business, together with stamps showing payment of tax thereon, and he requested the collector to visit the factory and satisfy himself by an examination of the books, or in any other manner, that the alcohol had been used as alleged. He also requested payment of the amount of tax appearing from the stamps to have been paid. The collector declined to entertain the application, and Dunlap filed a petition in the court of claims to recover the full amount of the tax which had been paid, as shown by the stamps, which, on December 6, 1897, was dismissed, whereupon he took this appeal.

The findings of fact set forth, among other things, that "in the early part of September, 1894, the Secretary of the Treasury requested the Commissioner of Internal Revenue to have regulations drafted for the use of alcohol in the arts, etc., and for the presentation of claims for rebate of the tax;" and that "subsequently there was correspondence between these officers as follows:"

From the Commissioner to the Secretary, October 3, 1894:

"I have the honor to report that the preparation of regulations governing the use of alcohol in the arts and manufactures, with rebate of the internal revenue tax as provided by section 61 of the revenue act of August 28, 1894, has been and is now receiving very serious consideration from this office, and many communications have been received from, and personal interviews had with, manufacturers who use alcohol in their establishments; and it is found, in every case without exception, all agree that no regulation can be enforced without official supervision, and that without such supervision the interests of manufacturers and of the government alike will suffer through the perpetration of frauds.

"As it is found to be impossible to prepare

these regulations in a way that will prove satisfactory without official supervision, I have the honor to inquire whether there is
[67] any *appropriation or any general provision of law authorizing the expenditure of money by this department needed to procure such supervision."

From the Secretary to the Commissioner, October 5, 1894:

"Yours of the 3d instant, inquiring whether there is any appropriation or general provision of law authorizing the expenditure of money by the Treasury Department or by the Commissioner of the Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, is received, and in response I have the honor to state that no appropriation whatever, either special or general, has been made by Congress for the purpose mentioned, or for any other purpose connected with the execution of the section of the statute referred to."

From the Commissioner to the Secretary, October 5, 1894:

"I have the honor to acknowledge the receipt of your letter of the 5th instant, in reply to my letter of the 3d instant, in which you state that no appropriation whatever, either special or general, has been made by Congress authorizing the expenditure of money by the Treasury Department or by the Commissioner of Internal Revenue to provide supervision of manufacturers using alcohol in the arts, etc., under section 61 of the act of August 28, 1894, or for any purpose connected with the execution of the section of the statute referred to.

"In reply I would suggest that, inasmuch as I have been unable, as stated in my letter of the 3d instant, after thorough consideration of the matter, and upon consultation by letter and by personal interview with a large number of the most prominent manufacturers, to prepare any set of regulations which would yield adequate protection to the government and the honest manufacturer without official supervision, which has not been provided for by Congress, the preparation of these regulations be delayed until Congress has opportunity to supply this omission."

From the Secretary to the Commissioner, October 6, 1894:

"Your communication of yesterday, in reference to the execution of section 61 of the
[68] act of August 28, 1894, and *advising me that, for the reasons therein stated, you are unable 'to prepare any set of regulations which would yield adequate protection to the government and the honest manufacturer without official supervision, which has not been provided for by Congress,' is received. I have also given much attention to the subject, and have fully considered all the arguments and suggestions submitted by parties interested in the execution of the section of the statute referred to, and have arrived at the conclusion that, until further action is taken by Congress, it is not possible to establish and enforce such regulations as are absolutely necessary for an effective and beneficial execution of the law.

"You are therefore instructed to take no further action in the matter for the present."

In consequence of this last letter a circular was issued by the Commissioner, November 24, 1894, stating:

"In view of the fact that this department has been unable to formulate effective regulations for carrying out the provisions of section 61 of the act of August 28, 1894, relating to the rebate of tax on alcohol used in the 'arts, or in any medicinal or other like compounds,' collectors of internal revenue will, on receiving notice from manufacturers of the intended use of alcohol for the purposes named, advise such manufacturers that, in the absence of regulations on the subject, no official inspection of the alcohol so used or the articles manufactured therefrom can be made, and that no application for such rebate can be allowed or entertained."

Finding 8 was:

"On December 3, 1894, the Secretary of the Treasury transmitted to the Congress the annual report on the finances, containing the following statement:

" 'Owing to defects in the legislation the Treasury Department has been unable to execute the provisions of section 61 of the act of August 28, 1894, permitting the use of alcohol in the arts, or in any medicinal or other like compound, without the payment of the internal tax. The act made no appropriation to defray the expenses of its administration, or for the repayment of taxes provided for; and after *full considera- [69]
tion of the subject and an unsuccessful attempt to frame regulations which would, without official supervision, protect the government and the manufacturers, the department was constrained to abandon the effort and await the further action of Congress.

" 'It is estimated in the office of the Commissioner of Internal Revenue that the drawbacks or repayments provided for in the act will amount to not less than $10,000,000 per annum, and that the expense of the necessary official supervision will not be less than $500,000 per annum. For the information of Congress the correspondence between the Secretary and the Commissioner of Internal Revenue upon this subject will accompany this report. (Finance report, 1894, LXVI.)'

"Appended to this report was a draft of regulations proposed for carrying out section 61, copies of communications from the Commissioner of Internal Revenue explaining the estimates of the appropriations required, and copies of the official correspondence between the Secretary and the Commissioner, given in the preceding finding, showing the action of the department. The proposed regulations were as follows:"

[These regulations, consisting of thirty-three articles and including many subdivisions, were set forth at length.]

The ninth finding was to the effect that the amounts appropriated in the urgent deficiency act of January 25, 1895, chap. 43 (28 Stat. at L. 636), aggregating $245,095, were the amounts of the Secretary's estimate transmitted to Congress December 4, 1894,

as necessitated by the income tax provisions of the act of August 28, 1894.

The case is reported 33 Ct. Cl. 135.

Messrs. **George A. King, Joseph H. Choate,** *B. F. Tracy,* and *William B. King* for appellant.

Messrs. **Charles C. Binney** and **John W. Griggs,** Attorney General, for appellee.

[70] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Section 61 of the act of August 28, 1894, read as follows:

"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid."

The court of claims held that as the rebate provided for was to be paid only on alcohol used "under regulations to be prescribed by the Secretary of the Treasury," and as this alcohol had not been so used, there could be no recovery, and, speaking through Weldon, J., among other things, said:

"The right of the manufacturer to a rebate being dependent on the regulations of the Secretary, such regulations are conditions precedent to his right of repayment, and therefore no right of repayment can vest until in pursuance of regulations the manufacturer uses alcohol as contemplated by the statute. The statute having prescribed certain conditions upon which the right of the claimant is predicated and from which it originates, there can be no cause of action unless it affirmatively appears that such conditions have been complied with on the part of the claimant. This is a proceeding based upon an alleged condition of liability upon the part of the defendants, and it must be shown that all the essential elements of that condition exist before any liability can accrue. Conceding that it was the duty of the Secretary to prescribe regulations consistent with the purpose and requirements of the law, his failure to do so will not supply a necessary element in the cause of the claimant."

Alcohol has for years been used in the arts and in medicinal and other like compounds,
[71] and has been taxed and *no rebate allowed, but by this section manufacturers who used alcohol in the arts, etc., under regulations prescribed by the Secretary, were granted a rebate on proof of such regulated use and of the payment of the tax on the alcohol so used.

There were no regulations in respect to the use of alcohol in the arts at the time this alcohol was used, but it is contended that the right to repayment was absolutely vested by the statute, dependent on the mere fact of actual use in the arts, and not on use in compliance with regulations. So that during such period of time as might be required for the framing of regulations, or as might elapse if additional legislation were found necessary, all alcohol used in the arts would be free from taxation, although the exemption applied only to regulated use. But if the right of the manufacturer could not inure without regulations, and Congress had left it to the Secretary to determine whether any which he could prescribe and enforce would adequately protect the revenue and the manufacturers, and he had concluded to the contrary; or, if he had found that it was not practicable to enforce such as he believed necessary, without further legislation,—then it is obvious the right to the rebate would not attach. In any view the right was not absolute, but was conditioned on the performance of an executive act; and the absence of performance left the condition of the existence of the right unfulfilled.

The distinction between the one class of cases and the other is clear, and has been observed in many decisions of this court.

By the eighth section of the act of June 12, 1866, chap. 114 (14 Stat. at L. 60), it was provided "that when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of eighteen hundred and fifty-four, fixing compensation, then the Postmaster General shall review and readjust under the provisions of said section" (namely, § 2, act July 1, 1864, chap. 197, 13 Stat. at L. 336); and in *United States* v. *McLean,* 95 U. S. 750 [24: 579], it was held that the law imposed no obligation on the government to pay an increased salary, though warranted by the quarterly *returns of an office, until read- [72]
justment by the Postmaster General. Mr. Justice Strong, delivering the opinion, after remarking that the "readjustment was an executive act, made necessary by the law in order to perfect any liability of the government," said:

"But courts cannot perform executive duties, nor treat them as performed, when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled." And see *United States* v. *Verdier,* 164 U. S. 213 [41: 407].

On the other hand, in *Campbell* v. *United States,* 107 U. S. 407 [27: 592], it was ruled that where a statute declares that there shall be a rebate or drawback of a tax under certain circumstances, the amount to be determined under regulations prescribed by the Secretary of the Treasury, the inaction of the Secretary is immaterial, and the drawback must be paid whether ascertained under the Secretary's regulations or not, because the right to the drawback depends on the statute, and not on the Secretary's regulations, which relate merely to the ascertainment of the amount. The difference between

the statutes in regard to drawbacks, and the wording of section 61, is very marked. Drawback laws relate to an article after it is manufactured. The mere use of imported materials in manufacturing does not entitle the manufacturer to a drawback, and it is only when the manufactured goods are exported that the reason for the repayment of duty arises. In such instances the exportation and the ascertainment of the character and quality of the imported materials existing in the manufactured article are subjected to regulation, but not the process of manufacture. The case of Campbell only concerned the ascertainment of the amount of drawback, and it was held that inasmuch as the amount had been proved to the satisfaction of the court as completely as if every reasonable regulation had been complied with, a recovery could be sustained.

If we compare section 61 with the statute involved in *Campbell* v. *United States* (act of August 5, 1861, chap. 45, § 4, 12 Stat. at
[73] L. 292), the *distinction between this case and that will be clearly discernible.

§ 61, Act of August 28, 1894.	§ 4, Act of August 5, 1861.
"Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasurer of the United States a rebate or repayment of the tax so paid."	"From and after the passage of this act, there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback, equal in amount to the duty paid on such materials and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury; provided that ten per centum on the amount of all drawbacks, so allowed, shall be retained for the use of the United States by the collectors paying such drawbacks respectively."

By the act of 1894 Congress required that the thing itself should be done under official regulations; by the act of 1861, simply that proof of the doing of the act should be made in the manner prescribed.

In the case before us the first condition was that the alcohol should have been used by the manufacturer in accordance with regulations; and as that condition was not fulfilled, it is difficult to hold that any justifiable right by action in assumpsit arose.

This is the result of the section taken in its literal meaning, and as the rebate constituted in effect an exemption from taxation, we perceive no ground which would justify a departure from the plain words employed.

[74] *Nor are we able to see that the letter of the statute did not fully disclose the intent.

This section was one of many relating to the taxation of distilled spirits, which imposed a higher tax and introduced certain new requirements in regard to regauging, general bonded warehouses, etc., the object to derive more revenue from spirits used as beverages being perfectly clear; and the general intention to forego the revenue that had been previously derived from spirits used in the arts could only be carried out in consistency with the general tenor of the whole body of laws regulating the tax on distilled spirits, which undertook to guard the revenue at all points, and which required from the officers of the government evidence that everything had been correctly done. The regulations contemplated by section 61 were regulations to insure the bona fide use in the arts, etc., of all alcohol on which a rebate was to be paid, and to prevent such payment on alcohol not so used; and these were to be specific regulations under that section, and could not otherwise be framed than in the exercise of a large discretion based on years of experience in the Treasury Department.

Since, as counsel for government argue, the peculiar nature of alcohol itself, the materials capable of being distilled being plentiful, the process of distillation easy, and the profit, if the tax were evaded, necessarily great, had led in the course of thirty years to a minute and stringent system of laws aimed at protecting the government in every particular, it seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts, it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite, and may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, and, if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations if he found it practicable to do so.

*Without questioning the doctrine that de- [75]
bates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (*United States* v. *Trans-Missouri Freight Association,* 166 U. S. 318 [41: 1020]), it is nevertheless interesting to note that efforts were made in the Senate to amend the bill by the addition of sections which, while making alcohol used in the arts free from the tax, sought to secure the government from fraud by provisions for the methylating of such spirits so as to render them unfit for use as a beverage; that these proposed amendments were rejected (26 Cong. Rec. 6935, 6936); and that subsequently section 61 was adopted as an amendment, it being urged in its support that "if the Secretary of the Treasury and the Commissioner of Internal Revenue think they cannot adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures and the arts, then there will be relief under it." 26 Cong. Rec. p. 6985.

As soon as the act of August 28, 1894, became a law, without the approval of the President, Congress adjourned, and at its

first meeting thereafter the Secretary reported a draft of the regulations he desired to prescribe, stating that their enforcement would cost at least half a million of dollars annually, for which no appropriation was available, and that therefore he could not execute the section until Congress took further action, and he transmitted the correspondence between himself and the Commissioner, including his letter of October 6, 1894, instructing the commissioner to take no action regarding the matter.

Congress was thus distinctly informed that no claims for rebate would be entertained in the absence of further legislation, but none such was had, and finally, on June 3, 1896, section 61 was repealed, and the appointment of a joint select committee was authorized to "consider all questions relating to the use of alcohol in the manufactures and arts free of tax, and to report their conclusions to Congress on the first Monday in December, eighteen hundred and ninety-
[76] six," with *power to "summon witnesses, administer oaths, print testimony or other information." 29 Stat. at L. 195, chap. 310.

Numerous other provisions of the act called for regulations by the Secretary of the Treasury, such as those relating to the collection of customs duties and the free list; to the importation or manufacture in bond or withdrawal from bond free of tax; to drawbacks on imported merchandise; to the collection of internal revenue, and some others; but these related to matters for whose efficient regulation the Secretary of the Treasury was invested with adequate power, and their subject-matter was different from that of section 61.

If the duty of the Secretary to prescribe regulations was merely ministerial, and a mandamus could, under circumstances, have issued to compel him to discharge it, would not the judgment at which he arrived, the action which he took, and his reference of the matter to Congress, have furnished a complete defense? But it is insisted that by reason of the exercise of discretionary power necessarily involved in prescribing regulations as contemplated the Secretary could not have been thus compelled to act. We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect. Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the Department, as the matter stood, such use could not be regulated.

All this, however, only tends to sustain the conclusion of the court of claims that this was not the case of a right granted *in præsenti* to all persons who might, after the passage of the law, actually use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but that the grant of the right was conditioned on use in compliance with regulations to be prescribed, in the absence of which the right could not vest so as to create a cause of action by reason of the unregulated use. The decisions bearing on the subject are examined and *discussed in the opinion of the court of claims, and we do not feel called on to recapitulate them here. [77]

Judgment affirmed.

Mr. Justice **Brown**, Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** dissented.

UNITED STATES, *Appt.*,
v.
ANTHONY F. NAVARRE and Eighty-nine Other Members of the Pottawatomie Tribe of Indians.

(See S. C. Reporter's ed. 77-79.)

Indian claims for depredations.

The act of Congress of March 3, 1891, referring to the court of claims for adjudication the claims of the Pottawatomie Indians for depredations committed by others upon their property, includes depredations committed by other Indians as well as those committed by white men.

[No. 393.]

Submitted January 9, 1899. Decided February 20, 1899.

APPEAL from a judgment of the Court of Claims in favor of the petitioners, the appellees in this court, allowing claims for depredations committed upon their property by other Indians to the amount of $5,890, under the act of Congress of March 3, 1891, referring the claims of the Pottawatomie Indians for depredations to the Court of Claims for adjudication. *Judgment of the Court of Claims affirmed.*

See same case below, 33 Ct. Cl. 235.

The facts are stated in the opinion.

Messrs. **L. A. Pradt,** Assistant Attorney General, and **Charles C. Binney** for appellant.

Messrs. **J. H. McGowan** and **John Wharton Clark** for appellees.

*Mr. Justice **McKenna** delivered the opinion of the court: [77]

Claims for depredations committed on members of the Pottawatomie tribe of Indians were referred to the court of claims for adjudication, by the acts of Congress hereafter quoted.

The appellees in pursuance of said acts of Congress filed a petition setting forth claims for depredations committed on them by white men, and prayed judgment therefor.

The proof showed depredations committed by Indians as well as by white men, and the court of claims gave judgment accordingly, and the United States appealed.

Only the claims allowed for property taken by Indians are contested. They amount to the sum of $5,890.

*The right to recover was based on the tenth [78]

article of the treaty with the Pottawatomie Indians, proclaimed August 7, 1868. 15 Stat. at L. 533. It provided as follows: "It is further agreed that upon the presentation to the Department of the Interior of the claims of said tribe for depredations committed by others upon their stock, timber, or other property, accompanied by evidence thereof, examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises."

The court below found that "under said treaty these claims were by the Secretary of the Interior transmitted, with the evidence in support thereof, to Congress for its action thereon; and by Congress, under the acts of March 3, 1885, and March 3, 1891, said claims, with all evidence, documents, reports, and other papers pertaining to same, were referred to this court to be adjudicated and determined." 23 Stat. at L. 372; 26 Stat. at L. 1011.

Nothing was done under the act of March 3, 1885. It seems to be conceded that the reason was because the act required strictly legal evidence of the claims.

The act of March 3, 1891, is as follows:

"That the claims of certain individual members of the Pottawatomie Nation of Indians, their heirs or legal representatives, for the depredations committed by others upon their stock, timber, or other property, reported to Congress under the tenth article of the treaty of August 7, 1868, be, and the same are hereby, referred to the court of claims for adjudication. And said court shall, in determining said cause, ascertain the amounts due and to whom due by reason of actual damage sustained.

"And all papers, reports, evidence, records, and proceedings relating in any way to said claims, now on file or of record in the Department of the Interior or any other department, or on file or of record in the office of the secretary of the Senate or the office of the clerk of the House of Representatives, shall be delivered to said court, and in considering the merits of the claims presented

[79] to the court all testimony and reports *of special agents or other officers, and other papers now on file or of record in the departments of Congress, shall be considered by the court, and such value awarded thereto as in its judgment is right and proper."

The contention of the United States depends on the meaning of the words in the act, "for the depredations committed by others." Exactly the same words are used in article 10 of the treaty, and the Secretary of the Interior, exercising his duty, reported claims for depredations by both Indians and white men, to Congress for its action. They were, therefore, claims for depredations "reported to Congress under the tenth article of the treaty of August 7, 1868." But it is argued, and ably so, that claims for depredations by other Indians were improperly reported.

We do not think it necessary to review the argument in detail. It is sufficient to say that Congress had before it when it legislated all the claims, and did not discriminate between them. If the meaning of the treaty was doubtful, it was competent for Congress to resolve the doubt and accept responsibility for all claims. It was natural enough for it to adopt the interpretation of the Interior Department. At any rate, it did not distinguish between the claims. Its language covers those which came from the acts of Indians as well as those which came from the acts of white men.

Judgment affirmed.

JOHN W. COLLIER, Admr. of James E. Ranck, Deceased, *Appt.*,

v.

UNITED STATES and the Apache Indians.

(See S. C. Reporter's ed. 79–83.)

Claim for Indian depredations—competent evidence.

1. In a claim against the United States for damages for the destruction of property by Indians, if the Indians who committed the depredation were not in amity with the United States the court is without jurisdiction.
2. Official reports and documents made competent evidence by the act of Congress of March 3, 1891, in the adjudication of such claim, are legally competent on the issue of amity.

[No. 252.]

Submitted January 9, 1899. Decided February 20, 1899.

APPEAL from a judgment of the Court of Claims dismissing for want of jurisdiction a claim filed by one Ranck, since deceased, for the destruction of property in 1869 by Indians near the line of Texas and Mexico. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. H. Garland** and **Heber J. May** for appellant.

Mr. **John G. Thompson,** Assistant Attorney General, for appellee.

*Mr. Justice **White** delivered the opinion of the court: [80]

This appeal brings up for review a judgment of the court of claims, dismissing, for want of jurisdiction, a claim originally filed in that court by one Ranck, since deceased, to recover for damages alleged to have been sustained on March 2, 1869, by the destruction of property of the claimant by Indians near the line of Texas and Mexico.

The finding of the court is that "the alleged depredation was committed on or about the 2d day of March, 1869, in the southeastern part of the territory of New Mexico, by Mescalero Apache Indians, who at the time and place were not in amity with the United States." Upon its finding of the ultimate facts thus stated, the court below rested the legal conclusion that it was without jurisdiction of the cause. This court accepts the findings of ultimate fact made by the court below, and cannot review them. *Mahan* v. *United States*, 14 Wall. 109 [20:

764]; *Stone* v. *United States,* 164 U. S. 380 [41: 477]. Applying the law to the facts, it is clear that, as the Indians by whom the depredation was committed were not in amity, the court correctly decided that it was without jurisdiction. *Marks* v. *United States,* 161 U. S. 297 [40: 706], Followed in *Leighton* v. *United States,* 161 U. S. 291 [40: 703]; *Valk* v. *United States,* 168 U. S. 703 [42: 1211]. This legal conclusion was not
[81] disputed in the argument at bar, *but it was contended that this court will, as a matter of law, where the record enables it to do so, determine for itself whether the ultimate facts found below are supported by any evidence whatever, and that it also will determine whether the ultimate facts were solely deduced by the court below from evidence which was wholly illegal. And upon the foregoing legal proposition it is asserted, first, that it is disclosed by the record that there was no evidence whatever tending to show that the depredation was committed by the Mescalero Apache Indians; and, second, that the record also discloses that the conclusion of fact that the Indians committing the depredation were not in amity was solely rested by the court upon certain official reports and documents which were inadmissible. The rule by which these contentions are to be measured is thus stated in *United States* v. *Clark,* 96 U. S. 40 [24: 698], as follows:

"But we are of opinion that when that court [the court of claims] has presented, as part of their findings, what they show to be all the testimony on which they base one of the essential, ultimate facts which they have also found and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court, made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether upon the whole of the testimony as presented by the court itself, there is not evidence to support its verdict; that is, its finding of the ultimate fact in question." See also *Stone* v. *United States, supra,* 383 [41: 478].

Whether the record before us is in such a state as to support either of the contentions above stated is the question for decision. In so far as the question of the tribe of Indians by whom the depredation was committed, it obviously is not, since there is not therein contained any reference whatever to the evidence upon which the court based its conclusion on this subject. The portion of the record which is relied upon to establish the contrary is the following statement:
[82] *"the court determines that the Mescalero Indians were not in amity at the time of the depredation, from the following official reports, documents, and facts deduced from the testimony of witnesses, which are set forth in the findings."

But the matter thus certified clearly purports only to relate to the evidence from which the court drew its conclusions as to amity, and not to that upon which it based its finding as to the tribe by whom the depredation was committed. It follows, then, that the argument is simply this: That we are to determine that there was no evidence supporting the finding as to the particular tribe committing the depredation, when the record does not disclose and the court has not certified the proof from which its conclusion was drawn. The claim that the record discloses that the finding as to amity rested solely upon certain official reports and documents finds also its only support in the excerpt from the record just above stated. While it is true the statement certifies that certain reports and official documents were considered by the court in reaching its finding as to the want of amity, it does not state that it was alone based upon these reports, for it says that the determination that the Indians were not in amity at the time of the depredation was likewise drawn from "facts deduced from the testimony of witnesses, which are set forth in the findings." Now, while the findings contain certain reports and official documents, presumably those referred to in the statement, they do not contain the testimony of any of the witnesses. After reproducing the reports and documents, the record concludes with a mere recapitulation of the result of the testimony of certain witnesses as to the number of Indians by whom the depredation was committed and the circumstances surrounding, that is, the nature of the attack made by the Indians and the conflict which ensued when it was made. It follows, that even if the reports and official documents to which the findings refer were legally inadmissible to show want of amity, we could not hold that there was no legal evidence supporting the conclusion that amity did not exist, since all the evidence which the court states it considered on this subject is not in the record. But the *offi- [83]
cial reports in question were legally competent on the issue of amity. It is conceded that if competent they were relevant, since it is admitted they tended to establish that the tribe was not in amity when the depredation was committed.

The act of March 3, 1891, for the adjudication and payment of claims arising from Indian depredations (26 Stat. at L. 851), provides in the fourth and eleventh sections as follows:

"In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and proper."

"Sec. 11. That all papers, reports, evidence, records, and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to

the court upon its order, or at the request of the Attorney General."

These provisions express the manifest purpose of Congress to empower the court of claims to receive and consider any document on file in the departments of the government or in the courts, having a bearing upon any material question arising in the consideration of any particular claim for compensation for Indian depredation, the court to allow the documents such weight as they were entitled to have.

There is no merit in the contention that, although documents within the description of the statute were relevant to the question of amity, they were nevertheless incompetent, as they did not refer to the particular depredation in question, because the statute only authorizes the consideration of reports, documents, etc., "relating to any such claim." As amity was made by law an essential prerequisite to recover, it follows that evidence bearing on such subject was necessarily evidence relating to the claim under consideration.

Affirmed.

---

[84] CENTRAL LOAN & TRUST COMPANY, *Appt.*,

v.

CAMPBELL COMMISSION COMPANY.

(See S. C. Reporter's ed. 84-99.)

Necessary parties to appeal—Oklahoma statute—appointment of garnishee—power of probate judge—allowance of attachment—right to attach nonresident's property— equal protection of the laws.

1. Interveners who claim the proceeds of an attachment sale, who did not except in the trial court to vacating the attachment and dismissing the action, and who were not parties to the proceedings to review the judgment of the trial court in the territorial supreme court, and were not treated in that court as necessary parties, are not necessary parties to an appeal from the judgment of the supreme court to this court.
2. Under Okla. Stat. 1893, § 4085, the answer of the garnishee upon which no issue is taken is not conclusive of the truth of the facts stated therein, as against an interpleader who claims to own the property.
3. The appointment of the garnishee as receiver of the property attached, by his own consent and that of all the parties, to dispose of the property and pay his own claim and hold the balance to the order of the court, rendered it unnecessary to traverse the answer of the garnishee, and estopped him from claiming individual possession of the property.
4. The Oklahoma statute conferring power upon the probate judge to sign an order for an attachment is not repugnant to the organic act of the territory, or void, as it does not involve the discharge of a judicial function.
5. Where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official.
6. The organic act of Oklahoma territory which provides that all civil actions shall be brought in a county where the defendant resides or is found, does not preclude the right to proceed by attachment against the property of a nonresident in the place in the territory where the property of such nonresident is found.
7. A territorial statute permitting attachment against a nonresident without a bond, while requiring the bond for attachment against a resident does not constitute a denial to the nonresident of the equal protection of the laws or of due process of law.

[No. 145.]

Argued and Submitted January 17, 1899. Decided February 20, 1899.

ON APPEAL from a judgment of the Supreme Court of the Territory of Oklahoma affirming a judgment of the District Court of Noble County which quashed an attachment issued at the suit of the Central Loan & Trust Company for want of jurisdiction. Judgment of the lower court *reversed,* and the case remanded for further proceedings in conformity to this opinion.

See same case below, 5 Okla. 396.

Statement by Mr. Justice **White:**

This action was commenced on July 2, 1895, in the district court of Noble county, Oklahoma, by the Central Loan & Trust Company, a Texas corporation, against the Campbell Commission Company, a Missouri corporation, to recover upon certain promissory notes not then due. Upon affidavit a writ of attachment issued, and was levied upon five thousand head of cattle, as the property of the Campbell Company. After such levy, a summons in garnishment was served upon one A. H. Pierce, who answered that he was not indebted to and held no property owned by or in which the Campbell Company had an interest. As "a further and special answer" Pierce set out a written agreement entered into between himself and the Campbell Company for the sale and shipment by him, to that company, of a specified number of cattle. This agreement provided that Pierce was to deliver at Pierce Station, Texas, a designated number of cattle, which the company agreed to ship to its pastures in the Indian territory "at its own risk and pay all freight and other expenses," the expenses to embrace the wages of a man to be put by Pierce with the cattle, "to represent his interest in said cattle." It was recited in the contract that five thousand dollars had been paid at the signing of the agreement "as part of the purchase price;" and the company further agreed to pay to Pierce interest at the rate of ten per cent per annum on all unpaid amounts from the date of shipment of the cattle until full and final payment in accordance with the contract. The company also agreed to ship the cattle to market during the summer or fall of 1895, *for account of [86] Pierce, and to apply the proceeds of sale to payment for the cattle until fully paid for at the rate of fifteen dollars per head; and it was also stipulated that title and ownership of the cattle should be and remain in Pierce until such payment.

In said "further and special answer" it was also alleged that the cattle, upon which the writ of attachment had been levied, formed part of the number covered by the contract above referred to, and had been shipped by Pierce to the pastures of the Campbell Company, but that they had never ceased to continue in the possession of Pierce; it being further claimed that the cattle were subject to a charge for unpaid purchase money, expenses for their care and keeping, etc. The answer further stated that notice had been received by Pierce from one T. A. Stoddard, trustee, that an assignment had been made of said contract to him by the Campbell company, and a copy of the alleged assignment was annexed. It purported to "sell and assign all the title and interest in and to" the contract between Pierce and the Campbell Company, any profit which might be derived by Stoddard from carrying the contract into final execution to be applied by him as trustee to the payment, *pro rata, of* certain described notes. The garnishee also declared that on July 12, 1895, receivers had been appointed of the assets of the Campbell Company, and the answer concluded with asking that Pierce might be discharged as garnishee.

With the answer to the garnishment there was also filed by Pierce what was termed an interplea. It was therein, in substance, averred that the cattle which had been levied upon were wrongfully detained from Pierce; that he was entitled to their immediate possession; and he prayed that on the hearing of the interplea judgment might be awarded for the return of cattle, with damages for their alleged wrongful seizure and detention. A motion was also filed, on behalf of Pierce, "as garnishee and interpleader," to discharge the attachment, substantially on the ground that the cattle belonged to Pierce, and that the latter was not indebted to the Campbell Company and held none of its property.

[87] *On the date when this motion came on for hearing the plaintiff filed an application for the appointment of Pierce as receiver, "to take charge of the property attached in this action and sell the same in accordance with a certain written contract" attached as an exhibit, being the contract referred to in the answer of Pierce to the garnishment. The service of the writ of attachment was averred, and it was stated that the cattle which had been levied upon had been "under the care, custody, and control of the sheriff of Noble county since the third day of July, 1895, when said attachment was levied;" and it was further averred: "That said A. H. Pierce claims no interest in said property of this uit except as set forth in said contract hereto attached, and is entirely friendly to all parties concerned in said action, and, as plaintiff and its attorneys are informed and believe, the appointment of said A. H. Pierce as receiver herein would be entirely satisfactory to the defendant and all other parties in said action."

The pecuniary responsibility of Pierce and his large experience as a dealer and raiser and shipper of cattle, and other circumstances, were set forth as warranting his appointment without bond to sell the cattle in the usual commercial way, instead of at public sale, and the application concluded as follows:

"That is would be to the interest of all parties concerned to have A. H. Pierce appointed receiver to take charge of said steers and sell the same to the best advantage, accounting to the court for all sales, and, after satisfying his claim under said contract, hold the money remaining in his hands subject to the final order of this court.

"That said A. H. Pierce has already shipped from five thousand head of steers so seized in attachment about three hundred and sixty head and sold the same in market, and now holds the proceeds thereof, which should be accounted for by A. H. Pierce along with other accounts of shipments."

An order appointing the receiver was thereupon made, the consent of the attorneys both of Pierce and the plaintiff being noted thereon, and Pierce qualified as receiver.

A summons which had been issued having been returned *"defendant not found," publi- [88]
cation was had in compliance with the legal requirements.

Subsequently Stoddard, trustee, filed an interplea. Therein it was averred that the contract between Pierce and the Campbell Company had been made by that company for account of a firm styled George W. Miller & Son, and had been entered into in the name of the Campbell Company in order to secure that company for advances which had been made by it to Miller & Son; that under an assignment by the Campbell Company to Stoddard he was entitled to the proceeds of the sale of the cattle in the hands of the receiver after the claim of Pierce had been paid. Plaintiff demurred to this interplea on November 5, 1895, but no action was ever had thereon.

A report was filed by the receiver, showing that he had sold the cattle, and from the proceeds had satisfied in full his claim under the contract of September, 1894, and that a balance was in his hands subject to the order of the court. Thereafter the Campbell Company filed a "plea to the jurisdiction," and subsequently filed an amended plea which stated seven grounds why the court was without jurisdiction, all of which will be hereafter referred to.

After this George W. Miller and J. C. Miller filed an interplea in the action, claiming that they were the real contractors with Pierce in the agreement of September 8, 1894, and averred their ownership of the cattle, and that if the contract had been assigned to Stoddard, it was done without their authority, and was void. It was prayed that the proceeds of the cattle be paid to them after the payment to Pierce of the amount of his claim. No issue was taken on this interplea.

On the same date that the Miller interplea was filed the plaintiff filed an answer to the interplea of A. H. Pierce, averring among other things that Pierce, as a result of the receivership proceedings, had waived and abandoned all his claim in and to the ownership of the cattle levied on under the

attachment. On December 16, 1895, the plea of the Campbell Company to the jurisdiction
[89] was heard, upon the *record, over objection and exception by plaintiff. The court overruled all the grounds assigned in the plea except the second, which asserted that there was a want of power in the probate judge to issue an order for attachment. As to such ground it held that the act of the Territorial Assembly of Oklahoma, conferring power upon the probate judge, as to debts not yet due, to order an attachment in the absence of the district judge from the county, was unconstitutional and void. It thereupon concluded that all the proceedings were void. the attachment was quashed, and the suit dismissed for want of jurisdiction, without prejudice to the Campbell Company. The Campbell Company excepted to the action of the court in overruling all the grounds of its plea to the jurisdiction but that referring to the power of the probate judge, and the plaintiff excepted to the action of the court holding that there was a want of power in the probate judge.

Error was prosecuted to the supreme court of the territory. That court, whilst concluding that the lower court was wrong in deciding that the probate judge was without authority to allow the attachment, yet affirmed the judgment below on the ground that as an actual levy on the property of the defendant Campbell Company was necessary to give the lower court jurisdiction to determine the cause, and as there had been in law no such levy, therefore the court below was without jurisdiction, and had correctly dismissed the suit. The reasoning of the court, in effect, sustained the third ground of the motion to quash the attachment made by the Campbell Company. A petition for rehearing having been overruled, the cause was brought to this court.

Mr. **William D. Williams** for appellant.

Mr. **John W. Shartel** for appellee.

[89] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

[90] *On the threshold it is necessary to dispose of a suggestion of want of jurisdiction made by the appellee. It is based on the proposition that as the interveners in the trial court are not made parties to this appeal, we are without jurisdiction, since the judgment to be rendered may materially prejudice their rights. But the interveners did not except to the action of the trial court in vacating the attachment and dismissing the action. They were not made parties to the proceedings in error prosecuted from the judgment of the trial court to the supreme court of the territory. In that court the cause was determined without any suggestion, so far as the record discloses, that the questions arising on the record could not be decided in the absence of the interveners, and the supreme court of the territory manifestly assumed that the interveners were not essential parties to a determination of the controversy before it, since it passed on the case as presented without their presence. If their absence was treated by the parties to the proceedings in the supreme court of the territory as not affecting the right to a review of the judgment of the trial court, there can be no reason why we should now hold that the presence of such interveners is necessary on this appeal, which has solely for its object a review of the judgment rendered by the supreme court of the territory. Considering the facts just stated, and the further fact that it is obvious that the rights of the interveners cannot be prejudiced by a review of the action of the supreme court of the territory in dismissing the cause for want of jurisdiction, the motion to dismiss is overruled.

The third ground stated in the plea of the defendant, the Campbell Company, to the jurisdiction of the court, was the one which the supreme court of the territory found to be well taken, and upon which it based its affirmance of the judgment quashing the attachment and dismissing the action for want of jurisdiction. The reasoning by which the court reached its conclusion was in substance as follows:

The garnishee Pierce answered that he had nothing subject to garnishment. After doing this, he further answered, setting out an alleged contract between himself and the defendant, *by which he had agreed to sell and [91]
ship to the pastures of the defendant a certain number of cattle, which agreement had been carried into execution, the cattle seized under the attachment being a portion of those shipped in carrying out the contract. The answer then stated that although the cattle had been thus shipped, by the terms of the contract, the right to their possession remained in the garnishee Pierce, to whom there was a large amount due under the contract for purchase money and expenses. The answer further stated that the garnishee had been notified of an assignment by the defendant of its rights under the contract, the date of this assignment as given being prior in time to the levy of the attachment. Considering that there had been no traverse by the plaintiff to the answer of the garnishee, within twenty days, as required by the Oklahoma statute, the court concluded that all the facts and averments and the inferences deducible therefrom, stated in the answer, were to be taken as true, not only as between the garnishee and the plaintiff, but also between the plaintiff and the defendant, in determining whether property of the defendant had been levied upon, under the attachment. Upon this assumption, finding that the answer of the garnishee established that no property of the defendant had been levied upon under the attachment, it thereupon dissolved the attachment and dismissed the suit. But this reasoning was fallacious, since it assumed that because the failure to traverse the answer of the garnishee was conclusive of his nonliability, in the garnishment proceedings, it was therefore equally so, as between the plaintiff and defendant, in determining whether the property which had been levied upon under the attachment be-

longed to the defendant. But the two considerations, the liability of the garnishee under the proceedings in garnishment and the validity of the levy previously made under the attachment, were distinct and different issues. The section of the Oklahoma statute to which the court referred (Oklahoma Stat. 1893, § 4085) provides that the answer of the garnishee "shall in all cases be conclusive of the truth of the facts therein stated, unless the plaintiff shall within twenty days serve upon the garnishee a notice in
[92] *writing that he elects to take issue on his answer." It, however, can in reason be construed only as importing that the facts stated in the answer, unless traversed, should be conclusive, for the purpose of determining whether the garnishee was liable under the process issued against him and to which process his answer was directed.

Indeed, all the facts stated in the "further" answer of the garnishee were, in legal effect, substantially irrelevant to the issue between the plaintiff and the garnishee, since they referred, not to the garnishee's liability to the defendant, but propounded a distinct and independent claim which the garnishee asserted existed in his favor as against the defendant, as a basis on his part for claiming property which was already in the possession of the court under the attachment, and held as the property of the defendant in attachment. This was the view taken by the garnishee of his rights on the subject, for the answer in the garnishment concluded simply by asking that the garnishee be discharged from the proceedings. And on the same day he intervened in the main action and filed his interplea asserting in his behalf a right of possession to the cattle seized and demanding damages for their detention. The judgment below, then, not alone caused the failure to traverse the answer to conclude the plaintiff as to the issues which could legally arise on the garnishment, that is, the liability of the garnishee thereunder, but it also made the failure to traverse operate as a summary and conclusive finding in favor of the garnishee on his interplea in the action, which was a wholly independent and distinct proceeding from the garnishment itself. The reasoning necessarily went further than this, since by relation it caused the answer of the garnishee to become conclusive between the plaintiff and the defendant, thereby setting aside the seizure made before the garnishment issued, falsifying and destroying the return of the sheriff that he had levied upon the property of the defendant, and in effect decided the case in favor of the defendant without proof and without a hearing.

Nor can a different conclusion be reached by considering that in the further answer of
[93] the garnishee it was stated that *he had been notified of an assignment of the rights of the defendant Campbell Company under the contract, purporting to have been made prior to the levy of the attachment. This was not pertinent to the question of the liability of the garnishee under the garnishment proceedings, and could not operate to conclusively establish as between the plaintiff and the defendant, or as between the plaintiff and the alleged assignee, either the verity or the legal sufficiency of the alleged assignment.

Aside, however, from the foregoing consideration, the record established a condition of fact which relieved the plaintiff from the necessity of traversing the answer of the garnishee, in so far as that answer referred to the independent facts substantiating the intended claim of the garnishee to the right of possession of the property already under seizure, and which, moreover, estopped the garnishee, and therefore the defendant, from asserting any right of possession by reason of the facts alleged in the further answer. Before the time for traverse had expired, and at the date when a motion filed by Pierce, as garnishee and interpleader, to discharge the attachment on the ground of his assumed right of possession under the contract, had been noticed for hearing, the court, by the consent of plaintiff and the garnishee (the only parties who had up to that time appeared in the cause), appointed the garnishee Pierce receiver, to dispose at private sale of the cattle, which had been levied upon, to pay from the proceeds the claim of Pierce, by virtue of his contract, and to hold the balance subject to the final order of the court. Obviously, this order, and the rights which Pierce took under it, were wholly incompatible with the assumption that he was entitled to the possession of the property levied upon as the owner thereof. By the effect of the order, he was to be paid the full purchase price of the cattle. He could not take the price and keep the cattle. The situation was this: At the time the Campbell Company made its motion to dismiss for want of jurisdiction, the garnishee had taken substantial rights which had for their inevitable legal effect to render unnecessary any traverse of so much of his answer as referred to his rights *under the supposed contract, and which also disposed of [94]
his interplea and claim of individual right to the possession of the property levied on under the attachment; yet the result of the judgment rendered below was to dismiss the action at the instance of the defendant on the ground of supposed rights vested in the garnishee, when the garnishee himself had disclaimed or had abandoned the assertion of such presumed rights.

As the foregoing reasons dispose of the view of the case taken by the lower court, we confine ourselves to them. Because, however, we do so, we must not be understood as intimating that the defendant had the right to assail the jurisdiction of the court, or question the right of the court to order the giving of notice by publication, on the ground that it was not the owner of the property actually levied upon, and that the affidavit for publication was untrue in stating that the defendant had property within the jurisdiction, when if it were not such owner no prejudice could come to it, as the judgment of the court, from the nature of the proceeding before it, could necessarily only operate upon the property levied on. Nor, moreover, must we be considered as as-

senting to the construction given by the court, to the contract between the Campbell Company and Pierce; the court, in its recital of the facts, stating that under the contract Pierce had a vendor's lien for the amount of the purchase price upon the cattle which had been levied upon, but in the opinion construing the contract as not devesting Pierce of the title to the cattle.

Although the court below based its conclusion only upon one of the grounds taken in the plea of the defendant to the jurisdiction, it nevertheless in the course of its opinion stated that the whole plea was before it, and that all the grounds therein stated were open for its consideration. We, therefore, shall briefly consider such of the remaining grounds stated in the plea to jurisdiction as have been urged in argument upon our attention.

I. It is contended that the attachment proceedings were void and that the court conse-
[95] quently was without jurisdiction, *because the order for attachment was signed by the probate judge, acting in the absence of the district judge, conformably to a power to that effect given by the territorial statute. The claim is that the statute conferring such power upon the probate judge was repugnant to the organic act and void, for the following reason: The organic act authorized the establishment of a supreme court and district courts to be vested with "chancery as well as common-law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory affecting persons or property." The grant of common-law jurisdiction, it is argued, embraced authority to issue attachments. Being then within the jurisdiction expressly vested in the courts named, it was incompetent for the territorial legislature to delegate to the probate courts, which the organic act authorized to be established, or to a judge of such a court, any jurisdiction in the premises, even although the organic act empowered the legislature to define and limit the jurisdiction to be exercised by probate courts.

A review of this contention is rendered unnecessary, because of the mistaken premise upon which it rests. On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute. The text of the statute is stated in the margin.†
[96] This statute is a reproduction *of a statute of Kansas; and, in 1884, before the organization of the territory of Oklahoma, the supreme court of Kansas, in *Buck* v. *Panabaker*, 32 Kan. 466, had recognized the power of a probate judge to grant a writ of attachment in cases provided by law, while it had early held, in *Reyburn* v. *Brackett*, 2 Kan. 227 [83 Am. Dec. 457], under a statute containing requirements as to the statements to be made in the affidavit for attachment like unto those embodied in the statute of Oklahoma now under consideration, that the authority vested in an official to grant the writ imposed a duty simply ministerial in its nature. It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court. *Reyburn* v. *Brackett*, 2 Kan. 227 [83 Am. Dec. 457]; *Wheeler* v. *Farmer*, 38 Cal. 203; *Harrison* v. *King*, 9 Ohio St. 388; Drake on Attachments, 7th ed. p. 92. The cases cited and relied upon by counsel as holding to the contrary do not sustain what is claimed for them. In some of them (*Reyburn* v. *Brackett*, 2 Kan. 227 [83 Am. Dec. 457]; *Simon* v. *Stetter*, 25 Kan. 155; and *Harrison* v. *King*, 9 Ohio St. 388), the rule we have stated is upheld; in others (*Morrison* v. *Lovejoy*, 6 Minn. 183, and *Guerin* v. *Hunt*, 8 Minn. 477, 487), the particular statute under consideration was construed as requiring, on the part of the officer allowing the writ, a weighing and determination of the sufficiency of the proof; whilst, again, in others (*Seidentopf* v. *Annabiel*, 6 Neb. 524, and *Howell* v. [*Dickerman*] *Circuit Judge*, 88 Mich. 369), the statute expressly required that the writ should be allowed by a judge, and hence the clerk of the court was held incompetent *to issue [97]
the writ without the previous authorization of the order by the court.

Nor does section three of the act of Congress of December 21, 1893 (28 Stat. at L. 20), empowering the supreme court of the territory or its chief justice to designate any judge to "try" a particular case in any district where the regular judge is for any reason unable to hold court, constitute an implied prohibition against the conferring by the legislature of authority upon one not a judge of the court in which the main action is pending to perform a ministerial act like that here considered.

II. It is insisted that "under the organic act of the territory, the court could not acquire jurisdiction of the person of the defendant by constructive service by foreign attachment without its consent."

The section of the organic act referred to requires that all civil actions shall be brought in the county where a defendant re-

†Sec. 4120. Where a debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay the collection of their debts, or is about to make such sale or conveyance or disposition of his property, with such fraudulent intent, or is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering them or delaying them in the collection of their debts, a creditor may bring an action on his claim before it is due, and have an attachment against the property of the same debtor.

Sec. 4121. The attachment authorized in the last section may be granted by the court in

sides or can be found. In a proceeding by attachment of property, which is in the nature of an action *in rem,* it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached. It would be an extremely strained construction of the language of the act to hold that Congress intended to prohibit a remedy universally pursued, that of proceeding against the property of nonresidents in the place in the territory where the property of such nonresident is found.

III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a nonresident defendant in the ease of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the civil rights act. The law of the territory, it is said, in ease of an attachment for the cause stated against a resident of the territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it has been construed to make no such requirement in the case of an attachment against a nonresident. This,
[98] it is argued, *is a discrimination against a nonresident, does not afford due process of law, and denies the equal protection of the laws. The elementary doctrine is not denied that for the purposes of the remedy by attachment, the legislative authority of a state or territory may classify residents in one class and nonresidents in another, but it is insisted that where nonresidents "are not capable of separate identification from residents by any facts or circumstances other than that they are nonresidents—that is, when the fact of nonresidence is their only distinguishing feature—the laws of a state or territory cannot treat them to their prejudice upon that fact as a basis of classification."

When the exception, thus stated, is put in juxtaposition with the concession that there is such a difference between the residents of a state or territory and nonresidents as to justify their being placed into distinct classes for the purpose of the process of attachment, it becomes at once clear that the exception to the rule, which the argument attempts to make, is but a denial, by indirection, of the legislative power to classify which it is avowed the exception does not question. The argument in substance is that where a bond is required as a prerequisite to the issue of an attachment against a resident, an unlawful discrimination is produced by permitting process of attachment against a nonresident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing processes of attachment against a nonresident and not permitting such process against a resident in any case. That the distinction between a resident and a nonresident is so broad as to authorize a classification, in accordance with the suggestion just made, is conceded, and, if it were not, is obvious. The reasoning, then, is that, although the difference between the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is *exacted in the other. The [99]
power, however, to grant in the one and deny in the other of necessity embraces the right, if it be allowed in both, to impose upon the one a condition not required in the other, for the lesser is necessarily contained in the greater power. The misconception consists in conceding, on the one hand, the power to classify residents and nonresidents, for the purpose of the writ of attachment, and then from this concession, to argue that the power does not exist, unless there be something in the cause of action, for which the attachment is allowed to be issued, which justifies the classification. As, however, the classification depends upon residence and nonresidence, and not upon the cause of action, the attempted distinction is without merit.

The foregoing considerations dispose, not only of the grounds passed upon by the court below, but those pressed upon our attention and which were subject to review in that court; and as from them we conclude *there was error in the judgment of the lower court, its judgment must be reversed* and the case be remanded for further proceedings in conformity to this opinion. And it is so ordered.

SIOUX CITY TERMINAL RAILROAD & WAREHOUSE COMPANY *et al.* *v.* TRUST COMPANY OF NORTH AMERICA.

(See S. C. Reporter's ed. 99–113.)

Interpretation of a state statute—bonds of Iowa corporation in excess of statutory limit—estoppel of corporation.

1. This court in interpreting a state statute will construe and apply it as settled by the court of last resort of the state, and hence will only form an independent judgment as to the meaning of the state law when there is no binding construction of such state statute by the court of last resort of the state.
2. Bonds of an Iowa corporation in excess of the maximum limitation stated in its charter and of the statutory limit fixed by Iowa Code 1897, § 1611, are not void in the hands of innocent purchasers for value.
3. Under the decisions of the supreme court of Iowa, the act of a corporation in contracting a debt in excess of the statutory limit is not

---

which the action is brought or by the judge thereof, or in his absence from the county by the probate judge of the county in which the action is brought; but, before such action shall be brought or such attachment shall be granted, the plaintiff or his agent or attorney shall make an oath in writing showing the nature and amount of the plaintiff's claim, that it is just, when the same will become due, and the existence of some one of the grounds for an attachment enumerated in the preceding section.

void, but merely voidable, and for this reason the corporation, or those holding under it, cannot be heard to assail such act.

[No. 192.]

Argued January 23, 24, 1899. Decided February 20, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree of that court which affirmed a decree of the Circuit Court of the United States for the Northern District of Iowa in a suit for the foreclosure of a certain mortgage held by the Trust Company of North America as trustee. The decree of the Circuit Court established the validity of the mortgage and bonds which it secured, and decreed a foreclosure of the same. *Affirmed.*

See same case below, 69 Fed. Rep. 441, and 49 U. S. App. 523.

Statement by Mr. Justice **White:**

[100] *The facts which are relevant to the controversy arising on this record are as follows: The Sioux City Terminal Railroad & Warehouse Company (hereafter designated as the Terminal Company) was, in 1889, incorporated under the general laws of the state of Iowa, with an authorized capital of one million dollars. In January, 1890, the corporation, by authority of its board of directors authorized by its stockholders, mortgaged in favor of the Trust Company of North America its "grounds, franchises, liens, rights, privileges, lines of railway, side tracks, warehouses, storage houses, elevators, and other terminal facilities . . . within the corporate limits of the city of Sioux City," all of which property was more fully described in the deed of mortgage. The purpose of the mortgage was to secure an issue of negotiable bonds, with the interest to accrue thereon, the bonds being for the face value of one million two hundred and fifty thousand ($1,250,000) dollars. The form of the bonds was described in the deed, and they were numbered from 1 to 1250 inclusive. The deed contained a statement that the corporation "has full power and authority under the laws of the state of Iowa to create this present issue of bonds and to secure the same by mortgage of all its property, leases, and franchises." The bonds thus secured were negotiated to an innocent purchaser for value, and the proceeds were applied to the credit of the company.

In 1893 the Terminal Company also mortgaged in favor of the Union Loan & Trust Company, an Iowa corporation, the property previously mortgaged, as above stated, this second mortgage being to secure one hundred and ninety promissory notes, fifty whereof were for one thousand dollars each, and one hundred and forty whereof were for five thousand dollars each, the total aggregating seven hundred and fifty thousand ($750,000) dollars. All the notes referred to in this mortgage bore the date of the deed,
[101] which contained *the following covenant: "The said party of the first part (that is, the mortgagor) hereby covenants that the said premises are free from all encumbrances excepting a deed of trust made on the 1st day of January, A. D. 1890, by said party of the first part to the Trust Company of North America, of Philadelphia, to secure the sum of one million two hundred and fifty thousand ($1,250,000) dollars of bonds; and the said party of the first part will warrant and defend the title unto the said party of the second part, its successors and assignees, against all persons whomsoever claiming the same, subject to the lien of the said prior deed of trust."

On the 10th day of October, 1893, in the United States circuit court for the northern district of Iowa, a bill was filed by certain national banks, citizens of other states than the state of Iowa, against the Terminal Company, E. H. Hubbard, as assignee of the Union Loan & Trust Company, and others, having for its object the foreclosure of the second mortgage above referred to. Without fully recapitulating the averments of the bill, it suffices to say that it alleged that the notes which were secured by the second mortgage had been placed in the hands of the Union Loan & Trust Company in part for the benefit of certain claims against the Terminal Company held by the complainants; that the Union Loan & Trust Company had, in April, 1893, made an assignment to E. H. Hubbard for the benefit of all its creditors, and that Hubbard had succeeded to the rights and obligations of the company of which he was assignee, and in which capacity he held the notes secured by the second mortgage, and the benefit of which the complainants were entitled to invoke for the purpose of procuring the payment of their claims. A receiver was prayed for and was appointed.

On the 23d of December, 1893, the Terminal Company, reciting the fact that the notes which were secured by the second mortgage for $750,000 had been drawn and the mortgage given for the benefit of certain outstanding creditors whose claims amounted to $728,000, and that the notes covered by the second mortgage had been placed in the hands of the Union Loan & Trust Company for the benefit of such *creditors; that the [102]
company had made an assignment to Hubbard, assignee, and in that capacity he had received the notes in question; that in a suit pending in the Northern District of Iowa, to foreclose said second mortgage, a question had arisen whether such creditors were entitled to avail themselves of the benefit of the second mortgage,—therefore, in order to allay any such question, and to give the creditors intended to be covered by the second mortgage an undoubted right to claim under it, the deed conveyed absolutely to Hubbard, trustee, the property covered by the mortgage, giving to the trustee full power to realize and apply the property and rights to the discharge of the debts secured or intended to be secured as above stated. It suffices, for the purpose of this case, to give this outline of the deed in question, without stating all the various clauses found in it intended to accomplish the purpose which it had in view. The deed, however, contained

this declaration: "This conveyance is made, however, with full notice of the assertion of the following claims against the said property, to wit, a certain mortgage or trust deed to the Trust Company of North America, of Philadelphia, Pennsylvania, as trustee, to secure certain bonds for the sum of one million two hundred and fifty thousand ($1,-250,000) dollars, and also certain mechanics' liens to the amount of about $55,000, and also certain judgments to the amount of about $20,000. Nor shall said first party (that is, the transferrer) be understood to covenant that there are not other claims than those hereinbefore expressly mentioned, none of which, however, are to be considered and assumed by said second party (Hubbard, trustee); nor by the acceptance of this deed is he in anywise held to admit the validity of said trust deed liens, judgments, or of any claims made or that may arise thereunder; nor shall this deed be held in any manner to operate as the merger of said mortgage to said Union Loan & Trust Company, but said mortgage shall at all times be kept in full force until all persons and corporations entitled and claiming benefits thereunder shall consent to its discharge, or so long as it may be necessary to keep said
[103] mortgage in force for the protection *of the title herein conveyed, or any interest claimed by virtue hereof."

Default having taken place in the payment of the interest on the bonds secured by the first mortgage, the Trust Company of North America, as the trustee, filed its bill in the circuit court of the United States for the northern district of Iowa for foreclosure. On the 20th of June, 1894, the court ordered the two foreclosure suits—that is, the one previously brought by certain national banks in October, 1893, and the one brought by the Trust Company of North America—to be consolidated, and appointed the same person who had been made receiver under the first bill also the receiver under the second. On July 23, 1895, the Credits Commutation Company, a corporation organized under the laws of the state of Iowa, filed its suit against the Terminal Company in the state court of Iowa in and for Woodbury county. It was alleged that the Credits Commutation Company had become the holder and owner of a large number of the claims against the Terminal Company which were intended to be secured by the second mortgage, and for whose benefit the deed to Hubbard, trustee, had been made. The relief sought was a judgment against the Terminal Company "without prejudice to any rights or interests which the plaintiff (the Credits Commutation Company) may have as a holder of said notes in the said trust deed;" that is, the deed of trust to Hubbard, trustee, for the benefit of the noteholders as already mentioned. On the day the suit was filed the Terminal Company answered, admitting the correctness of the claim, and judgment was then entered for $692,096.95 with interest, the whole without prejudice to the rights of the parties under the deed of trust as prayed for.

The Terminal Company in its answer to the suit for foreclosure brought by the Trust Company of North America relied upon many defenses, only one of which need be referred to, that is, that the bonds and the mortgage in favor of the said Trust Company of North America were *ultra vires*. However it may be observed that the Terminal Company by its answer asserted that the
rights of those entitled to claim *under the [104]
second mortgage or the conveyance made for their benefit to Hubbard, trustee, were paramount to the claims of the Trust Company of North America, or the bondholders under the first mortgage in favor of that company. The Credits Commutation Company intervened in the foreclosure proceedings, averring that the bonds secured by the deed in favor of the Trust Company of North America were void, because the Terminal Company at the time the bonds were executed was without lawful power to issue them or to secure them by mortgage. It was also claimed that in virtue of the judgment rendered in the state court the Credits Commutation Company was a creditor of the Terminal Company to the amount of the judgment, and was entitled to avail itself of the rights accruing to it from the deed of conveyance made by the Terminal Company to Hubbard, trustee, and therefore that the Credits Commutation Company was entitled to be paid from the proceeds of the property sought to be foreclosed before the holders of the bonds secured by the deed which had been made in favor of the Trust Company of North America.

The trial court decided in favor of the validity of the bonds issued to the Trust Company of North America and of the mortgage securing the same. 69 Fed. Rep. 441. On appeal to the circuit court of appeals for the eighth circuit, the judgment of the trial court was affirmed. 49 U. S. App. 523. The case then, by the allowance of a writ of certiorari, was brought to this court.

Messrs. **Henry J. Taylor** and **John C. Combs** for petitioners.

Messrs. **Asa F. Call** and *Joseph H. Call* for respondent.

*Mr. Justice **White**, after making the [104]
foregoing statement, delivered the opinion of the court:

The errors assigned and the discussion at
the bar confine *the question to be decided [105]
solely to the validity of the negotiable bonds of the Terminal Company which were issued to the Trust Company of North America, and which were sold in open market to innocent purchasers for value, and the proceeds of which inured to the benefit of the Terminal Company. The issue for decision is restricted to this question, since all the errors assigned and the contentions based upon them depend on the assertion that the bonds issued to the Trust Company of North America, and the mortgage by which their payment was secured, were wholly void. This complete want of power in the Terminal Company is predicated upon certain requirements of the law of the state of Iowa, existing at the time of the incorpo-

ration of the Terminal Company, and of a provision in the charter of that company, inserted therein in compliance with the Iowa statute. The law of Iowa relied on is section 1611 of the Iowa Code of 1897, contained in the portion thereof relating to the organization of corporations, and is as follows:

"Such articles must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which in no case, except risks of insurance companies, and liabilities of banks not in excess of their available assets, not including their capital, shall exceed two thirds of its capital stock. But the provisions of this section shall not apply to the bonds or other railway or street-railway securities issued or guaranteed by railway or street-railway companies of the state in aid of the location, construction, and equipment of railways or street railways, to an amount not exceeding sixteen thousand dollars per mile of single track, standard-gauge, or eight thousand dollars per mile of single track, narrow-gauge, lines of road for each mile of railway or street railway actually constructed and equipped. Nor shall the provisions of this section apply to the debentures or bonds of any company incorporated under the provisions of this chapter, the payment of which shall be secured by an actual transfer of real-estate securities for the benefit and protection of purchasers thereof; such securities to be at least equal in amount to the par value of such bonds or
[106] debentures, and to be first *liens upon unencumbered real estate worth at least twice the amount loaned thereon."

The part of the foregoing section commanding the insertion in the charter of incorporated companies of the amount of inability for which the corporation could at one time be subject, and limiting such amount to two thirds of the capital stock, originated in the state of Iowa in the year 1851, and was continuously in force from the time of its adoption in the year in question up to the period when it was embodied in the Code of 1897. Iowa Code 1851, § 676; Iowa Code 1873, § 1061. The subsequent portions of the section creating exceptions as to certain classes of railway bonds, and as to bonds secured by an actual transfer of real-estate securities, originated, the one in 1884 and the other in the year 1886, and continued in force until they were also incorporated in the Iowa Code of 1897. 20 Iowa Laws, chap. 22; 21 Ib. chap. 54. And section 1622 of the Iowa Code also contains the following cognate provision: "If the indebtedness of any corporation shall exceed the amount of indebtedness permitted by law, the directors and officers of such corporation knowingly consenting thereto shall be personally and individually liable to the creditors of such corporation for such excess."

The portion of the charter of the Terminal Company fixing, in obedience to the statutory requirement, the amount of the debt which could at any one time exist, was as follows:

"The highest amount of indebtedness to which this (Terminal) company shall at any time subject itself shall not exceed two thirds of the paid-up capital stock of said company, aside from the indebtedness secured by mortgage upon the real estate of the company."

As the sum of the bonds which were issued and secured by the mortgage in favor of the Trust Company of North America exceeded the statutory limit and the amount stated in the charter, the question which arises first for consideration is this: Did this fact render them void; and, secondarily, was the issue of bonds taken from out the operation of the general rule laid down in the statute by the exceptions mentioned in the *latter portions [107]
thereof? As the claim that the bonds were void is based on the statutory provisions above referred to, it follows that we are compelled to primarily ascertain the meaning and operation of the state law. In making this inquiry we are constrained in the first place to inquire what construction has been placed upon the Iowa statute by the supreme court of that state; for it is an elementary principle that this court in interpreting a state statute, will construe and apply it as settled by the court of last resort of the state, and will, hence, only form an independent judgment as to the meaning of the state law when there was no binding construction of such state statute by the court of last resort of the state. *Nobles* v. *Georgia*, 168 U. S. 398 [42: 515]; *First National Bank* v. *Chehalis County*, 166 U. S. 440 [41: 1069]; *Morley* v. *Lake Shore & M. S. Railway Co.* 146 U. S. 166 [36: 928], and authorities there cited.

The subject-matter of the creation by an Iowa corporation of a debt in excess of the maximum amount fixed in its charter in accordance with the requirement of the statute, and also in excess of the sum limited by the state law, was considered by the supreme court of the state of Iowa in *Garrett* v. *Burlington Plow Co. and Others* (1886) 70 Iowa, 697 [59 Am. Rep. 461]. The case was this: An action was brought in chancery to foreclose a mortgage executed by the Burlington Plow Company, an Iowa corporation, to the plaintiff as a trustee for certain of its creditors upon real estate and personal property. The authorized capital stock of the corporation was fifty thousand dollars. The maximum limit imposed by the articles of incorporation was the maximum imposed by the statute, that is, two thirds of the amount of the capital stock. The corporation had contracted an indebtedness in excess of the limitation fixed by the statute and fixed by the charter; that is, with an authorized capital stock of fifty thousand dollars it had contracted an indebtedness exceeding fifty thousand dollars, of which total indebtedness the sums pressed in the foreclosure suit were a part. The defense to the suit was twofold: First, that the total debt of the corporation, including that sued on, was in excess of the two-thirds limitation; and, second, that the mortgage was void because it had been granted to protect certain directors *of the corporation to the prejudice of [108]
its general creditors. The fact that the debt

exceeded the two thirds allowed by the charter and the statute was admitted on the face of the record, and stated by the court in its opinion to be unquestioned. The court said (p. 701):

"Do the facts alleged in the answer, that the holders of the notes, as directors of the company, in the management of its affairs, contracted indebtedness beyond the limit prescribed by the articles of incorporation, and caused the mortgage to be executed to secure the amount due them, defeat their security and give other creditors a right to share in the proceeds of the property mortgaged? We do not understand counsel for the defendants to claim that a debt of the corporation beyond the prescribed limits of its indebtedness is invalid, and, if held by a director of the corporation, cannot be enforced for that reason alone. It may be that a director would be answerable to stockholders or others for negligence or mismanagement of the affairs of a corporation whereby debts were contracted in excess of the limitation prescribed in the articles of incorporation; but it cannot be claimed that such a debt, for a consideration received by the corporation, cannot be enforced against it."

Again, referring to the same subject, the court said (p. 702):

"It is averred that the directors unlawfully contracted indebtedness of the corporation in excess of the limit prescribed by its articles of incorporation. But this has nothing to do with the directors' claims in controversy. As we have before said, they may be liable to proper parties for their negligence or unlawful acts, but honest contracts made with them are not defeated thereby."

In *Warfield and Others* v. *Marshall County Canning Company* (1887) 72 Iowa, 666, where a debt had been confessedly contracted by a corporation in excess of its charter limitation, confining the power of the corporation to create a debt to a sum not exceeding one half of the capital stock actually paid in, the court, in considering the legal consequences of such excessive debt, said (p. 672):

"The proposition is stated by counsel, but
[109] it is not, *we think, insisted upon, that the mortgage is *ultra vires* because the articles of incorporation provide 'that it shall be competent to mortgage the property of the company to the amount of not exceeding one half of the capital stock actually paid in.' This question was determined adversely to appellant in *Garrett* v. *Burlington Plow Co.* before cited."

It follows then that at the time of the issue of the bonds in favor of the Trust Company of North America, and of the execution of the deed of mortgage by which such bonds were secured, the supreme court of the state of Iowa had in two cases declared the law of that state to be that a debt contracted in excess of the maximum limitation stated in the charter, in virtue of the provisions of the statute requiring that such maximum limit should be fixed, was not void, although the consequence of contracting a debt beyond the limitation might be to entail upon the officers of the corporation a personal liability for the amount thereof.

Light is thrown upon the condition of the law of the state of Iowa, on the question now before us, by a decision of the supreme court of that state, wherein it was called upon to consider issues arising from the identical contracts which are involved in this case. The cause was adjudged in the supreme court of Iowa, after the decision of the trial court in this cause, and after that of the circuit court of appeals. Without deciding that the construction given the statute by the supreme court of the state of Iowa at the time and under the circumstances stated is necessarily controlling on this court, such interpretation, conceding that it is not controlling, is manifestly relevant for the purpose of elucidating the previous decisions of the supreme court of Iowa, and as indicating what was the settled law of that state at the time the contract in question was entered into, and prior to the time when the controversy which this case presents originated in the courts of the United States. The decision in question is *Beach et al.* v. *Wakefield et al.* (1898) 76 N. W. 688 (not yet reported in the official reports of the state of Iowa). The case as stated in the report thereof was this: Beach, a subcontractor, commenced proceedings to establish and foreclose a mechanic's *lien on a depot built by the Termi- **[110]**
nal Company. Wakefield was the principal contractor for building the depot. He denied in part the claim of Beach, and sought also on his own behalf to be recognized as having a mechanic's lien upon the depot. The Terminal Company, the Trust Company of North America, and the Credits Commutation Company were parties to the cause. The decree of the supreme court of Iowa recognized in part a mechanic's lien on the depot building paramount to the mortgage in favor of the Trust Company of North America, but adjudged that the bonds issued to the Trust Company of North America and the mortgage by which they were secured were paramount to the claim of the Credits Commutation Company and others holding junior mortgage rights. In considering the legal result of the creation of a debt in excess of the statutory limitation the court said (p. 694):

"A distinction is to be taken between contracts like this and those which, independent of statute, are in violation of public policy. The creation of this indebtedness involved no moral turpitude. The making of the mortgage did not disable the corporation from performing its duties to the public. The Terminal Company had a right to incur a debt, and to execute a mortgage to secure it. The only ground of complaint is that it went further than the law permitted. Of this the state may complain, but the Terminal Company cannot; nor can any person whose rights are derived through the Terminal Company and who acquired such rights with knowledge of the mortgage lien."

Again, in commenting on the same subject, the court said (p. 695):

"We are aware that the security has been held invalid, and a right of recovery thereon

denied, in many cases where an action has been permitted upon the common counts. But we think these cases will be found to involve contracts which were absolutely void, and not, as in the case at bar, voidable only. This distinction is clearly preserved in the cases. In *Garrett* v. *Burlington Plow Co. supra,* the indebtedness exceeded the charter limit of the corporation, and the creditors
[111]had notice *thereof when the transaction took place; and yet a right of recovery was allowed and the lien of the mortgage upheld."

Recurring to the legal consequence, under the Iowa statute, of contracting a debt in excess of the statutory limit, the court said (p. 695):

"It is said, further, that the plea of estoppel can be urged only in favor of the innocent, and that the bondholders here are not of that class, for they are held to notice of the corporate power of the Terminal Company. This rule has been applied in cases where the act done was wholly void because of an absolute want of power to sustain it, and in cases where considerations of public policy intervened. Here, as repeatedly said, the act is voidable only. The statute does not even impose a penalty therefor."

The argument, then, reduces itself to this: Although it was conclusively settled by the decisions of the state of Iowa at the time the contract in question was entered into, that a debt contracted by a corporation in excess of the statutory limitation was in no sense of the word void, but on the contrary was merely voidable, we nevertheless should, in enforcing the state statute, disregard the construction affixed to it by the supreme court of the state of Iowa, and hold that the act of the corporation in exceeding the limit of debt imposed by the statute or fixed in the charter in compliance with the statute was absolutely void. But to so decide would violate the elementary rule previously referred to, under which this court adopts and applies the meaning of a state statute as settled by the court of last resort of the state. As, then, under the Iowa law the fact that the corporation contracted a debt in excess of the charter or statutory limitation did not render the debt void, but, on the contrary, such debt, by the settled rule in Iowa, was merely voidable, and was enforceable against the corporation and those holding under it, and gave rise only to a right of action on the part of the state because of the violation of the statute, or entailed, it would seem, a liability on the officers of the corporation for the excessive debt so contracted, it follows that the whole foundation upon which the errors assigned in this court must rest is
[112]without support in *respect of Federal law, and therefore the decrees below were correctly rendered.

It is claimed, however, that this court is not obliged to follow the Iowa decisions interpreting the statute of that state, because it is assumed that those decisions proceed alone upon the principle of estoppel. Estoppel, it is argued, is a matter of general, and not of local, law upon which this court must form an independent conclusion, even although in doing so it may disregard the rule established in the state of Iowa by the supreme court of that state. Whatever, it is argued, may be the rule in state courts, in this court it is settled that a corporation cannot be estopped from asserting that it is not bound by a corporate act which is absolutely void, citing, among other cases, *Pullman's Palace Car Co.* v. *Central Transp. Co.* 171 U. S. 138 [*ante,* 108]; *California National Bank* v. *Kennedy,* 167 U. S. 362 [42: 198]; *McCormick* v. *Market National Bank,* 165 U. S. 538 [41: 817]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55].

But we are not called upon in the case before us, to decide the question thus raised, since it rests upon an assumption that the court of Iowa has decided that the corporation was by estoppel prevented from complaining of a void act. But the supreme court of Iowa has not so decided. On the contrary, while in the course of its opinions it has referred to the doctrine of estoppel, it expressly, in the cases cited, made the application of the doctrine depend upon the legal conclusion found by it, that the act of a corporation in contracting a debt in exeess of the statutory limit was not void, but merely voidable, and for this reason the corporation, or those holding under it, could not be heard to assail the act in question. The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its relation to contracts which were merely voidable. Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of bonds by a corporation in excess of a statutory inhibition was not void, but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow *the settled construction given to it by [113]
the supreme court of that state.

It necessarily follows that *the decrees of the Circuit Court and of the Circuit Court of Appeals were correct, and both are therefore affirmed.*

FREDERICK BAUSMAN, as Receiver of the Ranier Power & Railway Company, *Plff. in Err.,*

v.

SAMUEL DIXON.

(See S. C. Reporter's ed. 113-115.)

Federal question.

In a suit in a state court against a receiver appointed by a Federal court the mere order of the latter court appointing him does not create a Federal question, where the receiver did not set up any right derived from that order which he asserted was abridged or taken away by the decision of the state court, and where all the questions involved were questions of general law, including the inquiry whether the receiver was responsible for the acts of his predecessor.

[No. 197.]

Argued and Submitted January 25, 1899. Decided February 20, 1899.

IN ERROR to the Supreme Court of the State of Washington to review a judgment of that court affirming a judgment of the Superior Court of King County, Washington, in an action brought by Dixon to recover damages for personal injuries sustained by him by reason of the negligence of one Backus, predecessor of the defendant, Bausman, as receiver, etc. The judgment of the trial court was rendered in favor of the plaintiff upon a verdict for $10,000. *Writ of error dismissed.*

See same case below, 17 Wash. 304.

The facts are stated in the opinion.

Mr. **Frederick Bausman** for plaintiff in error.

Messrs. **John E. Humphries, Edward P. Edsen,** *William E. Humphrey, Harrison Bostwick,* and *C. E. Remsberg* for defendant in error.

[113] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Dixon brought an action in the superior court of King county, Washington, against Bausman, receiver of the Ranier Power & Railway Company, to recover damages for injuries sustained by reason of defendant's negligence. The complaint alleged that the Ranier Power & Railway Company was a corporation organized under the laws of Washington, and engaged in operating a certain street railway in the city of Seattle; that June 13, 1893, one Backus was duly appointed by the circuit court of the United States for the district of Washington receiver of the company, and qualified and served
[114] *as such until February 11, 1895, when he was succeeded by Bausman; and that the injury of which plaintiff complained was inflicted in the course of the operation of the railway, on June 15, 1893. The answer denied that Bausman's predecessor in office had employed Dixon, and that Dixon's injuries were caused by negligence; and set up contributory negligence as an affirmative defense. The action was tried by a jury and a verdict rendered in favor of Dixon, the jury also returning answers to certain questions of fact specially propounded. A motion for a new trial was overruled and judgment entered on the verdict, and the cause was carried to the supreme court of Washington, which affirmed the judgment (17 Wash. 304); whereupon this writ of error was allowed.

We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States, or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

We have just held in *Capital National Bank of Lincoln* v. *The First National Bank of Cadiz,* 172 U. S. 425 [*ante.* 502], that where *the receiver of a national bank was a [115]
party defendant in the state courts, contested the issues on a general denial, and set up no claim of a right under Federal statutes withdrawing the case from the application of general law, this court had no jurisdiction to revise the judgment of the highest court of the state resting thereon; and, certainly, an officer of the circuit court stands on no higher ground than an officer of the United States.

Defendant did not deny that he was amenable to suit in the state courts; he did not claim immunity as receiver from suit without previous leave of the circuit court, and could not have done so in view of the act of March 3, 1887, chap. 373 (24 Stat. at L. 552); all the questions involved were questions of general law, including the inquiry whether one person holding the office of receiver could be held responsible for the acts of his predecessor in the same office; and the judgment specifically prescribed that the "said amount and judgment is payable out of the funds held by said Bausman as receiver of said company, which come into the hands of said receiver and are held by him as receiver, and funds belonging to the receivership which are applicable for that purpose, which may hereafter come into the receiver's hands or under direction of the court appointing such receiver."

Section 3 of the act of March 3, 1887, provides that "every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." It is not denied that this action was prosecuted and this judgment rendered in accordance therewith.

The writ of error is dismissed.

[116]J. K. MULLEN and Charles D. McPhee,
Plffs. in Err.,
v.
WESTERN UNION BEEF COMPANY.

(See S. C. Reporter's ed. 116-123.)

Review of a state judgment—highest state court.

1. A writ of error from this court to review a state judgment cannot be maintained where such judgment is not that of the highest court of the state in which a decision could be had.
2. It must affirmatively appear from the record that a decision could not have been had in the highest court of the state, or a writ of error to an inferior state court cannot be sustained.

[No. 153.]

Argued and Submitted January 18, 1899. Decided February 20, 1899.

IN ERROR to the Court of Appeals of the State of Colorado to review a judgment of that court which affirmed a judgment of the District Court of Arapahoe County, Colorado, in favor of the defendant, the Western Union Beef Company, in an action brought to recover damages for the loss of stock occasioned by the communication of an infectious disease from the cattle of the defendant to those of the plaintiff. Writ of error *dismissed.*

See same case below, 9 Colo. App. 497.

Statement by Mr. Chief Justice **Fuller:**

This was an action brought by Mullen and McPhee against the Western Union Beef Company, in the district court of Arapahoe County, Colorado, to recover damages for loss of stock occasioned by the communication from cattle of defendant to cattle of plaintiffs of the disease known as splenetic or Texas fever, by the importation into Colorado of a herd of Texas cattle, in June, 1891, and suffering them to go at large, in violation of the quarantine rules, regulations, and orders of the United States Department of Agriculture, in accordance with the act of Congress approved May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry," etc., 23 Stat. 31, chap. 60; and the act approved July 14, 1890, 26 Stat. 287, chap. 707; and in violation of the quarantine rules and regulations of the state of Colorado. The trial resulted in a verdict for defendant, on which judgment was entered. Plaintiffs sued out a writ of error from the court of appeals of the state of Colorado, and the judgment was affirmed, whereupon the present writ of error was allowed.

The court of appeals held that the question of violation by defendant of the quarantine rules and regulations of the state need not be considered because "upon sufficient evidence, it was settled by the jury in defendant's favor;" that "no question of negligence generally in the shipment and management of the cattle is presented by the record;" and that the theory on which the case had been tried below and was argued in that court was that "if the loss of the plaintiff's *cattle was in consequence of dis- [117]
ease communicated by the cattle of the defendant, its liability depends upon its acts with reference to rules and regulations which it was legally bound to observe."

The regulations of the Secretary of Agriculture were as follows:

Regulations Concerning Cattle Transportation.

United States Department of Agriculture,
Office of the Secretary,
Washington, D. C., February 5th, 1891.

To the Managers and Agents of Railroad and Transportation Companies of the United States, Stockmen and Others:

In accordance with section 7 of the act of Congress approved May 29, 1884, entitled "An Act for the Establishment of a Bureau of Animal Industry, to Prevent the Exportation of Diseased Cattle, and to Provide Means for the Suppression and Extirpation of Pluro-pneumonia and Other Contagious Diseases among Domestic Animals," and of the act of Congress approved July 14. 1890, making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1891, you are notified that a contagious and infectious disease known as splenetic or southern fever exists among cattle in the following described area of the United States: . . . From the 15th day of February to the 1st day of December, 1891, no cattle are to be transported from said area to any portion of the United States north or west of the above-described line, except in accordance with the following regulations.

[Here followed a series of stringent rules concerning the method to be pursued in transporting cattle from the infected districts.]

United States Department of Agriculture,
Office of the Secretary,
Washington, D. C., April 23d, 1891.

Notice is hereby given that cattle which have been at least ninety days in the area of country hereinafter described *may be [118]
moved from said area by rail into the states of Colorado, Wyoming, and Montana for grazing purposes, in accordance with the regulations made by said states for the admission of southern cattle thereto.

Provided:

1. That cattle from said area shall go into said states only for slaughter or grazing, and shall on no account be shipped from said states into any other state or territory of the United States before the 1st day of December, 1891.

2. That such cattle shall not be allowed in pens or on trails or ranges that are to be occupied or crossed by cattle going to the eastern markets before December 1, 1891, and that these two classes shall not be allowed to come in contact.

3. That all cars which have carried cattle from said area shall, upon unloading, at once be cleaned and disinfected in the manner provided by the regulations of this department of February 5th, 1891.

4. That the state authorities of the states

of Colorado, Wyoming, and Montana, agree to enforce these provisions.

The court, after stating that the territory described in both orders included that from which the defendant's cattle were shipped, said: "It is the rules relating to the isolation of cattle moved from infected districts, and more particularly the second proviso of the second order, which were claimed to have been violated by the defendant."

And it was then ruled that the regulations were not binding, as it was not shown that the state had agreed to them; that they were not authorized by the statute; that "the second provision undertakes to regulate the duties in relation to them [the cattle], of the persons by whom they might be removed after their arrival in the state, and it is upon this provision that the plaintiffs' reliance is chiefly placed. After becoming domiciled within the state their management would be regulated by its laws and not by the act of Congress. Any violation of the Federal law in connection with the cattle would consist in their removal. The dispo-
[119] sition of them afterwards *was not within the scope of the statute. [9 Colo. App. 497], 49 Pac. 425.

Messrs. **T. B. Stuart** and *W. C. Kingsley* for plaintiffs in error.

Messrs. **C. S. Thomas, W. H. Bryant,** and *H. H. Lee* for defendant in error.

[119] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

We are met on the threshold by the objection that the writ of error runs to the judgment of the court of appeals, and cannot be maintained, because that is not the judgment of the highest court of the state in which a decision could be had.

The supreme court of Colorado is the highest court of the state, and the court of appeals is an intermediate court, created by an act approved April 6, 1891 (Sess. Laws Colo. 1891, 118), of which the following are sections:

"Section 1. No writ of error from, or appeal to, the supreme court shall lie to review the final judgment of any inferior court, unless the judgment, or in replevin the value found, exceeds two thousand five hundred dollars, exclusive of costs. *Provided*, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the state or of the United States is necessary to the determination of a case. *Provided, further*, that the foregoing limitation shall not apply to writs of error to county courts."

"Sec. 4. That the said court shall have jurisdiction:

"First. To review the final judgments of inferior courts of record in all civil cases and in all criminal cases not capital.

"Second. It shall have final jurisdiction, subject to the limitations stated in subdivision 3 of this section, where the judgment, or in replevin the value found, is two thousand five hundred dollars, or less, exclusive of costs.

*"Third. It shall have jurisdiction, not [120]
final, in cases where the controversy involves a franchise or freehold, or where the construction of a provision of the Constitution of the state, or of the United States, is necessary to the decision of the case; also, in criminal cases, or upon writs of error to the judgments of county courts. Writs of error from, or appeals to, the court of appeals shall lie to review final judgments, within the same time and in the same manner as is now or may hereafter be provided by law for such reviews by the supreme court."

The supreme court of Colorado has held in respect of its jurisdiction under these sections, that whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error from that court will lie; that "it matters but little how such question is raised, whether by the pleadings, by objections to evidence, or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it;" but "it must fairly appear from an examination of the record that a decision of such question is necessary, and also that the question raised is fairly debatable (*Trimble* v. *People*, 19 Colo. 187); and also that "when it appears by the record that a case might well have been disposed of without construing a constitutional provision, a construction of such provision is not so necessary to a determination of the case as to give this court jurisdiction to review upon that ground" (*Arapahoe County Comrs.* v. [*McIntire*] *State Board of Equalization*, 23 Colo. 137); and, again, that "unless a constitutional question is fairly debatable, and has been properly raised, and is necessary to the determination of the particular controversy, appellate jurisdiction upon that ground does not exist." *Madden* v. *Day*, 24 Colo. 418.

This record discloses that defendant insisted throughout the trial that the acts of Congress relied on by plaintiffs were unconstitutional if construed as authorizing the particular regulations issued by the Secretary.

When plaintiffs offered the rules and regulations in evidence, which they contended defendant had violated, defendant *objected to [121]
their admission on the two grounds that they were not authorized by the acts of Congress, and that, if they were, such acts were unconstitutional. The objection was overruled and defendant excepted.

The regulations having been introduced in evidence, plaintiffs called as a witness, among others, a special agent of the Department of Agriculture, who was questioned in respect of their violation, to which defendant objected and excepted on the same grounds.

At the conclusion of plaintiffs' case, a motion for nonsuit was made by defendant, the unconstitutionality of the acts under which the regulations were made being again urged, and an exception taken to the denial of the motion.

The trial then proceeded, and, at its close, defendant requested the court to give this instruction: "The court instructs the jury

that the act of Congress and the rules and regulations made under the same which the plaintiffs allege to have been violated, are not authorized by the Constitution of the United States, and are not valid subsisting laws or rules and regulations with which the defendant is bound to comply, and any violation of the same would not, of itself, be an act of negligence, and you are not to consider a violation of the same as an act of negligence in itself in arriving at a verdict in this case."

This instruction was objected to and was not given, though no exception appears to have been thereupon preserved.

On behalf of plaintiffs the court was asked to instruct the jury as follows:

"If the jury are satisfied from the evidence that the defendant company failed to comply with paragraph two of the rules and regulations of the United States Department of Agriculture of April 23, 1891, and that the defendant company did not put its cattle in pens or on trails or ranges that were to be occupied or crossed by the plaintiffs' cattle going to eastern markets before December, 1891, so that these two classes should not come in contact, then that constitutes negligence and want of reasonable care on the part of the defendant, and you need not look to any other evidence to find that the defend-
[122] ant did *not use reasonable care in this case, and that the defendant was guilty of negligence."

This was refused by the court and plaintiffs excepted. But the court charged the jury that the rule promulgated by the Secretary of Agriculture "would have the effect to give to this defendant notice that the United States authorities having in charge the animal industries, so far as the government of the United States may control it, were of the opinion that it was unsafe to ship cattle from Kimble county at the period of the year into Colorado and graze them upon lands that were being occupied by other cattle intended for the eastern market, or to allow them to commingle with them." To this modification of the instruction requested plaintiffs saved no specific exception.

After the affirmance of the judgment by the court of appeals, plaintiffs filed a petition for a rehearing, the eighth specification of which was that—

"This court erred in holding and deciding that the rules and regulations promulgated by the Secretary of Agriculture on April 23, 1891, as shown by the record herein, were not applicable to the herd of cattle which the defendant in error imported into Colorado in June, 1891, as shown by the record herein, for the reason, as this court held, that after said cattle were domiciled in Colorado their management must be regulated by the state laws, and not by the act of Congress, and that the disposition of said cattle afterwards was not within the scope of Federal authority."

It thus appears that if the trial court and the court of appeals had been of opinion that the Secretary's rules and regulations were within the terms of the authority conferred by the statutes, and that noncompliance therewith would have constituted negligence *per se*, those courts would have been necessarily compelled to pass upon the constitutionality of the acts, which question was sharply presented by defendant. And it is also obvious that if the supreme court had been applied to and granted a writ of error, and that court had differed with the conclusions of the court of appeals, arrived at apart from constitutional objections, the validity of the acts and regulations would have been considered.

*The court of appeals seems to have been of [123]
opinion that after the cattle arrived in Colorado, Congress had no power to regulate their disposition, and hence that the regulations were not binding. And the question of power involved the construction of a provision of the Constitution of the United States. At the same time its judgment may fairly be said to have rested on the view that the statutes did not assert the authority of the United States, but conceded that of the state, in this regard; and that the regulations were not within the terms of the statutes. But, if the case had reached the supreme court, that tribunal might have ruled that the judgment could not be sustained on these grounds, and then have considered the grave constitutional question thereupon arising.

And although the supreme court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.

We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the state, and, this being so, the writ of error cannot be sustained. *Fisher* v. *Perkins* 122 U. S. 522 [30: 1192].

Writ of error dismissed.

HENRIETTA MINING & MILLING COMPANY, *Appt.*,
v.
JAMES I. GARDNER.

(See S. C. Reporter's ed. 123-130.)

Arizona law as to attachment—time of issuing attachment—construction of statute.

1. The right to issue an attachment "at the commencement of the suit, or at any time during its progress," as given by Ariz. Rev. Stat. 1887, tit. 4, chap. 1, ¶ 42, is taken away by the provision of the act of March 6, 1891, authorizing attachment at the issuance of summons, or at any time afterward.

2. An attachment issued before the issuance of a summons is void under Ariz. Rev. Stat. 1887, ¶ 40, as amended by the act of March 6, 1891, allowing attachment "at the time of issuing the summons, or at any time afterward."

8. A statute taken from another state will be presumed to be taken with the meaning it had there.

[No. 140.]

Argued January 16, 1899. Decided February 20, 1899.

ON APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming a judgment of the District Court of the Fourth Judicial District in and for Yavapai County, in said Territory, in favor of James I. Gardner, appellee, against the Henrietta Mining & Milling Company, in an action in which an attachment was issued and property sold upon the judgment. *Reversed*, and cause remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Frank Asbury Johnson** and *William H. Barnes* for appellant.

Messrs. **S. M. Stockslager** and *George C. Heard* for appellee.

[124] *Mr. Justice **McKenna** delivered the opinion of the court:

This is an appeal from a judgment of the supreme court of the territory of Arizona, affirming a judgment of the district court of the fourth judicial district in and for Yavapai county, for $12,332.08 in favor of appellee and against appellant, who was plaintiff in error below. The action was upon an open account and a large number of assigned accounts. An attachment was sued out and the mines and mining property of appellant company were seized. Judgment was rendered by default, and the property attached ordered sold.

The judgment is attacked on two grounds: (1) That there was no personal service on appellant; (2) that the attachment was void because the writ was issued before the issuance of summons.

It is conceded that the appellant is an Illinois corporation, and that there was no personal service upon it. Was the attachment issued in accordance with the statutes of Arizona? If it was not, the judgment must be reversed. *Pennoyer* v. *Neff*, 95 U. S. 714 [24:565].

The record shows that the complaint was filed December 4, 1894; that on the 24th of that month affidavit and bond for attachment were filed and the writ was issued. The return shows the seizure of the property on the 26th of December, the day summons was issued.

[125] *The Revised Statutes of Arizona of 1887, chapter 1 of title 4, provided for attachments and garnishments as follows:

"40 (Sec. 1). The judges and clerks of the district courts and justices of the peace may issue writs of original attachment returnable to their respective courts, upon the plaintiff, his agent, or attorney, making an affidavit in writing, stating one or more of the following grounds:

"1. That the defendant is justly indebted to the plaintiff, and the amount of the demand; and,

"2. That the defendant is not a resident of the territory, or is a foreign corporation, or is acting as such; or,

"3. That he is about to remove permanently out of the territory, and has refused to pay or secure the debt due the plaintiff; or,

"4. That he secretes himself, so that the ordinary process of law cannot be served on him; or,

"5. That he has secreted his property, for the purpose of defrauding his creditors; or,

"6. That he is about to secrete his property for the purpose of defrauding his creditors; or,

"7. That he is about to remove his property out of the territory, without leaving sufficient remaining for the payment of his debts; or,

"8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or,

"9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or,

"10. That he is about to dispose of his property with intent to defraud his creditors; or,

"11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

"12. That the debt is due for property obtained under false pretenses.

"41 (Sec. 2). The affidavit shall further state:

"1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and,

*"2. That the plaintiff will probably lose [126]
his debt unless such attachment is issued.

"42 (Sec. 3). No such attachment shall issue until the suit has been duly instituted, but it may be issued in a proper case either at the commencement of the suit or at any time during its progress.

"43 (Sec. 4). The writ of attachment above provided for may issue, although the plaintiff's debt or demand be not due, and the same proceeding shall be had thereon as in other cases, except that no final judgment shall be rendered against the defendant until such debt or demand shall become due."

Paragraph 649 provides that "all civil suits in courts of record shall be commenced by complaint filed in the office of the clerk of such court." Therefore, if paragraph 42 (section 3) was in force at the time the writ of attachment was issued, to wit, on the 24th of December, 1894, there is no doubt of the validity of the writ. But it is contended that the paragraph was not in force, because, it is claimed, it had been repealed by an act passed by the legislative assembly of the territory, approved March 6, 1891.

This act is entitled "An Act to Amend Chapter 1, Title 4, Entitled 'Attachments and Garnishments.'" Revised Statutes of Arizona, 1887. Section 1 is as follows:

"Sec. 1. Paragraph 40, being section 1, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"The plaintiff at the time of issuing the

summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as in this act provided in the following cases:

"First. In an action upon a contract, express or implied, for the direct payment of money where the contract is made or is payable in this territory, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

"Second. When any suit be pending for [127] damages, and the *defendant is about to dispose of or remove his property beyond the jurisdiction of the court in which the action is pending, for the purpose of defeating the collection of the judgment.

"Third. In an action upon a contract, express or implied, against the defendant not residing in this territory or a foreign corporation doing business in this territory.

"Sec. 2. Paragraph 41, being section 2, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

"Section 2. The clerk of the court or justice of the peace must issue the writ of attachment upon receiving an affidavit by or on behalf of plaintiff, showing—

"First. That the defendant is indebted to the plaintiff upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this territory, and that the payment of the same has not been secured as provided in section 1 of this act, and shall specify the character of the indebtedness, that the same is due to plaintiff over and above all legal set-offs or counterclaims, and that demand has been made for the payment of the amount due; or,

"Second. That the defendant is indebted to the plaintiff, stating the amount and character of the debt; that the same is due over and above all legal set-offs and counterclaims; and that the defendant is a nonresident of this territory or is a foreign corporation doing business in this territory; or,

"Third. That an action is pending between the parties, and that defendant is about to remove his property beyond the jurisdiction of the court to avoid payment of the judgment: and,

"Fourth. That the attachment is not sought for wrongful or malicious purpose, and the action is not prosecuted to hinder or delay any creditor of the defendant.

"Sec. 3. Paragraph 43, being section 4, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby repealed.

"Sec. 4. Paragraph 47, being section 8, chapter 1, title 4, Revised Statutes of Ari- [128] zona, 1887, is hereby amended by *striking out the word 'original' where it occurs in the first line of said section.

"Sec. 5. Paragraph 50, being section 11, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by striking out the word 'repleviable' where it occurs in line five of said section.

"Sec. 6. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

"Approved March 6, 1891."

The amending act is more than a revision of the provisions of the statute of 1887; it is a substitute for them. It, however, does not expressly repeal paragraph 42. Does it do so by implication? Expressing the rule of repeal by implication, Mr. Justice Strong, in *Henderson's Tobacco*, 11 Wall. 657 [20: 238], said:

"Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In *United States* v. *Tynen*, 11 Wall. 92 [20: 154], it was said by Mr. Justice Field, that 'when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' For this several authorities were cited, some of which have been cited on the present argument. This is undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new *provisions, is plainly intended as a sub- [129]
stitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed."

May paragraph 40, as amended, subsist with paragraph 42? Certainly not, if the former prescribes the time when the writ of attachment may be issued, and not the time when it may be levied. Its identical language was section 120 of the practice act of California, and was continued as 537 of the Code of Civil Procedure of said state, and was such at the time the act of 1891 of Arizona was passed. When part of the practice act, it was construed by the supreme court of California in the case of *Low* v. *Henry*, 9 Cal. 538. Mr. Justice Burnett, speaking for the court, said:

"The twenty-second section of the practice act provides that a suit shall be commenced by the filing of a complaint and the issuance of a summons; and the one hundred and twentieth section allows the plaintiff, 'at the time of issuing the summons, or at any time afterwards,' to have the property of the defendants attached. These provisions must be strictly followed, and the attachment, if issued before the summons, is a nullity. *Ex parte Cohen*, 6 Cal. 318. The issuance of the

summons afterwards cannot cure that which was void from the beginning:"

Counsel for appellee, however, urges that this decision is explained by the fact that by the California laws a suit was commenced by *filing a complaint* and the *issuance* of a *summons*, and that the decision of the court was that the attachment having been issued before summons was issued, it was issued before the commencement of suit, and hence was void on that ground. We think not. "To have the property of the defendant attached" was construed to mean the issuance of the attachment, and it was held to be a nullity if done before the summons was issued. If, however, ambiguity could arise under the practice act and the Code of Civil Procedure as originally passed, it could not arise after the Code was amended in 1874, and as it existed at the time of the Arizona enactment of 1891. At that time the issu-
[130]ance of summons *was not the commencement of the action. The amendment of 1874 (Amendment of the Codes 1873–4, 296) provided that "civil actions in the courts of the state are commenced by filing a complaint," (section 405) and summons may be issued at any time within one year thereafter (section 406). Section 537, which provided for the issuance of an attachment and which was adopted by the Arizona statute, was not changed. Notwithstanding the amendment of 1874, we have been cited to no case reversing or modifying *Low* v. *Henry*, nor is it claimed that the practice did not continue in accordance with the ruling in that case. Indeed, how could there be change? The provisions of the Code did not need further interpretation. The procedure was clearly defined. An action was commenced by filing a complaint. Within a year summons might be issued, and when issued the plaintiff might have the property of the defendant attached, that is, have an attachment issued

The language of paragraph 40, as amended in 1891, having been taken from the California Code, it is presumed that it was taken with the meaning it had there, and hence we hold it worked a repeal of paragraph 42 of the Revised Statutes of Arizona of 1887; and *the judgment of the Supreme Court of the Territory is reversed* and the cause remanded for further proceedings in accordance with this opinion.

---

[131]T. B. MERRILL, as Receiver of the First National Bank of Palatka, Florida, *Appt.*,

v.

NATIONAL BANK OF JACKSONVILLE.

T. B. MERRILL, as Receiver of the First National Bank of Palatka, Florida, *Appt.*,

v.

NATIONAL BANK OF JACKSONVILLE.

(See S. C. Reporter's ed. 131–179.)

Decree, when final—right to appeal—jurisdiction of equity—secured creditor of insolvent national bank—basis of dividends—bankruptcy rule.

1. A decree of the circuit court of appeals reversing a decree of the circuit court, with specific directions to enter a decree in accordance with the mandate, is final for the purposes of an appeal to this court.
2. The entry of a decree by the circuit court in conformity with a mandate of the circuit court of appeals, after reversal, with specific directions, does not cut off the right to an appeal not yet prosecuted from the decree of reversal.
3. A controversy as to the basis on which dividends should be declared by a receiver of a national bank, which involves the enforcement of the administration of the trust, is within the jurisdiction of equity.
4. A secured creditor of an insolvent national bank is not estopped from claiming the right to prove his full claim, by temporarily submitting to an adverse ruling of the comptroller, when other creditors have not been harmed thereby.
5. A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full.
6. The bankruptcy rule which requires the holder of collateral security to exhaust it and credit the proceeds on his claim, or else to surrender it, before he can prove his claim, is not adopted for national banks by U. S. Rev. Stat. § 5236, providing for a ratable dividend on claims proved or adjudicated.

[Nos. 54 and 55.]

Argued October 20, 21, 1898. Decided February 20, 1899.

APPEALS from decrees of the United States Circuit Court of Appeals for the Fifth Circuit in a suit by the National Bank of Jacksonville against T. B. Merrill, as receiver of the First National Bank of Palatka, Florida, one decree reversing the decree of the Circuit Court of the United States, for the Southern District of Florida, and remanding the case with directions to enter a decree that the Jacksonville Bank was entitled to prove its claims to the entire amount of the indebtedness to it of the Palatka Bank, etc.; and the other decree dismissing an appeal taken by the receiver of the Palatka Bank. Decree of the Circuit Court of Appeals, first mentioned, *affirmed;* and decree of the Circuit Court entered in pursuance of the mandate of the Court of Appeals, also *affirmed.*

See same case below, 41 U. S. App. 529, and 645.

Statement by Mr. Chief Justice **Fuller:**

On the 17th day of July, A. D. 1891, the First National Bank of Palatka, Florida, a banking association incorporated under the laws of the United States, having its place of business at Palatka, Florida, failed and closed its doors. Subsequently T. B. Merrill was duly appointed receiver of the bank

by the Comptroller of the Currency, and entered upon the discharge of his duties. At the time of the failure of the bank, it was indebted to the National Bank of Jacksonville in the sum of $6,010.47, on sundry drafts, which indebtedness was unsecured; and also in the sum of $10,093.34, being $10,000, and interest, for money borrowed June 5, 1891, evidenced by a certificate of deposit, which was secured by sundry notes belonging to the First National Bank of Palatka, attached to the certificate as collateral. These notes aggregated $10,896.22, the largest being a note of A. L. Hart for
[132]$5,350.22. The *National Bank of Jacksonville proved its claim upon the unsecured drafts for $6,010.47, and as to this there was no controversy. It also offered to prove its claim for $10,093.34, but the receiver would not permit it to do this, and, under the ruling of the Comptroller of the Currency, it was ordered first to exhaust the collaterals given to secure the certificate of deposit, and then to prove for the balance due after applying the proceeds of the collaterals in part payment.

The Jacksonville Bank collected all the notes excepting that of A. L. Hart, obtained a judgment on the latter, which it assigned and transferred to the receiver, applied the proceeds of the collaterals which it had collected to its claim on the certificate, and proved for the balance due thereon, being the sum of $4,496.44. On December 1, 1892, a dividend of $1,573.75 was paid on the claim as thus proved and on May 17, 1893, a second dividend of $449.64 was paid.

On the 11th of September, 1894, the Jacksonville Bank filed its bill of complaint in the Circuit Court of the United States for the Southern District of Florida against Merrill as receiver, which set forth the foregoing facts, complained of the action of the receiver in not permitting proof for the full amount of the certificate of deposit, and alleged that it "gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, —to wit, that it would demand a *pro rata* dividend upon $16,103.81, and interest thereon from the 17th day of July, A. D. 1891."

The prayer of the bill was, among other things, for a *pro rata* distribution on the entire amount of the indebtedness.

The defendant demurred to the bill, and, the demurrer having been overruled, answered, denying "that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security;" and averring, to the contrary, that "the complainant accepted the said ruling of the said Comptroller without demur, and accepted from the said Comptroller, through this defendant, without protesting notice of any kind, the checks of the
[133]said Comptroller *in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the Comptroller and would demand payment upon a different basis."

Sundry exceptions were taken to the answer, which were overruled, and the cause was set down for final hearing on bill and answer.

The circuit court entered its decree, January 29, 1896, that complainant was entitled to receive dividends on the whole face of the indebtedness due July 17, 1891, less the dividends actually paid to it; that the receiver declare the dividend on the basis of the whole claim, and pay it out of any assets which were in his hands March 15, 1894; and that he render an account.

From this decree the receiver prosecuted an appeal to the circuit court of appeals for the fifth circuit. That court, differing from the circuit court as to the form of its decree, reversed it and remanded the cause, with directions to enter a decree that the Jacksonville Bank was entitled to prove its claims to the entire amount of the indebtedness, and to the payment thereon of the same dividends as had been paid on other indebtedness of the Palatka Bank, with interest on such dividends from the date of the declaration thereof, less a credit of the sums which had been paid as dividends on the part of the claim theretofore allowed, provided the dividends theretofore paid and thereafter to be paid on the sum of $10,093.34, together with the amounts theretofore and thereafter received on the collaterals securing that indebtedness, should not exceed one hundred cents on the dollar of the principal and interest of said debt; that the receiver recognize the Jacksonville Bank as creditor of the Palatka Bank in said sum of $10,093.34 as of July 17, 1891, and pay dividends as aforesaid thereon, or certify the same to the Comptroller of the Currency, to be paid in due course of administration; and that the Jacksonville Bank receive, before further payment to other creditors, its due proportion of the dividends as thus declared, with interest. 41 U. S. App. 529. From that decree, *after the mandate of the circuit court [134]
of appeals had been sent down to the circuit court, and proceedings had thereunder, an appeal was taken and perfected to this court, and is numbered 54 of this term.

The decree was entered by the circuit court in pursuance of the mandate of the circuit court of appeals, July 27, 1896, and the receiver prayed an appeal therefrom to the circuit court of appeals, which was by that court dismissed on motion of the Jacksonville Bank. 41 U. S. App. 645. From this decree of dismissal, an appeal was allowed and perfected to this court, and is numbered 55 of this term.

These appeals were argued together.

Messrs. **Edward Winslow Paige** and **Francis F. Oldham** for appellant.

Messrs. **William Worthington,** *George H. Yeaman,* and *J. C. Cooper* for appellee.

*Mr. Chief Justice **Fuller** delivered the [134]
opinion of the court:

The circuit court of appeals reversed the decree of the circuit court, with specific di-

rections. Nothing remained for the circuit court to do except to enter a decree in accordance with the mandate, and, for the purposes of an appeal to this court, the decree of the circuit court of appeals was final. The mandate went down and the circuit court entered its decree in strict conformity therewith before the appeal in No. 54 was prosecuted to this court. This promptness of action did not, however, cut off that appeal, and any difficulty in our dealing with the cause in the circuit court was obviated by the second appeal, which brings before us in No. 55 the record subsequent to the first decree of the circuit court of appeals.

It is contended that the bill should have been dismissed because of adequate remedy
[135] at law, and on the ground of *laches and estoppel. As the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, we have no doubt of the jurisdiction in equity.

Nor was the lapse of time such as to raise any presumption of laches, nor could an estoppel properly be held to have arisen. Less than two years had elapsed from the payment of the first dividend to the filing of the bill, and the other creditors of the insolvent bank had not been harmed by the temporary submission of complainant to the ruling of the Comptroller. The decree affected only assets on hand or such as might be subsequently discovered; and if the other creditors had no rights superior to that of complainant, they lost nothing by the reduction of their dividends, if any, afterwards declared to be paid out of such assets.

The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized the claim has been paid in full.

Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:

"Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the proceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

"Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

[136] *"Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

"Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

The circuit court and the circuit court of appeals held the fourth rule applicable, and decreed accordingly.

This was in accordance with the decision of the circuit court of appeals for the sixth circuit, in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs.

In *Kellock's Case*, L. R. 3 Ch. 769, it was held that *the creditor's interest in the gen- [137]
eral fund to be distributed vested at the date of presenting or proving his claim; and this rule has been followed in many jurisdictions where statutory provisions have been construed to require an affirmative election to become a beneficiary thereunder. For instance, the cases in Illinois construing the assignment act of that state, which are well considered and full to the point, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim with the assignee." *Levy* v. *Chicago National Bank*, 158 Ill. 88 [30 L. R. A. 330]; *Furness* v. *Union National Bank*, 147 Ill. 570.

On the other hand, the supreme court of Pennsylvania in *Miller's Appeal*, 35 Pa. 481, and many subsequent cases, has held, necessarily in view of the statutes of Pennsylvania regulating the matter, that the interest vests at the time of the transfer of the assets in trust. In that case the debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became en-

titled to a legacy which was attached by a creditor, who realized therefrom $2,402.87. It was held that such creditor was, notwithstanding, entitled to a dividend out of the assigned estate on the full amount of his claim at the time of the execution of the assignment. Mr. Justice Strong, then a member of the state tribunal, said: "By the deed of assignment the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the $2,402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a
[138] distributive share of *the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust and after his ownership had become vested, it would seem, must be immaterial."

Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by the statute, or deed of trust, or rule of law, under which they are to be administered.

The first rule is commonly known as the bankruptcy rule, because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other, but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story, Eq. Jur. (13th ed.) § 633; *Re Bates*, 118 Ill. 524 [59 Am. Rep. 383]. And it is well established that in marshalling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. Leading Cases in Equity, White & Tudor, vol. 2, pt. 1, 4th Am. ed. pp. 258, 322.

*In *Greenwood* v. *Taylor*, 1 Russ. & M. 185, [139]
Sir John Leach applied the bankruptcy rule in the administration of a decedent's estate, and remarked that the rule was "not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets;" and referred to the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. But *Greenwood* v. *Taylor* was in effect overruled by Lord Cottenham in *Mason* v. *Bogg*, 2 Myl. & C. 443, 488, and expressly so by the court of appeal in chancery in *Kellock's Case;* and the application of the bankruptcy rule rejected.

In *Kellock's Case*, Lord Justice W. Page Wood, soon afterwards Lord Chancellor Hatherly, said:

"Now, in the case of proceedings with reference to the administration of the estates of deceased persons, Lord Cottenham put the point very clearly, and said: 'A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see.'

"Mr. De Gex, who argued this case very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that where a mortgagor is insolvent the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand?

"It was strongly pressed upon us, and the argument succeeded before Sir J. Leach in *Greenwood* v. *Taylor*, that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is, that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property *of traders unable to meet [140]
their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the court of chancery. . . . We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

And it was the established rule in England prior to the judicature act, 38 & 39 Vict. chap. 77, that in an administration suit a

mortgagee might prove his whole debt and afterwards realize his security for the difference; and so as to creditors with security, where a company was being wound up under the companies act of 1862. 1 Daniel, Ch. Pr. 384; *Re Withernsea Brickworks,* L. R. 16 Ch. Div. 337.

Certainly the giving of collateral does not operate of itself as a payment or satisfaction, either of the debt or any part of it, and the debtor who has given collateral security remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis* v. *United States,* 92 U. S. 623 [23: 515], it was ruled that "it is a settled principle of equity that a creditor holding collaterals is not bound to apply theme before enforcing his direct remedies against the debtor."

Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment; but as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

As Judge Taft points out, it is because of
[141] the distinction *between the right *in personam* and the right *in rem* that interest is only added up to the date of insolvency, although, after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets, or so much of his dividends as are unnecessary to pay him, must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York court of appeals in *People* v. *Remington,* 121 N. Y. 328 [8 L. R. A. 458], "unchanged although insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement." The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part; and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken.

We cannot concur in the view expressed by Chief Justice Parker in *Amory* v. *Francis,* 16 Mass. 308 (1820), that "the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken."

We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources, as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

The ruling in *Amory* v. *Francis* was disapproved shortly *after it was made, by the [142]
supreme court of New Hampshire in *Moses* v. *Ranlet,* 2 N. H. 488 (1822), Woodbury, J., afterwards Mr. Justice Woodbury of this court, delivering the opinion, and is rejected by the preponderance of decisions in this country, which sustain the conclusion that a creditor with collateral is not on that account to be deprived of the right to prove for his full claim against an insolvent estate. Many of the cases are referred to in *Chemical Nat. Bank* v. *Armstrong,* and these and others given in the Encyclopedia of Law and Eq. 2d ed. vol. 3, p. 141.

Does the legislation in respect to the administration of national banks require the application of the bankruptcy rule? If not, we are of opinion that the equity rule was properly applied in this case.

By section 5234 of the Revised Statutes, and section 1 of the act of June 30, 1876, chap. 156 (19 Stat. at L. 63), the Comptroller of the Currency is authorized to appoint a receiver to close up the affairs of a national banking association when it has failed to redeem its circulation notes when presented for payment, or has been dissolved and its charter forfeited, or has allowed a judgment to remain against it unpaid for thirty days, or whenever the Comptroller shall have become satisfied of its insolvency after examining its affairs. Such receiver is to take possession of its effects, liquidate its assets, and pay the money derived therefrom to the Treasurer of the United States.

Section 5235 of the Revised Statutes requires the Comptroller, after appointing such receiver, to give notice by newspaper advertisement for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

By section 5242, transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by the chapter of which that section forms a part, or with a view to preferring any creditor except in payment of its circulating notes, are declared to be null and void.

*Section 5236 is as follows: [143]

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptrol-

ler shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

In *Cook County National Bank* v. *United States*, 107 U. S. 445 [27: 537], it was ruled that the statute furnishes a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved and was not decided, but the case is in harmony with *First National Bank* v. *Colby*, 21 Wall. 609 [22:687], and *Scott* v. *Armstrong*, 146 U. S. 499 [36: 1059], which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by section 5242, are preserved; and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be "ratable" on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be "ratable" the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White* v. *Knox*, 111 U. S. 784 [28: 603]. In that case it appeared that the Miners' National Bank had been put in the hands of a receiver by the Comptroller of the Currency, December 20, 1875. White presented a claim for $60,000, which the Comptroller refused to allow. White then brought suit to have his claim adjudicated, and on June 23, 1883, recovered
[144] judgment for $104,523.72, being *the amount of his claim with interest to the date of the judgment. Meanwhile the Comptroller had paid the other creditors ratable dividends, aggregating sixty-five per cent of the amounts due them, respectively, as of the date when the bank failed. When White's claim was adjudicated, the Comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him sixty-five per cent on that amount. White admitted that he had received all that was due him on the basis of distribution assumed by the Comptroller, but claimed that he was entitled to have his dividends calculated on the face of the judgment, which would give him several thousand dollars more than he had received, and he applied for a mandamus to compel the payment to him of the additional sum. The writ was refused by the court below, and its judgment was affirmed. Mr. Chief Justice Waite, speaking for the court, said: "Dividends are to be paid to all creditors, ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment. . . . The business of the bank must stop when insolvency is declared. Rev. Stat. § 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

In *Scott* v. *Armstrong*, 146 U. S. 499 [36: 1059], it was argued that the ordinary equity rule of set-off in case of insolvency did not apply to insolvent national banks in view of sections 5234, 5236, and 5242 of the Revised Statutes. It was urged "that these sections by implication forbid this set-off because they require that, after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered, *in contemplation of or after com- [145]
mitting the act of insolvency, shall stand;" and "that the assets of the bank existing at the time of the act of insolvency include all its property without regard to any existing liens thereon or set-offs thereto." But this court said: "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges, or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank; and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

The set-off took effect as of the date of the declaration of insolvency, but outstanding collaterals are not payment, and the statute does not make their surrender a condition to the receipt by the creditor of his share in the assets.

The rule in bankruptcy went upon the principle of election; that is to say, the se-

cured creditor "was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the court of bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy his demand; but if he neglected to do this,
[146]and proved for his whole debt, he *was bound to give up his security." Robson, Law, Bank. 336. But it was only under bankrupt laws that such election could be compelled. *Tayloe* v. *Thompson,* 5 Pet. 358, 396 [8: 154, 158].

And we are unable to accept the suggestion that compulsion under those laws was the result merely of the provision for ratable distribution, which only operated to prevent preferences and to make all kinds of estates, both real and personal, assets for the payment of debts, and to put specialty and simple-contract creditors on the same footing, and so gave to all creditors the right to come upon the common fund. Equality between them was equity, but that was not inconsistent with the common-law rule awarding to diligence, prior to insolvency, its appropriate reward; or with conceding the validity of prior contract rights.

We repeat that it appears to us that the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.

Whatever Congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks. Yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do, unless required by statute at the time the indebtedness was created.

[147] *The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any of such creditors, and ought not to be construed as having, or being intended to have, such a result.

Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities, cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited.

The case was rightly decided by the circuit court of appeals; its decree in No. 54 is affirmed; and the decree of the circuit court, entered July 27, 1896, in pursuance of the mandate of that court, is also affirmed.

Remanded accordingly.

Mr. Justice **White,** with whom concurred Mr. Justice **Harlan** and Mr. Justice **McKenna,** dissenting:

The court now decides: 1st. That on the failure of a national bank a creditor thereof whose debt is secured by pledge is entitled to be recognized and classed by the Comptroller of the Currency to the full amount of his debt, without in any way taking into account the collaterals by which the debt is secured, and on the amount so recognized he is entitled to be paid out of the general assets the sum of any dividend which may be declared. 2d. That this right to be classed for the full amount of the debt, without regard to the value of the collaterals, is fixed by the date of the insolvency and continues to the final distribution, whatever may be the change in the debt thereafter brought about by the realization of the securities, provided only that the sums received by the creditor by way of dividends and from the amount collected *from the collaterals do not [148]
exceed the entire debt and therefore extinguish it.

I am constrained to dissent from these propositions, because, in my opinion, their enforcement will produce inequality among creditors and operate injustice, and, as a necessary consequence, are inconsistent with the national banking act.

It cannot be doubted that the acts of Congress, which regulate the collection and distribution of the assets of an insolvent national bank, are controlling. It is clear that every creditor who contracts with such bank does so subject to the provisions directing the manner of distributing the assets of such bank in case of its insolvency, and therefore that the terms of the act enter into and form part of every contract which such bank may make. Now, the act of Congress makes it the duty of the receiver appointed by the Comptroller to liquidate the affairs of a failed national bank, to take possession of and realize its assets (Rev. Stat. § 5234), to call, by advertisement for ninety days, upon creditors to present and make legal proof of their claims (Rev. Stat. § 5235), and from the proceeds of the assets the Comptroller is directed to make a "ratable dividend" on the recognized claims (Rev. Stat. § 5236). To prevent preferences the law, moreover, directs that all contracts from which preferences may arise, made after the commission of an act of insolvency or in contemplation

thereof, "shall be utterly null and void." Rev. Stat. § 5242.

It seems to me superfluous to demonstrate that the rules now upheld, by which a creditor holding security is decided to be entitled to disregard the value of his security and take a dividend upon the whole amount of the debt from the general assets, violates the principle of equality and ratable distribution which the act of Congress establishes. Is it not evident that if one creditor is allowed to reap the whole benefit of his security, and at the same time take from the general assets a dividend, on his whole claim, as if he had no security, he thereby obtains an advantage over the other general creditors, and that he gets more than his ratable share of the general assets? Let me illus-
[149] trate the unavoidable *consequence of the doctrine now recognized. A loans a national bank $5,000, and takes as the evidence of such loan a note of the bank for the sum named, without security. The lender is thus a general or unsecured creditor for the sum of $5,000. B loans to the same bank $5,000, without security. He is applied to for a further loan, and agrees to loan another $5,000 on receiving collateral worth $5,000, and requires that a new note be executed for the amount of both loans, which recites that it is secured by the collateral in question. While theoretically, therefore, B is a secured creditor for $10,000, he practically has no security for $5,000 thereof. Insolvency supervenes. The general assets received by the Comptroller equal only fifty per cent of the claims. Now, under the rule which the court establishes, A on his unsecured claim of $5,000 collects a dividend of but $2,500, thereby losing $2,500; B, on the other hand, who proves $10,000, taking no account whatever of his collateral, realizes by way of dividends $5,000, and by collections on collaterals a similar amount, with the result that though as to $5,000 he was, in effect, an unsecured creditor, he loses nothing. B is thus in precisely as good a situation as though he had originally demanded and received from the borrowing bank collateral securities equal in value to the full amount loaned. It is thus apparent that the application of the rule would operate to enable B—who, I repeat virtually held no collateral security for $5,000 of the sums loaned—to be paid his entire debt, though the assets of the insolvent estate of the borrower paid but fifty cents on the dollar, while another creditor holding an unsecured claim for $5,000 fails to realize thereon more than $2,500. Is it not plain that this result is produced by practically a double payment to B, that is, by recognizing B as a preferred creditor in the specific property, of the value of $5,000, pledged to him, withdrawing that property from the general assets, and allowing B to solely appropriate it, yet permitting him, when the secured part of his debt is thus virtually satisfied, to *again assert* the same secured portion of the debt against other assets, by a claim upon the general fund in the hands of the receiver for the full amount
[150] *loaned? The consequence of the receipt of this extra sum upon account of the already fully secured portion of the original loan is that B is enabled to offset it against the deficient dividend on the unsecured portion of the debt, one equalling the other, thus closing the transaction without loss to him.

Let us suppose, also, the case of a creditor of a national bank, who recovers a judgment for $100,000 and levies the same upon real estate of the bank worth only $50.000. While the legal title and possession is still in the bank a receiver is appointed and takes possession of the real estate. Certainly it cannot be contended that this judgment-lien holder is not in equally as good a position as the holder of a mortgage lien or other collateral security. The doctrine of the court, however, if applied to the judgment-lien holder, would authorize him to demand that the receiver treat the real estate as not embraced in the general assets, and that the creditor be allowed to enforce his whole claim against the other assets irrespective of the value of the specific security acquired by his lien.

That the doctrine maintained by the court also tends to operate a discrimination as between secured creditors, in favor of the one holding collateral securities not susceptible of prompt realization, is, I think demonstrable. Thus, a secured creditor who takes collaterals maturing on the same day with the debt owing to himself, which collaterals consist of negotiable notes, the makers of which and indorsers upon which are pecuniarily responsible, finds the collaterals promptly paid when deposited for collection, and if his debtor should become insolvent the day after payment the creditor could only claim for the residue of the debt still unpaid. On the other hand, a creditor of the same debtor, the debt to whom matures at the same time as that owing the other creditor, and is secured by collaterals also due contemporaneously, has the collaterals protested for nonpayment, and when the debtor fails the collaterals have not been realized. While the first debtor who had received first-class collateral can collect dividends against the estate of his insolvent debtor only for the unpaid portion of the claim, losing a part of such residue by the inability of the *estate [151]
to pay in full, the debtor who received poor collateral collects dividends out of the general assets on his whole claim, and, if he eventually realizes on his securities, may come out of the transaction without the loss of one cent. These illustrations, to my mind, adequately portray the inequality and injustice which must arise from the application of the rules of distribution now sanctioned by the court.

The fallacies which, it strikes me, are involved in the two propositions sanctioned by the court, are these: First. The erroneous assumption that, although the act of Congress contemplates that the dividend should be declared out of the general assets after the secured creditors have withdrawn the amount of their security, it yet provides that the secured creditor who has withdrawn his security, and thus been *pro tanto* satisfied, can still assert his whole claim against the general assets, just as if he had no security and

had not been allowed to withdraw the same. Second. The mistaken assumption that the act confers upon the secured creditor a new and substantial right, enabling him to obtain, as a consequence of the failure of the bank, an advantage and preference which would not have existed in his favor had the failure not supervened. This arises from holding that the insolvency fixed the amount of the claim which the secured creditor may assert, as of the time of the insolvency; thereby enabling him to ignore any collections which he may have realized from his securities after the failure, and permitting him to assert as a claim, not the amount due at the time of the proof, but, by relation, the amount due at the date of the failure, the result being to cause the insolvency of the bank to relieve the creditor holding security from the obligation to impute any collections from his collateral to his debt, so as to reduce it by the extent of the collections,—a duty which would have rested on him if insolvency had not taken place. Third. By presupposing that because before failure a secured creditor had a legal right to ignore the collaterals held by him and resort for the whole debt, in the first instance, against the general estate of his debtor, that it would impair the obligation of the contract to require
[152] the secured creditor in case of insolvency *to take into account his collaterals and prevent him from asserting his whole claim, for the purpose of a dividend, against the general assets. But the preferential right arising from the contract of pledge is in nowise impaired by compelling the creditor to first exercise his preference against the security received from the debtor, and thus confine him to the specific advantage derived from his contract. Further, however, as the contract, construed in connection with the law governing it, restricts the secured as well as the unsecured creditor to a ratable dividend from the general assets, the secured creditor is prevented from enhancing the advantage obtained as a result of the contract for security, by proving his claim as if no security existed, since to allow him to so do would destroy the rule of ratable division, subject and subordinate to which the contract was made. A forcible statement of the true doctrine on the foregoing subject was expressed in the case of *Société Générale de Paris* v. *Geen*, L. R. 8 App. Cas. 606. The question before the court arose upon the construction to be given to a clause of the English bankrupt act of 1869, incidental to the requirement of a section, expressly embodied for the first time in a bankrupt act, that the secured creditor should in some form account for the collateral held by him in proving his claim against the general estate. In considering the restriction upon the remedy of a secured creditor produced by the insolvency, and the consequent right of such creditor to receive only a ratable dividend on the balance of the debt after the deduction of the value of the collaterals, Lord Fitzgerald said (p. 620):

"Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him, but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered,—the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy the bankrupt law endeavors to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right."

To resort, however, to reasoning for the purpose of endeavoring *to demonstrate that [153]
where a statute does not allow preferences in case of insolvency, and commands a ratable distribution of the assets, a secured creditor cannot be allowed to disregard the value of his security and prove for the whole debt, seems to me to be unnecessary, since that he cannot be permitted to so do, under the circumstances stated, has been the universal rule applied in bankruptcy in England and in this country from the beginning.

In the earliest English bankrupt act (34 & 35 Hen. VIII. chap. 4) the distribution of the general assets of the bankrupt was directed to be made, "for true satisfaction and payment of the said creditors; that is to say, to every of the said creditors, a portion rate and rate like, according to the quantity of their debts." In the statute of 13 Elizabeth, chap. 7 (and which was in force in this particular when the consolidated bankrupt statute of 6 Geo. IV. chap. 16, was adopted), the distribution of assets was directed in language similar to that just quoted from the statute of Henry VIII. Under these statutes, from the earliest times, it was held by the lord chancellors of England, having the supervision of the execution of the bankrupt statutes, that a secured creditor could not retain his collateral security and prove for his whole debt, but must have his security sold, and prove for the rest of the debt only. Lord Somers, in *Wiseman* v. *Carbonell* (1695) 1 Eq. Cas. Abr. 312, pl. 9; Lord Hardwicke, in *Howell, Petitioner* (1737) 7 Vin. Abr. 101, pl. 13, and in *Ex parte Grove*, (1747) 1 Atk. 105; Lord Thurlow, in *Ex parte Dickson* (1789) 2 Cox, Ch. Cas. 196, and in *Ex parte Coming* (1790) 2 Cox, Ch. Cas. 225; Cooke's Bankrupt Laws (1st ed. 1786) 114, and (4th ed. 1799) 119.

In 1794 (4 Bro. Ch. star paging 55) the prevailing practice with respect to a sale of a mortgage security was regulated by a general order formulated by Lord Chancellor Loughborough, wherein, among other things, it was provided that in case the proceeds of sale should be insufficient to pay and satisfy what should be found due upon the mortgage, "that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon, out of the bankrupt's estate or *effects, ratably and [154]
in proportion with the rest of the creditors seeking relief under the said commission," etc.

Concerning the practice in bankruptcy, Lord Chancellor Eldon, in 1813, in *Ex parte Smith*, 2 Rose, Bankr. Rep. 63, said:

"The practice has been long established in bankruptcy, not to suffer a creditor holding a security to prove unless he will give up

that security, or the value has been ascertained by the sale of it. The reason is obvious: Till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is. . . . It is, however, clearly within the discretion of the court to relax this rule, and cases may occur in which it would be for the benefit of the general creditors to relax it."

The first two bankrupt statutes enacted in this country (April 4, 1800, chap. 19, 2 Stat. at L. 19; August 19, 1841, chap. 9, 5 Stat. at L. 440) required a ratable distribution of the assets; and it was conceded in argument that the universal practice enforced under these acts was to require a creditor holding collateral security to deduct the amount of his security, and prove only for the residue of the debt. This court, speaking through Mr. Justice Story, in 1845, in *Re Christy* [*Ex parte City Bank*], 3 How. 314 [11: 613], declared that, under the act of 1841, "if creditors have a pledge or mortgage for their debt they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue."

As the universal rule and practice in bankruptcy in England and in this country, up to and including the bankrupt act of 1841, was solely the result of the statutory requirement that the assets should be ratably distributed among the general creditors, my mind fails to discern why the requirement for ratable distribution of the assets in the act for the liquidation of failed national banks should not have the same meaning and produce the same result as the substantially similar provisions had always meant and had always operated in England for hundreds of years, and in this country for many years, before the adoption by Congress of the act for the liquidation of national banks. Indeed, the fact that the requirement of ratable distribution had by a long course of
[155] practice *and judicial construction in England and in this country required the secured creditor to account for his security before proving against the general assets gives rise to the application of the elementary canon of construction that where words are used in a statute, which words at the time had a settled and well-understood meaning, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning.

The reasoning by which it is maintained that the requirement for ratable distribution should not be applied in the act providing for the liquidation of an insolvent national bank may be thus summed up: True it is, that universally in bankruptcy in England and in this country the rule was as above stated, but outside of bankruptcy a different practice prevailed in England, known as the chancery rule; and as the winding up of an insolvent national bank does not present a case of bankruptcy, its liquidation is governed by such chancery rule, and not by the bankruptcy rule. The bankruptcy rule, it is said, is commonly so called because enforced by bankruptcy courts in the exercise of their "peculiar" jurisdiction, and the courts which refuse to apply the rule generally declare that it arose from express provisions in bankrupt statutes requiring a creditor to surrender his collaterals or deduct for their value before proving against the estate.

Pretermitting for a moment an examination of this reasoning, it is to be remarked in passing that the argument, if sound, rests upon the hypothesis that all the bankruptcy laws from the beginning in England and in our own country, and the universal course of decision thereon and the practice thereunder, have worked out inequality and injustice by depriving a secured creditor of rights which, it is now asserted, belonged to him and which could have been exercised by him without producing inequality. This deduction follows, for it cannot be that if not to compel the creditor to deduct produces no inequality or injustice, then to compel him to do so would have precisely the same result. The two opposing and conflicting rules cannot both be enforced, and yet in each instance equality result. At best, then, the contention admits that by *the consensus of mankind not [156]
to compel the secured creditor to deduct the value of his collaterals before proving produces inequality, for of all statutes those relating to bankruptcy have most for their object an equal distribution of the assets of the insolvent among his creditors.

It is worthy also of notice, in passing, that the reasoning to which we have referred rests upon the assumption that the act of Congress providing for the liquidation of the affairs of a national bank and a distribution of the assets thereof among the creditors is not substantially a bankrupt statute. It certainly is a compulsory method provided by law for winding up the concerns of an insolvent bank, for preventing preferences, and for securing an equal and ratable division of the assets of the association among its creditors. And it assuredly can be safely assumed that Congress in adopting the rule of ratable distribution in the national banking act did not intend that the words embodying the rule should be so construed as to produce a result contrary to that which for hundreds of years had been recognized as necessarily implied by the employment of similar language. It may also, I submit, be likewise considered as certain that it was not intended, in using the words "ratable distribution" in the statute, to bring about an unequal instead of a ratable distribution of the general assets.

But, coming to the proposition itself, is there any foundation for the assertion that the rule or practice in bankruptcy requiring the secured creditor to account for his security was the result of something peculiar in the jurisdiction of bankruptcy courts, other than the requirement contained in bankruptcy statutes that the assets should be distributed ratably among creditors, and is there any merit in the contention that the rule was the consequence of an express provision in such laws imposing the obligation referred to on the secured creditor?

A careful examination of every bankrupt

statute in England, from the first statute of 34 & 35 Hen. VIII. chap. 4, down to and including the consolidated bankrupt act of 6 Geo. IV. chap. 16, fails to disclose any provi-
[157] sion sustaining the statement that *the rule in bankruptcy depended upon express statutory requirement, and, on the contrary, shows that it was simply a necessary outgrowth of the command of the statute that there should be an equal distribution of the bankrupt's assets.

I submit that not only an examination of the English statutes makes clear the truth of the foregoing, but that its correctness is placed beyond question by the statement of Lord Chancellor Eldon respecting proof in bankruptcy by a secured creditor, already adverted to, that "till his debt has been reduced by the proceeds of that sale" (that is, of the security), "it is impossible correctly to say what the actual amount of it is." And, as an authoritative declaration of the origin of the rule, the opinion of Vice Chancellor Malins, in *Ex parte Alliance Bank* (1868) L. R. 3 Ch., note at page 773, is in point. The Vice Chancellor said:

"This rule" (requiring a creditor to realize his security and prove for the balance of the debt only) "does not depend on any statutory enactment, but on a rule in bankruptcy, established irrespective of express statutory enactment, and under the statute of Elizabeth, which provides: 'Or otherwise to order the same (*i. e.* the assets) to be administered for the due satisfaction and payment of the said creditors, that is to say, for every of the said creditors a portion, rate and rate alike, according to the quantity of his and their debts.' "

Indeed, not only was the obligation of the secured creditor to account for his security derived from the provision as to ratable distribution, but from that provision also originated the equally well-settled rule causing interest to cease upon the issuance of the commission of bankruptcy. As early as 1743, Lord Hardwicke, in *Bromley* v. *Goodere*, 1 Atk. 75, in speaking of the suspension of interest by the effect of bankruptcy, said: "There is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors, that they may have a rate-like satisfaction, and is founded upon the equitable power given them by the act."

While, generally, the claim that the bankruptcy rule was the creature of an express
[158] provision of the bankruptcy acts, *other than the requirement as to a ratable distribution of assets, rests upon a mere statement to that effect without any reference to the specific text of the bankrupt act which it was assumed made such requirement, in one instance, in the brief of counsel in an early case in this country *(Findlay* v. *Hosmer*, (1817) 2 Conn. 350), the statement is made in a more specific form. A particular section of an English bankrupt statute is there referred to, as in effect expressly requiring a secured creditor to account for his collaterals in order to prove against the general assets. The statute thus referred to was section 9 of 21 James I. chapter 19. But an examination of the section relied on shows that it in no wise supports the assertion. The pertinent portion of the section reads as follows:

" . . . all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security for any more than a ratable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment, or other security."

The securities other than attachment referred to in this section were manifestly embraced in the class known at common law as "personal" security, as distinguished from "real" security or security upon property. Sweet's Dict. English Law, *verbo* Security. In other words, the effect of the section was but to forbid preferences in favor of creditors, which at law would have resulted from the particular form in which the debt was evidenced, and from which form a claim would *be raised to a higher ank than a sim- [159]
ple-contract debt. That this is the significance of the word "security" as used in this section is shown by the following excerpt from Cooke's treatise on Bankrupt Laws, published in 1786. At page 114 he says:

"The aim of the legislature in all the statutes concerning bankrupts being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally; nor will the nature of their demands make any difference, unless they have obtained actual execution, or taken some pledge or security before an act of bankruptcy committed. For when a creditor comes to prove his debt he is obliged to swear whether he has a security or not; and if he has, and insists upon proving, he must deliver it up for the benefit of his creditors, unless it be a joint security from the bankrupt and another person," etc.

The fact that the expression "security" contained in the section referred to had no reference to security on property is further demonstrated by the subsequent statute of 6 George IV. chap. 9, sec. 103, which re-enacted in an altered form the 9th section of the statute of James; for the re-enacted section, although it referred in broad terms to securities generally, yet especially excepted the case of a mortgage or pledge. The section is as follows:

"Sec. 103. And be it enacted, That no creditor having security for his debt, or having made any attachment in London, or any

other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy."

Is it pretended anywhere that after the re-enactment of section 9 of the statute of James I. found in section 103, chap. 9, 6 George IV., the obligation of a secured creditor to account for his collateral before he took a dividend out of the general assets ceased to exist? Certainly, there is no such
[160]*contention. If, however, that duty of the general creditor arose, not from the provision as to ratable distribution, but from the provisions of section 9 of the act of James as claimed, then necessarily such obligation on the part of the general creditor would have ceased immediately on the enactment of the statute of 6 George IV., which expressly excepted the mortgage creditor from the operation of the particular section which, it is contended, imposed the duty on the mortgage creditor to account. The continued enforcement of the rule which required the mortgage creditor to deduct the value of his security before proving against general assets, after the re-enactment of section 9 of the statute of George referred to, can lead to but one conclusion; that is, that the duty of the mortgage creditor before existing arose from the provision for ratable distribution, and not from the terms of section 9 of the statute of James, since that duty continued to be compelled after the re-enactment of that section in terms, which renders it impossible to contend that that section created the duty.

A similar course of reasoning applies to bankrupt statutes of this country.

Section 31 of our first bankrupt statute (chap. 19, act April 4, 1800, 2 Stat. at L. 30) was, in substance and effect, similar to the provision in the act of James. The statute of 1800 is said to have been a consolidation of the provisions of previous English bankrupt statutes (*Tucker* v. *Oxley*, 5 Cranch, 34, 42 [3: 29, 31]; *Roosevelt* v. *Mark*, 6 Johns. Ch. 285), and in *Tucker* v. *Oxley*, Chief Justice Marshall declared that, for that reason, the decisions of the English judges as to the effect of those acts might be considered as adopted with the text that they expounded. Section 31 reads as follows:

"Sec. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states or of the United States,
[161]on the estate of such bankrupt *(provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupts), shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt."

This provision of the act of 1800 was, however, omitted from the bankrupt act of 1841, manifestly because it had become unnecessary. The later statute contained in the 5th section a general provision forbidding all preferences except in favor of two classes of debts, thus rendering it superfluous to enumerate cases in which there should be no preference. It was, however, under the act of 1841, which was drafted by Mr. Justice Story (2 Story's Life of Story, 407), that this court, speaking through that learned justice, in *Re Christy* [*Ex parte City Bank*], already cited, declared that a secured creditor must account for his security when proving against the bankrupt estate. How it can be now argued that the requirement that such creditor should only so prove his claim was the result of a provision not found in the act of 1841, and clearly shown by all the antecedent legislation not to refer to a creditor holding property security, my mind fails to comprehend.

True it is that, both in our own act of 1867 and in the English bankrupt act of 1869, there were inserted express provisions requiring a secured creditor to account for his collaterals before proving against the general assets. But this was but the incorporation into the statutes of the rule which had arisen as a consequence of the requirement for a ratable distribution, and which had existed for hundreds of years before the statutes of 1867 and 1869 were adopted. In other words, the express statutory requirement only embodied in the form of a legislative enactment what theretofore from the earliest time had been universally enforced, because of the provision for a ratable distribution.

The rule in bankruptcy imposing the duty upon the creditor to account for his security before proving being, then, the result of the provision of the bankrupt laws requiring ratable distribution, I submit that the same requirements upon such *creditor should be [162]
held to arise from a like provision contained in the act of Congress under consideration.

But, coming to consider the chancery rule which, it is contended, lends support to the doctrines applied in the cases at bar.

The foundation upon which the so-called chancery rule rests is the case of *Mason* v. *Bogg*, 2 Myl. & C. 443, decided in 1837, where Lord Chancellor Cottenham expressed his approval of the contention that a mortgage creditor, despite the death and insolvency of his debtor, possessed the contract right to assert his whole claim against general assets in the course of administration in chancery, without regard to his mortgage security. The question was not directly decided, however, as to whether the creditor might prove in the administration for the whole amount of the debt, but was reserved. As stated, however, the reasoning of the court favored the existence of such right, upon the theory that a court of chancery, when administering assets, *in the absence of a statute regulating*

the subject, could not deprive a secured creditor of legal rights previously existing which he might have asserted at law, although by permitting the exercise of such rights preferences in the general assets would arise.

The next case in point of time in England, and indeed the one upon which most reliance is placed by those favoring the chancery rule, is *Kellock's Case*, reported in L. R. 3 Ch. 769, involving two appeals, and argued before Sir W. Page Wood, L. J., and Sir C. J. Selwyn, L. J. The cases arose in the winding up of companies by virtue of the statute of 25 & 26 Vict. chap. 89. The issue presented in each case was whether a creditor having collateral security was entitled to dividends upon the full amount of the debt without reference to the value of collaterals; and in one of the cases the lower court applied the doctrine supported by the reasoning in *Mason* v. *Bogg*, while in the other the lower court decided the bankruptcy rule governed. The appellate court held that the chancery practice should be followed. The claim was made that the secured creditor ought not to be allowed to take a dividend on the full
[163] amount of his claim, because, among *other reasons, of section 133 of the act, which provided as follows:

"133. The following Consequences shall ensue upon the voluntary Winding-up of a Company:

(1.) The Property of the Company shall be applied in satisfaction of its Liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the Regulations of the Company, be distributed amongst the Members according to their Rights and Interests in the Company."

This contention, however, was answered by Lord Justice Wood, who said (p. 778):

"There is a clause in the companies act of 1862, which says that in a voluntary winding up equal distribution is to be made among creditors; an expression similar to which, in 13 Eliz. chap. 7, appears to have led to the establishment of the rule in bankruptcy."

He then called attention to the fact that a voluntary winding up was not limited to cases of insolvent companies, but might be resorted to on behalf of a solvent one; and he proceeded to comment upon the fact that in previous winding-up acts, "when the legislature intended proceedings to be conducted according to the course in bankruptcy, it said so," concluding with the declaration that the omission to do so in the case before the court indicated the purpose of Parliament that the court should be governed by the chancery rule. Lord Justice Selwyn, in a measure, also adopted this view, saying (p. 782):

"I think, therefore, that the onus is clearly thrown on those persons who come here and say that when the legislature, with a knowledge of the existence of the difference between the practice in bankruptcy and the practice in chancery, intrusted the winding up of the companies to the court of chancery, and said in express terms that the practice of the court of chancery was to prevail, they intended by some implication or inference to diminish, prejudice, or affect the rights of creditors. I can find no trace of any such intention. I think, therefore, we are bound to follow the established practice of the court of chancery, especially when we find that *that practice has been followed [164]
ever since the passing of the winding-up act, and so long as winding-up orders have been made in the court of chancery."

The whole subject has been set at rest, however, in Great Britain, by section 25 of the judicature act of 1873, and by an amendment thereto adopted in 1875 (chap. 77), which expressly required that in the administration in chancery of an insolvent estate of one deceased, and in proceedings in the winding up of an insolvent company under the companies acts, "the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, . . . as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt."

So that now, in Great Britain, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security.

In view, therefore, of the English legislation in 1873 and 1875, which has rendered it impossible in cases of insolvency to apply the doctrine of the *Kellock Case*, we need not particularly notice decisions rendered in England subsequent to 1868, when the *Kellock Case* was decided, particularly as the tribunals which rendered such decisions were subordinate to the court of appeal and necessarily bound by its rulings.

Now, I submit, as the English chancellors, from the date of the enactment of the earliest English bankrupt law, felt constrained to compel a secured creditor to account for his security before proving against the general assets of the bankrupt estate, because Parliament had directed a ratable distribution of all such assets, it cannot in consonance with sound reasoning be said that this court is to apply the chancery rule to the distribution of the assets of an insolvent national bank as to which Congress has directed a ratable distribution, because in England a different rule was for a time applied to an act of Parliament providing, not solely for the liquidation of an insolvent estate, but equally to a solvent and *insolvent one, [165]
and which rule was so applied in England because a particular statute was construed as requiring that the practice pursued in chancery in administering upon estates should govern.

It is worthy of note that Lord Justice Wood, after stating in his opinion in the *Kellock Case* that the bankruptcy rule was "adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements," conceded that the provision in the statute of 13 Eliz. chap. 7, requiring equal distribution, "led to the establishment of the rule in bankruptcy." But the Lord

Justice took the cases then under consideration out of the operation of the provision of the statute of Elizabeth because of provisions found in the company act, which, in his opinion, gave rise to a contrary view in cases governed by that act. The distribution of the assets of a failed national bank under the act of Congress, it is obvious, presents the "peculiar" features which Lord Justice Wood had in mind, since the requirement of ratable distribution is the exact equivalent of the provision contained in the statute of Elizabeth. But the reasoning now employed to cause the rule announced in the *Kellock Case* to apply so as to defeat the ratable distribution provided by the act of Congress is made to rest upon the assumption that the act of Congress does not contain the peculiar requirement which was found in the bankruptcy acts, from which the duty of the secured creditor to account for his security before taking a dividend from the general assets arose. It comes, then, to this: That the theory by which the obsolete doctrine of the *Kellock Case* is made to apply rests upon an assumption which repudiates the reasoning of that case; in other words, that the result of the *Kellock Case* is taken and applied to this case, while the reasoning upon which the decision of the *Kellock Case* was based is in effect denied.

That to permit a secured creditor to retain his specific contract security, and also to prove against the general assets of his insolvent debtor for the whole amount of the debt, was deemed to work out inequality, is
[166] shown, not only by the fact *that it was not applied in bankruptcy, but that in the administration of equitable, as contradistinguished from legal, assets, courts of equity, following the maxim *Equitas est quasi equalitas*, would not permit claimants against equitable assets to share in the distribution of such assets until they had accounted for any advantage gained by the assertion against the general estate of the debtor of a preference permitted at law. *Morrice* v. *Bank of England*, Cas. *t.* Talb. 218; *Sheppard* v. *Kent*, 2 Vern. 435; *Deg* v. *Deg*, 2 P. Wms. 416; *Chapman* v. *Esgar*, 1 Smale & G. 575; *Bain* v. *Sadler*, L. R. 12 Eq. 570; *Purdy* v. *Doyle*, 1 Paige, 558; *Bank of Louisville* v. *Lockridge*, 92 Ky. 472; 1 Story, Eq. Jur. 12th ed. p. 543; Watson, 1 Comp. Eq. 2d rev. ed. chap. 11, p. 35.

It was undoubtedly from a consideration of this fundamental rule of equity, in construing the statutory requirement for ratable division of general assets, that the bankruptcy rule was formulated. That rule, however, in effect, declared that secured creditors might retain their preferential contract rights in particular portions of the estate of the insolvent debtor, but that it was the purpose of Parliament, in commanding ratable distribution, that general assets, that is, assets disencumbered of liens, should be distributed only among the general or unsecured creditors; the necessary effect being that a secured creditor could not prove against general assets without surrendering his security, thus becoming a general or unsecured creditor *for the whole amount of the debt*, or realizing upon the security, or in some form accounting for its value, in which latter contingency he would be general or unsecured creditor only *for the deficiency.* That the bankruptcy rule was deemed to be founded upon equitable principles, I think, is demonstrated by the statement of Lord Hardwicke in a case already mentioned, *Bromley* v. *Goodere*, 1 Atk. 77, where, after referring to the act of 13 Elizabeth, chapter 7, he said:

"It is manifest that this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall think fit; and that this has *been the [167]
construction ever since; and therefore when petitions have come before the chancellor he has always proceeded upon the same rules as he would upon causes coming before him upon the bill, *The rules of equity.*"

The foregoing reasoning renders it unnecessary to review at length the opinion delivered by the circuit court of appeals for the sixth circuit in *Chemical National Bank* v. *Armstrong*, 16 U. S. App. 465 [28 L. R. A. 231], to which the court has referred, as the conclusions announced by the circuit court of appeals were rested on the assumption that the bankruptcy rule was the creature of an express statutory requirement, and that to prevent a secured creditor from proving for his whole debt, as of the time of the insolvency, without regard to his collaterals, would deprive him of a contract right, both of which contentions have been fully considered in what I have already said. Nor is the case of *Lewis* v. *United States*, 92 U. S. 68 [23: 513], also referred to in the opinion of the court in the case at bar, controlling upon the question here presented. True, it was said in the *Lewis Case*, in passing, and upon the admission of counsel, that "it is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor," citing the Kellock and two other English and two Pennsylvania cases involving the question of the rights of a creditor having the securities of distinct estates of separate debtors. But the controversy before the court in the *Lewis Case* was of this latter character, being between the United States as creditor of a partnership and holding collaterals belonging to the partnership, and the trustee in bankruptcy of the separate estates of individual members of the partnership. The government was seeking to assert against such separate estates a right of preference given to it by statute. The court decided that as the United States had a paramount lien upon all the assets of every debtor for the full satisfaction of its claim, it was unaffected by the bankruptcy statutes, and therefore was not controlled by any provision found therein for ratable distribution or otherwise. It is apparent, therefore, that the court by the quoted statement did not decide that a court of equity *would apply the doctrine there set forth, [168]
where the rights of the secured creditor were limited and controlled by statute. If

the secured creditor, who is allowed in the case now decided to disregard his security and prove for the whole amount of his claim, had a paramount lien, not only upon his collaterals, but upon each and every asset of the insolvent bank, the rule in the *Lewis Case* would be apposite. But that is not the character of the case now before the court, since here a secured creditor has no paramount lien upon anything but his collaterals, and is governed in his recourse against the general assets by the requirement that there should be a ratable distribution.

As the case before us is to be controlled by the act of Congress, it would appear unnecessary to advert to state decisions construing local statutes; but inasmuch as those decisions were referred to and cited as authority, I will briefly notice them. They are referred to in the margin, and divide themselves into four classes: 1. Those which maintain that where ratable distribution is required, the creditor must account for his security before proving.[1] 2. Those cases which, on the contrary, decide that to allow the creditor to prove for his whole claim without deduction of security is not incompatible with ratable distribution, and hold that the security need not be taken into account.[2] 3. Those cases
[169] which, while seemingly denying *the obligation of the secured creditor to account for his security, yet practically work out a contrary result by requiring deduction upon collaterals as collected, and affording remedies to compel prompt realization of collaterals.[3] 4. Those which originated in purely local statutes, and which hold that the secured creditor can prove for the whole amount without reference to either the bankruptcy or the chancery rule.[4] And in the margin I supplement the compilation heretofore made by a reference to some state statutes and decisions referring to statutes which expressly provide that the claimants upon an insolvent estate can only prove for the balance due after deduction of any security held.[5]

Of course, for the purposes of this case, only the first two classes of cases need be considered. The first class is well represented by two Massachusetts cases: *Amory* v. *Francis*, 16 Mass. 308, and *Farnum* v. *Boutelle*, 13 Met. 159. In the first-named case Chief Justice Parker said (p. 311): "If it were not so, the equality intended to be produced by the *bankrupt laws would be grossly vio- [170]
lated, and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security only for a portion of the debt equal to its value; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend, which may be received upon the whole debt."

In the later case Chief Justice Shaw announced the rule as follows (13 Met. 164):

"If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as upon authority, that the creditors cannot prove their debt without first waiving their mortgage, or, in some mode, applying the amount thereof to the reduction of the debt, and then proving only for the balance. *Amory* v. *Francis*, 16 Mass. 308."

The second class of cases may be typified by the case of *People* v. *Remington*, 121 N. Y. 328 [8 L. R. A. 458], where the conclusion of the court was placed upon the ground that the rule in bankruptcy originated in an express requirement in the bankrupt acts other than that for a ratable distribution. The court, speaking through Gray, J., said (p. 332):

"Some confusion of thought seems to be worked by the reference of the decision of the

[1]Amory v. Francis (1820) 16 Mass. 308; Farnum v. Boutelle (1847) 13 Met. 159; Vanderveer v. Conover (1838) 16 N. J. L. 491; Bell v. Fleming's Executors (1858) 12 N. J. Eq. 13, 25; Whittaker v. Amwell National Bank (1894) 52 N. J. Eq. 400; Fields v. Creditors of Wheatley (1853) 1 Sneed, 351; Winton v. Eldridge (1859) 3 Head, 361; Wurtz v. Hart (1862) 13 Iowa, 515; Searle, Executor, v. Brumbach, Assignee (1862) 4 Western Law Monthly (Ohio) 330; *Re* Frasch (1892) 5 Wash. 344; National Union Bank v. National Mechanics' Bank (1895) 80 Md. 371 [27 L. R. A. 476]; American National Bank v. Branch (1896) 57 Kan. 27; Security Investment Co. v. Richmond National Bank (1897) 58 Kan. 414.

[2]Findlay v. Hosmer (1817) 2 Conn. 350; Moses v. Ranlet (1822) 2 N. H. 488; West v. Bank of Rutland (1847) 19 Vt. 403; Walker v. Baxter (1854) 26 Vt. 710, 714; *Re* Bates (1886) 118 Ill. 524 [59 Am. Rep. 383]; Furness v. Union National Bank (1893) 147 Ill. 570; Levy v. Chicago National Bank (1895) 158 Ill. 88 [30 L. R. A. 330]; Allen v. Danielson (1887) 15 R. I. 480; Greene v. Jackson Bank (1895) 18 R. I. 779; People v. E. Remington & Sons (1890) 121 N. Y. 328; Third National Bank of Detroit v. Haug (1890) 82 Mich. 607 [11 L. R. A. 327]; Kellogg v. Miller (1892) 22 Or. 406; Winston v. Biggs (1895) 117 N. C. 206.

[3]*Re* Estate of McCune (1882) 76 Mo. 200; State v. Nebraska Savings Bank (1894) 40 Neb. 342; Jamison v. Adler-Goldman Commission Co. (1894) 59 Ark. 548, 552; Philadelphia Warehouse Co. v. Anniston Pipe Works (1894) 106 Ala. 357; Erie v. Lane (1896) 22 Colo. 273.

[4]Shunk's & Freedley's Appeals (1845) 2 Pa. St. 304; Morris v. Olwine (1854) 22 Pa. 441, 442; Keim's Appeal (1856) 27 Pa. 42; Miller's Appeal (1860) 35 Pa. 481; Patten's Appeal (1863) 45 Pa. 151 [84 Am. Dec. 479]. And see a reference to the cases in Pennsylvania, in Boyer's Appeal (1894) 163 Pa. 143.

[5]Indiana:—Combs v. Union Trust Co. 146 Ind. 688, 691; Kentucky:—Statutes 1894 (Barbour & Carroll's ed.) chap. 7, § 74, p. 193; Bank of Louisville v. Lockridge, 2 Ky. 472; Massachusetts:—Act of April 23, 1838, chap. 163, § 3; General Statutes 1860, chap. 118, § 27; Michigan:—2 How. Stat. § 8824, p. 2156; Minnesota:—By statute March 8, 1860, the security is made the primary fund, to which resort must be had before a personal judgment can be obtained against the debtor for a deficit (Swift v. Fletcher, 6 Minn. 550); New Hampshire:—Laws 1862, chap. 2594; South Carolina:—Piester v. Piester, 22 S. C. 146, [53 Am. Rep. 711]: Wheat v. Dingle, 32 S. C. 473, [8 L. R. A. 375]; Texas:—Civ. Stat. 1897, art. 83; Acts 1879, chap. 53, § 13: Willis v. Holland (1896) [13 Tex. Civ. App. 689], 36 S. W. 329.

question to the rules of law governing the administration of estates in bankruptcy; but there is no warrant for any such reference. The rules in bankruptcy cases proceeded from the express provisions of the statute, and they are not at all controlling upon a court administering, in equity, upon the estates of insolvent debtors. The bankruptcy act requires the creditor to give up his security in order to be entitled to prove his whole debt; or, if he retains it, he can only prove for the balance of the debt after deducting the value of the security held. The jurisdiction in bankruptcy is peculiar and special, and a particular mode of administration is prescribed by the act."

Having thus eliminated the bankruptcy rule, the court reviewed the decisions in *Mason* v. *Bogg* and *Kellock's Case*, and held those cases to be controlling. The *Reming-*
[171]*ton Case*, *therefore, as well as those of which it is a type, need not be further reviewed, as the fundamental error upon which they rest has been fully stated in what I have previously said.

It is necessary, however, to call attention to the fact that in the cases which decline to apply the rule in bankruptcy, and refuse to enforce the provision for ratable distribution, there is an entire want of harmony as to the time when the rights of creditors are fixed with respect to the amount of the claim which may be proved against general assets; some holding that dividends are to be paid on the amount due at the date of insolvency, others on the amount due at the time of proof, and others upon the sum due when dividends are declared. This confusion is the necessary outcome of the erroneous premise upon which the cases rest. A similar confusion, moreover, I submit, is manifested by the rule now announced by the court; since while it is avowedly rested upon the defunct chancery rule exemplified in *Mason* v. *Bogg* and the *Kellock Case*, yet in effect it fails to follow the very rule upon which the decision is based. This is clear when it is borne in mind that the chancery rule was decided in both *Mason* v. *Bogg* and the *Kellock Case* to be that the amount of the claim of the creditor was fixed by the date when proof was actually made, and yet under the authority of the chancery rule and the cases in question the court now decides that the rights of the secured creditor are fixed by insolvency. Thus the chancery rule is applied and at the same time repudiated in an important particular, for the grave difference between allowing a secured creditor to prove only for the amount due when proof was made, and therefore compelling him to account for all collections realized on collaterals up to that time, and allowing him long after insolvency to prove, by relation, as of the date of the insolvency, and disregard the collections actually made, is manifest. In this connection it may not be amiss to call attention to the fact that if the bankruptcy rule was applied in the proof of claims, the amount of the claim would not vary, whether the date of insolvency or the time when proof was made was held to be the date when the rights of the creditor in the fund were fixed.

*Moreover, I submit that the propositions [172]
now adopted, which reject the bankruptcy rule, rest on reasoning which, if it be logically applied, requires the enforcement of the bankruptcy rule in its integrity. It seems to me it has been shown by the doctrine announced by Lord Hardwicke in 1743 (*Bromley* v. *Goodere, supra*), that the stoppage of interest on the claims of all creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court. This, then, takes the provision of the bankruptcy rule which favors the secured creditor, and which arises alone from ratable division, and gives him the benefit of it, while at the same time rejecting the obligation to account which arises from and depends on the very principle of ratable distribution which is in part enforced. To repeat, it strikes my mind that the conclusion now announced is this, that the obsolete chancery rule both applies and does not apply, that the bankruptcy rule at the same time does not apply and does apply, the result of this conflict being to so interpret the act of Congress as to strike from it the beneficent provision for equality of distribution among general creditors.

Mr. Justice **Gray** dissenting:

While also unable to concur in the opinion of the majority of the court, I prefer to rest my dissent upon the effect of the legislation of Congress, read in the light of the English statutes and decisions before the American Revolution, and of the judgments of the courts of the United States,—without particularly considering the cases in England in recent times, or the conflicting decisions made in the courts of the several states under local statute or usage, or upon general theory. As the course of reasoning in support of this view traverses part of the ground covered by the other dissenting justices, I shall endeavor to state it as shortly as possible.

The English bankrupt acts in force at the time of the Declaration of Independence, so far as they touched the distribution of a bankrupt's estate among his creditors, were the *statute of 13 Eliz. (1571) chap. 7, § 2, [173]
which directed the estate to be applied to the "true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate alike, according to the quantity of his or their debts;" and the statute of 21 James I. (1623) chap. 19, § 8 (or § 9), which made more specific provisions against allowing any creditors, whether "having security" or not, to prove "for any more than a ratable part of their just and due debts with the other creditors of the said bankrupt." As appears on the face of this provision, the word "security" was evidently there used, not as including a mortgage or other instrument executed by the debtor by way of pledging part of his property as collateral security for the payment of a debt, but merely as designating a bond or writing which was evidence of the debt itself as a direct personal obligation;

and the objects of the provision would appear to have been to put all debts, whether by specialty or by simple contract, upon an equal footing in the ratable distribution of a bankrupt's estate, and to permit the real amount only of any debt, and not any larger sum named in a bond or other specialty, to be proved in bankruptcy. 4 Statutes of the Realm, 539, 1228; 2 Cooke's Bankrupt Laws (4th ed.) [18] [33]; 1 Ib. 119; Bac. Abr. *Obligations*, A; 3 Bl. Com. 439.

Neither of those statutes contained any provision whatever for deducting the value of collateral security and proving the rest of the debt. Yet from the earliest period of which there are any reported cases, it was uniformly held,—without vouching in any provision of the bankrupt acts other than those directing a ratable distribution among all the creditors,—and had long before the American Revolution become the settled practice in the court of chancery, that a creditor could not retain collateral security received by him from the bankrupt and prove for his whole debt, but must have his collateral security sold and prove for the rest of the debt only. The authorities upon this point are collected in the opinion of Mr. Justice White.

After the American Revolution the provision of the statute of James I. was thrice re-
[174] enacted, with little modification. *Stats. 5 Geo. IV. (1824) chap. 98, § 103; 6 Geo. IV. (1825) chap. 16, § 108; 12 & 13 Vict. (1849) chap. 106, § 184. But the rule established by the decisions and practice of the court of chancery, as to the proof of secured debts, was never expressly recognized in any of the English bankrupt acts until 1869, when provisions to that effect were inserted in the statute of 32 & 33 Vict. chap. 71, § 40. And there is no trace of a different rule in England, in proceedings in equity for the distribution of the estate of any insolvent debtor or corporation, until more than sixty years after the Declaration of Independence. *Amory* v. *Francis* (1820) 16 Mass. 308, 311; *Greenwood* v. *Taylor* (1830) 1 Russ. & M. 185; *Mason* v. *Bogg* (1837) 2 Myl. & C. 443. In 1868, indeed, the court of chancery declined to apply the bankruptcy rule to proceedings under the winding-up acts. *Kellock's Case*, L. R. 3 Ch. 769. But Parliament, by the judicature acts of 1873 and 1875, applied that rule to such proceedings. Stats. 36 & 37 Vict. chap. 66, § 25 (1); 38 & 39 Vict. chap. 77, § 10. And Sir George Jessel, M. R., has pointed out the absurdity of having different rules in the cases of living and of dead bankrupts. *Re Hopkins* (1881) L. R. 18 Ch. Div. 370, 377.

The first bankrupt act of the United States, enacted in 1800, was in great part copied from the earlier bankrupt acts of England, and condensed the provisions, above mentioned, of the statutes of Elizabeth and of James I. in this form: "In the distribution of the bankrupt's effects there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts), shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, for more than a ratable part of his debt with the other creditors of the bankrupt." Act of April 4, 1800, chap. 19, § 31; 2 Stat. at L. 30. That provision must have received the *same construction that had been [175]
given by the English judges to the statutes therein re-enacted. *Tucker* v. *Oxley* (1809) 5 Cranch, 34, 42 [3: 29, 31]; *Scott* v. *Armstrong* (1892) 146 U. S. 499, 511 [36: 1059, 1063].

The bankrupt act of 1841, which is well known to have been drafted by Mr. Justice Story, omitted that section, and made no specific provision whatever as to the proof of secured debts, but simply provided that "all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets." Act of August 19, 1841, chap. 9, § 5; 5 Stat. at L. 444.

Yet Mr. Justice Story, both in the circuit court and in this court, laid it down as an undoubted rule, that a secured creditor could prove only for the rest of the debt, after deducting the value of the security given him by the bankrupt himself of his own property. *Re Babcock*, 3 Story (1844) 393, 399, 400; *Re Christy* [*Ex parte City Bank*] (1845) 3 How. 292, 315 [11: 603, 613].

The omission by that eminent jurist, when framing the act of 1841, of all specific provisions on the subject as unnecessary, and his repeated judicial declarations, after he had been habitually administering that act for three or four years, recognizing that rule as still in force, compel the inference that a general enactment for the ratable distribution of the estate of an insolvent among all the creditors had the effect of preventing any individual creditor, while retaining collateral security on part of the estate, from proving for his whole debt.

In 1864, Congress, in the first national bank act, after providing for the appointment of a receiver with power to convert the assets of any insolvent national bank into money and pay it to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, further provided that "from time to time the Comptroller, after full provision shall *have been first [176]
made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all

such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." Act of June 3, 1864, chap. 106, § 50; 13 Stat. at L. 115.

The words of this act, requiring "a ratable dividend" to be paid "on all claims" proved or adjudicated, are equivalent to the words of the last preceding bankrupt act, directing that "all creditors coming in and proving their debts . . . shall be entitled to share" in the estate "*pro rata*, without any priority or preference whatsoever," and, in view of the judicial construction which had been given to that act, may reasonably be considered as having been intended by Congress to have the same effect of preventing a creditor secured on part of the estate from proving his whole debt without relinquishing or applying the security, although neither act specifically so provided.

If such was the rule under the national bank act of 1864, it could not be affected, as to national banks, by the express affirmance of the rule in the bankrupt act of 1867, or by the re-enactment of the provisions of each of these two acts in the Revised Statutes. And the extension of the bankrupt act of 1867 to "moneyed business or commercial corporations and joint-stock companies" increases the improbability that Congress intended banking associations to be governed by a different rule from that governing other private corporations, as well as natural persons, in regard to the effect which a creditor's holding collateral security should have upon the sum to be proved by him against an insolvent estate. Act of March 2, 1867, chap. 176, §§ 20, 37; 14 Stat. at L. 526, 535; Rev. Stat. §§ 5075, 5236.

Reliance has been placed upon the remark of Mr. Justice Swayne in *Lewis* v. *United States*, 92 U. S. 618, 623 [23: 513, 515], that "it is a settled principle in equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." But he added,
[177] "This *is admitted," so that it is evident that the point was not controverted by counsel, or much considered by the court. Nor was it necessary to the decision, which had nothing to do with the right of an individual creditor holding security upon the separate property of the debtor to prove against his estate in bankruptcy; but simply affirmed the right of the United States, holding a debt against an English partnership, to prove the whole amount of the debt against one of the partners, an American, in proceedings in bankruptcy here under the act of 1867, without surrendering or accounting for collateral security given to the United States by the partnership. The United States were not bound by the bankrupt acts, nor subject to the rule of a ratable distribution, but were entitled to preference over all other creditors. *United States* v. *Fisher*, 2 Cranch, 358 [2: 304]; *Harrison* v. *Sterry*, 5 Cranch, 289 [3: 104]; *United States* v. *State Bank*, 6 Pet. 29 [8: 308]; *United States* v. *Herron*, 20 Wall. 251 [22: 275]. And, even as to a private creditor, it has always been held that he is obliged to account for such securities only as he holds from the debtor against whose estate he seeks to prove; and that a creditor proving against the estate of a partnership is not bound to account for security given to him by one partner, nor a creditor proving against the estate of one partner to account for security given him by the partnership. *Ex parte Peacock* (1825) 2 Glyn & J. 27; *Re Plummer* (1841) 1 Phill. Ch. 56; *Rolfe* v. *Flower* (1866) L. R. 1 P. C. 27, 46; *Re Babcock*, 3 Story, 393, 400. To require a creditor, before proving against the estate of one partner, to surrender to the assignee of that estate security held from the partnership, would be to add to the separate estate property which should go to the estate of the partnership.

The ground and the limits of the rule in bankruptcy were clearly stated by Lord Chancellor Lyndhurst in *Plummer's Case*, above cited, in which a partnership creditor was allowed to prove a partnership debt against the separate estate of each partner, without surrendering or realizing security held by him from the partnership. The Lord Chancellor said: "Now, what are the principles applicable to cases of this kind? If *a creditor of a bankrupt holds a security [178]
on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound. That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, Bankr. Rep. 76; and *Ex parte Goodman*, 3 Madd. 373,—in which it has been laid down. The next point is this. In administration under bankruptcy, the joint estate and the separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir John Leach and afterwards by Lord Eldon, and has since been followed in *Ex parte Bowden*, 1 Deacon & C. 135. Now this case is merely the converse of that, and the same principle applies to it." 1 Phill. Ch. 59, 60.

This court, under the existing national bank act, approving and following the example of the English courts under the statute of 13 Elizabeth, above cited, has allowed creditors to set off, against their claims on the estate, debts due from them to the debtor whose estate is in course of distribution, although the statute in question in either case

contained no provision directing or permitting a set-off. *Scott* v. *Armstrong*, 146 U. S. 499, 511 [36: 1059, 1063]. In giving effect to a statute which simply directs an equal and ratable distribution of a debtor's estate among all creditors, without saying anything [179]about either collateral *security or set-off, there would seem to be quite as much ground for requiring each creditor to account for his collateral security, for the benefit of all the creditors, as for allowing him the benefit of a set-off, to their detriment.

For the reasons thus indicated, I cannot avoid the conclusion that, under every act of Congress directing the ratable distribution among all creditors of the estate of an insolvent person or corporation, and making no special provision as to secured creditors, an individual creditor holding collateral security from the debtor on part of the estate in course of administration is not entitled to a dividend upon the whole of his debt without releasing the security or deducting its value; and that therefore the judgment of the circuit court of appeals should be reversed.

GREEN BAY & MISSISSIPPI CANAL COMPANY *v.* PATTEN PAPER COMPANY *et al.*

(See S. C. Reporter's ed. 179–190.)

Jurisdiction of state courts as to the rights of riparian owners.

The rights and disputes of riparian owners as to water which has found its way into the unimproved bed of a stream must be determined by the state courts, although they cannot interfere with the control of the surplus water power incidentally created by a dam and canal owned and operated by the United States.

[No. 14.]

Submitted January 16, 1899. Decided February 20, 1899.

There were two petitions for rehearing of this case, which was decided at the present term, and reported in 172 U. S. 58, *ante*, p. 364.

The petitions for rehearing were as follows:

First Petition for Rehearing.

[180] *The opinion herein shows that the plaintiffs below, defendants in error, did not make the leading facts respecting their water power plain. Hence they respectively petition the Honorable Court for a rehearing upon the following grounds, being matters of fact only:

I. The claim of the original plaintiffs seems to have been lost sight of. This court says: "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition. Nor was it created by the erection of a dam by private persons for that sole purpose."

Plaintiffs below, defendants in error, should have made it appear, as the fact is, that the water power about which they are contending is created by a dam built by private persons, Mathew J. Mead and N. M. Edwards, riparian owners, in 1880, for the sole purpose of water power. This dam furnishes a head of 12 to 18 feet. Mills on this power cost about $70,000.

This private dam was across an unnavigable channel between islands Three and Four. Its legality cannot be questioned herein.

If its legality could be questioned by other parties, it cannot by the canal company, because, as the complaint recites—

On August 1st, 1881, it, as riparian owner, leased to the Union Pulp Company, one of the plaintiffs below, "a constant flow of about 20,000 cubic feet of water per minute, parcel of and to be drawn from said Mead & Edwards water power, for *hydraulic [181] power, for a term of ten years, renewable for one hundred years; which said leasehold interest said Union Pulp Company still holds.

"That said Union Pulp Company has erected on said lot a pulp mill worth about forty thousand dollars ($40,000) and now operates the same, running the same by said water power."

Original defendant Kelso, for whom Reese Pulp Company was afterwards substituted, stands in the same relation to the canal company.

An examination of the printed record will show that in many other respects the original plaintiffs, defendants in error, have failed to make the facts of this case apparent to this court.

II. This court seems to us to have held in 142 U. S. 269, 270, 35 L. ed. 1009, 1010, that it was necessary that there should be notice of taking while compensation could be had. No other view seems admissible.

The notice of taking held sufficient in 142 U. S. 35 L. ed. was given to the Kaukauna Water Power Company only. There is no pretense of notice of taking as against the original plaintiffs herein, or any of the owners on the Mead and Edwards power or middle channel. None of them were parties to that suit.

Speaking of this notice Mr. Justice Brown said: "Until this time there had been no active interference with any claim or riparian rights belonging to the water power company."

Herein the original plaintiffs were, when the action commenced, ever since have been, and still are, using their water power between islands Three and Four to run their mills. One of them, Union Pulp Company,

is a lessee of the canal company as riparian owner of part of this mill power.

The canal company as riparian owner, united with the Patten Paper Company in leasing land and 1,000 cubic feet of water power per minute, parcel of this Mead and Edwards, or middle power to Kelso, now Reese Pulp Company. Not only had canal company not given notice of taking, but it had recognized the title of riparian owners on this middle power by leasing to Union Pulp Company original plaintiff, parcel of such power, as riparian owner, and uniting
[182]with original *plaintiff, Patten Paper Company, as riparian owner, in lease of parcel of this power to Kelso.

Compensation act of 1875 (18 Stat. at L. 506, chap. 166) was repealed in 1888 (25 Stat. at L. 4, 21, chap. 4). Hence any notice of taking after 1888 is fruitless. There was no claim made by canal company to this middle power otherwise than as riparian owner, until filing of cross bill in 1890.

III. This mill power can be preserved without interfering with the use of all the water of the river, by the canal company, on its "appurtenant lots" from to 2,000 feet below the dam represented on sheet marked "Kaukauna" on canal company's maps. Such middle power may be supplied by the spent water of the upper mills mentioned on page 3 of printed copy of opinion. But if canal company changes its plans and draws the water from the canal at lower points than now and heretofore, the water will be diverted from this middle power, and the mills on it become valueless.

The judgment should provide that 62-200 of the flow of the river, its proportion as partitioned, should, after being used by canal company, be permitted to flow into the middle channel to feed the mills of the riparian owners on that power, including the lessees of the canal company.

If the judgment should follow the opinion unmodified, it might be construed to permit the canal company to violate its own leases to Union Pulp Company, original plaintiff, and George F. Kelso (now Reese Pulp Company), original defendant.

We cannot think the court would so determine in view of the facts evidently not sufficiently presented.

IV. We failed to make clear to the court another matter of fact. The court says: "It was found by the trial court that the Green Bay & Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal."

We have not seen such a finding of the trial court. The trial court did find that the canal company had leased all of the water power "which it could find customers for," not that it had leased all the water power "created by the dam and canal." The
[183]*canal company filed a schedule of its leases existing at the time of the trial.

This schedule, the company's own statement, shows leases of water "to be used over the water lots abutting on the canal" of only 860 horse power out of the 2500 horse power reserved. It also shows leases from the pond at the middle power below the dam, whereon are the mills of the original plaintiffs and whereon the canal company is riparian owner of 900 horse power.

V. This power is one of those referred to by Colonel Houston in his report to the Secretary of War, accompanying arbitrators' report, wherein he says: "There is an immense water power in the lower Fox entirely independent of the works of improvement, part of which has been made available by works of private parties." This was not charged to the canal company by the United States.

We respectfully certify to this Honorable Court our full belief that the grounds assigned for the foregoing petition for rehearing are meritorious and well founded in law.

Respectfully submitted,

Moses Hooper,

Attorney for Plaintiffs, Defendants in Error.

George G. Greene,

of Counsel.

Second Petition for Rehearing.

The defendants in error respectfully petition this Honorable Court for a rehearing herein, upon the following grounds:

I. There is no controversy respecting the ownership or control of the navigation of the Fox river by the United States. All the parties throughout the whole litigation have at all times and in all places conceded such ownership and control to be absolute and paramount. The judgment under review expressly recognized such ownership and control. In its first subdivision it only partitioned such of the waters of the river as were not required for the purposes of navigation. In its third subdivision it expressly limited the right of the defendants in error, as to the use of water below the dam, to such as was not or might not be necessary for navigation. *Neither the parties nor the [184]
state supreme court have sought to invade the empire of the United States over the navigation or commerce of this river.

II. The opinion states that "the decisive question in this case" is "whether the water power . . . is subject to control and appropriation by the United States, owning and operating those public works, or by the state of Wisconsin, within whose limits Fox river lies."

We do not understand that any question arises respecting the control of the water power of the state of Wisconsin. The state does not claim any control over or interest in it. The question in controversy seems to us to be, Was the property of the riparian owners under United States patent to 12,600 horse power of water created by the fall of Fox river below the dam, taken away from such riparian owners without compensation by section 16, act of Wisconsin of August 8, 1848, saying: "Whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state subject to the future action of the legislature?"

This is legislation; it is the only founda-

tion of the claim of the canal company. At page 78 the cross bill states the basis of the claim of title as follows: "That by the appropriation under said act, approved August 8, 1848, and the building and maintaining of the dam, canal, and embankment hereinbefore specified . . . the Green Bay & Mississippi Canal Company acquired . . . the easement to and exclusive ownership of all the hydraulic power created by said dam, extension thereof and canal."

The canal company makes no claim by virtue of any grant from the United States. It alleges that the dam and canal "were constructed . . . under the act . . . approved August 8, 1848, and acts of the legislature subsequent thereto, other than which there was no authority for building and maintaining the same."

The controversy over construction of this act arises between citizens of Wisconsin. Is not the construction of a local statute, in controversy between its own citizens, a state question, and not a Federal question?

The state's construction of its own legislation between its own citizens is binding on this court.

St. Anthony Falls Water Power Co. v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, and cases cited.

This court said of a state decision respecting this identical act, in a controversy between the identical parties now before the court: "The construction thus given to this act is obligatory upon this court." 142 U. S. 254, 277, 35 L. ed. 1004, 1012.

We are not now questioning the jurisdiction of the court over this case, but only the power of the court to determine certain questions which are state, and not Federal.

III. On error to the state court in chan-
[185] cery cases *this court is concluded by the findings of fact of the court below.

Egan v. *Hart*, 165 U. S. 188, 41 L. ed. 680; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853; *Bartlett* v. *Lockwood*, 160 U. S. 357, 40 L. ed. 455; *Stanley* v. *Schwalby*, 162 U. S. 255, 40 L. ed. 960.

The opinions of the Wisconsin supreme court are a part of the record made such by § 2410, Wisconsin Statutes of 1898, in force since 1870.

"Sec. 2410. The supreme court shall give their decisions in all cases in writing, which . . . shall constitute . . . a part of the record in the action . . . and shall be certified therewith to any court of the United States to which such action or proceeding, or the record thereof, may be in any manner certified or removed."

Such opinions must therefore be examined by this court as part of the record, to ascertain what the court below found as facts.

Gross v. *United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680; *Kreiger* v. *Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675.

On appeals in equitable actions the supreme court of Wisconsin retries the case upon the merits, so that its findings of facts are ultimate findings in the case.

Whitney v. *Traynor*, 76 Wis. 628.

When the supreme court of Wisconsin retried this case on appeal it had before it a full record of all the proceedings in the lower court, including all the evidence, findings, requests for findings, refusals, and exceptions.

Some of the Facts Found by the Wisconsin Supreme Court:

First. Such court found that the state never took any of the water powers below the dam, and never granted any such water powers to the improvement company or to the canal company.

We quote:

"The property owned by the state and granted to the improvement company consisted in an easement in the lands occupied by the canal, dams, and ponds, and the water powers incidentally created by the dams. The water powers which the state owned and transferred to the improvement company were such as the state owned by virtue of section 16 of the act of 1848, which provided: 'Whenever a water power shall be created by reason of any dam or other improvement made on any of said rivers, such water power shall belong to the state.' The state did not take or own real estate below its dams, except what was taken for and occupied by the canal.

"This court held that the Green Bay & Mississippi Canal Company owned all the water power which was created by construction and operation of a government dam at Kaukauna; . . . the limit of this right is at the point where it infringes upon the rights of others. It concedes all the rights which the state had or could acquire as against such lower owners."

The finding above quoted, that the state did not take or own real estate below its dams, except what was taken for and occupied by the canal, really covers the whole question of fact as to its taking water powers below the dam. If it did not take any real estate below the dam, it took no water powers, for such water powers are part and parcel of the land itself.

Gould, Waters, § 204.

These findings are fully supported by the evidence, *viz.:* the report of the Secretary of War to Congress, and the accompanying report of Major Houston to the Secretary of War, as to the water powers which the canal company claimed, before the board of arbitrators, to own at Kaukauna, and for the value of which it gave credit to the United States in its sale of improvements to the United States.

The report of Major Houston is found at page 69 of the canal company's compilation of laws and documents referred to in the printed record.

Referring to the water powers created by the dams, and surplus water not required for purposes of navigation, valued by the arbitrators at $140,000, the major says:

"This water power is estimated to be equal to 14,000 horse power, distributed as follows, according to the testimony of Morgan L. Martin, upon whose evidence the award seems to be based.

"At Appleton 5000 horse power; at Ce-

dars, 1000 horse power; at Little Chute, 2500 horse power; at Kaukauna, 2500 horse power; at Rapid Croche, 1500 horse power; at Little Kaukauna, 750 horse power; at other points 750 horse power; in all, 14000 horse power."

He further says in his report: "There is an immense water power in the lower Fox, entirely independent of the works of improvement, part of which has been made available by works of private parties."

The state supreme court found as a fact that the water power created by the dam at Kaukauna was about 2700 horse power, and that on the rapids below the dam there was about 12600 horse power. These findings, together with the report of Major Houston, show it to be a conclusive fact that the state never took any of the water powers below the dam, and that the canal company at the time of the arbitration for the sale of the improvement to the United States only claimed to own at Kaukauna 2500 horse power which is a little less than that found by the state supreme court to be created by the dam.

This claim of the canal company, at the time of the arbitration and for the purposes of arbitration, was an honest one, or else the canal company, in only claiming to own 2500 horse power at that point, sought to play a trick upon the government by withholding from the arbitrators proof of its ownership of 12600 horse power below the dam, if it in fact owned the same, thereby largely reducing the amount to be credited the government for its franchises in the purchase by the government of the property of the canal company. The water power upon the rapids below the dam at Kaukauna is nearly equal in extent to all the water powers which the canal company, in its proofs before the arbitrators, claimed to own upon the entire Fox river.

From the above finding by the state supreme court, and the evidence supporting it,
[186]it is clear *that the water powers below the dam were never taken by the state, and were never treated by the state, the canal company, or the United States, as the source of a fund expended or to be expended in the completion and maintenance of the public improvement.

Second. The dam created 2700 horse power of water.

Third. The water power below the dam upon the rapids is 12600 horse power.

Fourth. The ordinary flow of the river is 300,000 cubic feet per minute.

Fifth. A flow of only 1000 cubic feet of water a minute is required for the use of the canal for the purposes of navigation during the season of navigation; this to fill the locks and supply waste by leakage and evaporation.

This finding is a verity as to the works of improvement in the river at Kaukauna as they exist to-day. The remainder of the ordinary flow of the river, *viz.*, 299,000 cubic feet per minute, is not required for the purposes of navigation, and constitutes the surplus water which, if not diverted to a private use, would flow over the dam and through the natural channels of the river.

Sixth. The river between the dam and the slack water below is rapids, and has never been navigable.

We do not claim that this finding of non-navigability of the river at this point excludes the United States from its sovereign power to control and improve the navigation of the Fox river, but only that the placing of structures in the bed of the stream where it is not navigable for over a mile in length, for hydraulic or other purposes, would work no injury to the navigation, and could only be complained of by the state.

The supreme court of Wisconsin in *A. C. Conn Co.* v. *Little Suamico Lumber Mfg. Co.* 74 Wis. 652, expressly recognizes the right of riparian owners to use navigable streams and their banks for purposes not inconsistent with the public use, and to place obstructions in the beds of such streams when it will not interfere with the navigation thereof. We quote from opinion at page 657:

"This plainly implies that an obstruction in a navigable stream, which does not impair the free navigation thereof, though not authorized by law, is not a nuisance and unlawful. Dams, booms, mills, and bridges, even, may be constructed on some navigable streams in such a manner as not seriously to affect the navigation thereof, or infringe upon the common right. To say, therefore, that there can be no obstruction or impediment whatsoever by the riparian owner in the use of the stream or its banks would be in many cases to deny all valuable enjoyment of his property so situated."

See also *State* v. *Carpenter*, 68 Wis. 165.

Seventh. The diversion of the water of the river through the canal for water power purposes, "by accelerating the current, impairs navigation."

IV. The water powers reserved to the canal company in its deed to the United States were only those which the arbitrators had valued at $140,000, and the title to which was already in said company.

This seems to be recognized by this court in that part of its opinion which says:

"The substantial meaning of the transaction was that the United States granted to the canal company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works, and that the United States were credited with the appraised value of the water powers and appurtenances and the articles of personal property. The method by which this arrangement was effected, *viz.*, by reservation in the deed, was an apt one," etc.

It already appears in this petition that the arbitrators included in their award of $140,000 only 2500 horse power of water at Kaukauna, a little less than that found by the state supreme court to be created by the dam, leaving the 12600 horse power upon the rapids below the dam (being the water power in controversy) wholly untouched by the award or the deed. This conclusion is emphasized by the language of the reservation in the

deed, *viz.*, "the water power created by the dams."

All water powers reserved in the deed were granted to the canal company by the state, through state legislation, presenting only state questions, which we respectfully submit are not reviewable by this court upon this writ of error.

V. If we may be permitted to do so we desire to suggest that the conclusion expressed in the following language of the opinion, *viz.:* "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition,"—is not strictly accurate. While it its true that in the natural condition of the stream the water power in question (being that below the dam) did not exist in its most available form, yet that it did exist in its most essential and valuable feature as a property right, *viz.*, in the natural fall of 42 feet from the head to the foot of the rapids, is too clear for controversy. Were it not for this natural fall there would be no water power; with it a power exists which can be fully developed for use at a small cost. It also exists in that part of the stream which the state supreme court found as a fact had never been navigable, and where the same court in *A. C. Conn Co.* v. *Little Suamico Lumber Mfg. Co.* 74 Wis. 652, and in *State* v. *Carpenter*, 68 Wis. 165, 60 Am. Rep. 848, recognizes the right of the riparian owner to place structures to make available the natural power, so long as such structures do not materially or unreasonably interfere with the public right.

VI. We failed to make clear to the court another matter of fact. The court says: "It was found by the trial court that the Green Bay & Mississippi Canal Company has leased all of the water power created by the dam and canal, or arm of the dam, to be used over the water lots abutting on the canal."

This is only true in the sense that the canal company had leased all of the water
[187]power "which it could find *customers for;" not that it had leased all the water power "created by the dam and canal." The canal company filed a schedule of its leases existing at the time of the trial of this cause. This schedule, the company's own statement, shows leases of water "to be used over the water lots abutting on the canal" of only 860 horse power out of the 2500 horse power reserved. It also shows leases from the pond at the middle power below the dam, whereon are the mills of the original plaintiffs and whereon the canal company is a riparian owner, of 900 horse power.

On and prior to October 1, 1880, the canal company had leased only 230 horse power "to be used over the water lots abutting on the canal."

VII. This court says: "It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition, nor was it created by the erection of a dam by private persons for that sole purpose." It should have been made to appear that a part of the water power involved in this contention is created by a dam built by private persons, Mathew J. Mead and N. M. Edwards, riparian owners, in 1880 for the sole purpose of a water power. The Kaukauna Water Power Company, principal defendant herein, is a riparian owner of part of this power, being the owner of three fourths of the residue after the separation therefrom of certain parcels leased to one of the original plaintiffs, the Union Pulp Company, and to one of the defendants.

VIII. This court held in 142 U. S. 254, 269, 270, 35 L. ed. 1004, 1009, 1010 that it was necessary that there should be notice of taking while compensation could be had.

The notice of taking held sufficient in that case only related to the withdrawing of water from the pond held by the government dam, and not to the use of the water on the various channels of the river below the dam.

Speaking of this notice Justice Brown said: "Until this time there had been no active interference with any claim or riparian rights belonging to the water power company."

This notice did not in any way relate to the water power *here in contention, which is [188]
that created by the fall of the river below the government dam. As to that water power there has been no notice of taking; on the contrary the canal company has recognized the riparian ownership by acting as a riparian owner itself, and by uniting as a riparian owner with other riparian owners in leases of power created by the Mead and Edwards dam, above referred to.

The compensation act of 1875 (18 Stat. at L. 506, chap. 166), was repealed in 1888 (25 Stat. at L. 421, chap. 4. Hence any notice of taking after 1888 is fruitless.

IX. The case of *Kaukauna Water Power Co.* v. *Green Bay & M. Canal*, 142 U. S. 254, 35 L. ed. 1004, between some of the parties to this suit, and relating to water power and other rights on this river at Kaukauna, settles so many questions applicable to the case at bar that we take the liberty of making several quotations from the opinion in that case.

At page 271, 35 L. ed. 1010, the court says: "It is the settled law of Wisconsin, announced in repeated decisions of its supreme court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. *Jones* v. *Pettibone*, 2 Wis. 308; *Walker* v. *Shepardson*, 2 Wis. 384, 60 Am. Dec. 423, 4 Wis. 486, 65 Am. Dec. 324; *Norcross* v. *Griffiths*, 65 Wis. 599, 56 Am. Rep. 642. In *Janesville* v. *Carpenter*, 77 Wis. 288, 8 L. R. A. 808; it is said of the riparian owner: 'He may construct docks, landing places, piers, and wharves out to navigable waters, if the river is navigable in fact; but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property un-

der the protection of the Constitution, and it cannot be taken or its value lessened or impaired, even for public use, "Without compensation" or "without due process of law," and it cannot be taken at all for anyone's private use.' With respect to such rights we have held that the law of the state, as declared by its supreme court, is controlling as a rule of property. *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Parker* v. *Bird*, 137 U. S. 661, 34 L. ed. 819; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428."

As to the water power that can be appropriated as an incident to the improvement, the court says, at page 275, 35 L. ed. 1011:

"The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for public improvement a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement."

Again, at page 276, 35 L. ed. 1012: "So far, however, as land was actually taken for the purpose of this improvement, either for the dam itself or for the embankment, or for the overflow, or so far as water was diverted from its natural course, or from the uses to which the riparian owner would otherwise have been entitled to devote it, such owner is undoubtedly entitled to compensation." These quotations clearly define and settle many of the rights of defendants in error in the case at bar.

Let us apply the law thus settled to some of the established facts in this case.

(1) The state supreme court found as a fact that the river between the dam and slack water below is rapids and has never been navigable. As to this part of the river the rights of riparian owners to the use of the water for hydraulic purposes, and to erect structures in the bed of the stream to develop such uses, is fully recognized by the above decision.

(2) The state supreme court found as facts that the ordinary flow of the river is 300,000 cubic feet a minute, and that a flow of only a thousand cubic feet a minute is required for the use of the canal for the purposes of navigation during the season of navigation. The diversion of the remaining 299,000 cubic feet of flow of water per minute from the riparian owners below the dam for hydraulic power would seem to be for the express or apparent purpose of obtaining water power to lease to private individuals, and not as an incident to the public improvement below the dam, *viz.*, the canal.

(3) The taking by the state of the 12-600 horse power found by the state supreme court to exist upon the rapids below the dam would seem to be for private purposes only, and not as an incident to the public improvement, and to be thoroughly condemned by the decision which we have just quoted.

*X. This decision goes very far towards overruling all former decisions respecting riparian rights upon public rivers. It practically denies the existence of such right, as against the claim of the state, to take the waters of the public rivers for private purposes, hydraulic power.

The decision may also work a public calamity to the cities of the Fox river valley. Its effect may embrace the water powers upon the whole line of the improvement, extending from Lake Winnebago to Green Bay, many of which have heretofore been possessed and enjoyed by parties other than the canal company under a supposed ownership. The decision may be so construed as to give all of the water powers throughout the whole line of improvement to the canal company, and place all of the industries of the Fox river valley depending upon water powers (and there are many) under contribution to that company.

We most respectfully submit this petition to this Honorable Court, and ask it to grant a rehearing herein, and certify that in our judgments the grounds assigned therefor are meritorious and well founded in law and fact.

John T. Fish,
Alfred L. Cary,
Counsel for Kaukauna Water Power Company and others, Defendants in Error.
Moses Hooper,
George G. Greene,
Counsel for Original Plaintiffs Defendants in Error.

*Mr. Justice **Shiras** delivered the opinion of the court: **[189]**

This is a petition by the defendants in error for a rehearing of the case of *Green Bay & Mississippi Canal Company* v. *Patten Paper Company and others*, decided at the present term, and reported in 172 U. S. 58 [*ante*, 364].

The reasons set forth in the petition and accompanying brief seem to go upon a misapprehension of the scope and meaning of the decision of this court.

Thus, it is made matter of complaint that this court did not deal with questions concerning the division of the waters of Fox river after they had spent the force or head given them by the dam and canal, and had passed into a non-navigable portion of the stream below the improvement; and it is suggested that we overlooked the fact that a private dam had been constructed between islands Three and Four.

But those are questions to which the jurisdiction of this *court does not extend, and **[190]** hence could not be considered by us. The purport of our decision was to preserve to the Green Bay & Mississippi Canal Company the use of the surplus waters created by the dam and canal. After such waters had flowed over the dam and through the sluices, and had found their way into the unimproved bed of the stream, the rights and disputes of the riparian owners must be determined by the state courts.

Again, apprehensions are expressed lest the decision in the present case may be con-

strued so as to injure parties using water powers at other places in the river, and who are not represented in the present controversy.

We are not ready to presume that the authorities of the United States will either permit or make changes in the places where the surplus waters are to be used by the Green Bay & Mississippi Canal Company, so as to deprive other parties of the water powers they have been using for so many years, unless such changes are found to be necessary and proper in the regulation and delivery of the surplus waters created by the public improvement. But such questions are not now before us.

While the courts of the state may legitimately take cognizance of controversies between the riparian owners, concerning the use and apportionment of the waters flowing in the non-navigable parts of the stream, they cannot interfere, by mandatory injunction or otherwise, with the control of the surplus water power incidentally created by the dam and canal now owned and operated by the United States.

The petition for a rehearing is denied.

---

[191] CITY OF NEW ORLEANS, *Plff. in Err.*,
v.
MARY QUINLAN.

(See S. C. Reporter's ed. 191-193.)

Certificates of indebtedness, when suable in Federal courts.

Certificates of indebtedness made by a city and payable to bearer, being made by a corporation, although not negotiable, are not subject to the restriction of the act of August 13, 1888, that an assignee of a chose in action cannot sue in a Federal court unless the assignor could sue in such court.

[No. 343.]

Submitted December 19, 1898. Decided February 27, 1899.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment of that court in favor of Mary Quinlan, plaintiff, against the City of New Orleans for the recovery of the amount of certain certificates made by the city and payable to bearer. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Samuel L. Gilmore** and **W. B. Sommerville** for plaintiff in error.

Mr. **Charles Louque** for defendant in error.

[191] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action brought in the circuit court of the United States for the eastern district of Louisiana by Mary Quinlan, a citizen of the state of New York, against the city of New Orleans, to recover on a number of certificates owned by her, made by the city, and payable to bearer. Defendant excepted to the jurisdiction because the petition contained no averment that the suit could have been maintained "by the assignors of the claims or certificates sued upon." The *circuit court overruled the exception, and the [192] cause subsequently went to judgment.

By the eleventh section of the judiciary act of 1789, it was expressly provided that the circuit courts could not take cognizance of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been, except in cases of foreign bills of exchange. The act of March 3, 1875 (18 Stat. at L. 470, chap. 137), provided: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." The restriction was thus removed as to "promissory notes negotiable by the law merchant," and jurisdiction in such suits made to depend on the citizenship of the parties as in other cases. *Tredway* v. *Sanger*, 107 U. S. 323 [27: 582].

By the first section of the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), the provision was made to read as follows: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

These certificates were payable to bearer and made by a corporation; they were transferable by delivery; they were not negotiable under the law merchant, but that was immaterial; they were payable to any person holding them in good faith, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer. *Thompson* v. *Perrine*, 106 U. S. 589 [27: 298]. They were therefore not subject to the restriction, and the circuit court *had jurisdiction. In *New Orleans* v. [193] *Benjamin*, 153 U. S. 411 [38: 764], where the question was somewhat considered, the instruments sued on were not payable to bearer.

In *Newgass* v. *New Orleans*, 33 Fed. Rep. 196, District Judge Billings construed the provision thus: "The circuit court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over—*First*, suits upon foreign bills of exchange; *second*, suits that might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; *third*, suits upon choses in action payable to bearer and made by a corporation." This decision

was rendered several months prior to the passage of the act of August 13, 1888, and has been followed by the circuit courts in many subsequent cases. The same conclusion was reached by Mr. Justice Miller in *Wilson* v. *Knox County*, 43 Fed. Rep. 481, and *Newgass* v. *New Orleans* was cited with approval. We think the construction obviously correct, and that the case before us was properly disposed of.

It is true that the act of March 3, 1887, was evidently intended to restrict the jurisdiction of the circuit courts, but the plain meaning of the provision cannot be disregarded because in this instance that intention may not have been carried out.

Judgment affirmed.

C. P. DEWEY, *Plff. in Err.*,
v.
CITY OF DES MOINES and Others.

(See S. C. Reporter's ed. 193-205.)

Federal question—how raised—assessment against a nonresident of the state—action in state court.

1. An assignment of error which relates solely to the validity of a provision in a state judgment imposing a personal liability against a nonresident of the state over whom the court had acquired no jurisdiction, for the deficiency arising on the tax sale of property, does not raise a Federal question as to the validity of the assessment upon the property.
2. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature, where that question was not raised in or decided by the state court.
3. A state statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lotowner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, as to enforce such personal liability would be a taking of property without due process of law and a violation of the Federal Constitution.
4. By resorting to the state court to obtain relief from such assessment and from such personal liability, such nonresident does not thereby consent or render himself liable to a judgment against him providing for any personal liability.

[No. 122.]

Argued January 11, 12, 1899. Decided February 27, 1899.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court affirming the judgment of the District Court of Polk County, which dismissed with costs an action brought by C. P. Dewey, a nonresident of the state, to set aside certain assessments upon his property for the paving of a street, and to enjoin proceedings for the sale, and to procure a judgment that there was no personal liability, but upheld and foreclosed a contractor's lien on plaintiff's property. *Reversed,* and cause remanded to the Supreme Court of Iowa for further proceedings.

See same case below, 101 Iowa, 416.

*Statement by Mr. Justice **Peckham:**

The petition in this case was filed by the **[194]** plaintiff in error to set aside certain assessments upon his lots in Des Moines, in the state of Iowa, which had been imposed thereon for the purpose of paying for the paving of the street upon which the lots abutted, and to obtain a judgment enjoining proceedings *towards their sale, and adjudging that **[195]** there was no personal liability to pay the excess of the assessment above the amount realized upon the sale of the lots.

The petition alleged that the petitioner was at all times during the proceedings mentioned a resident of Chicago, in the state of Illinois, and that he had no actual notice of any of the proceedings looking towards the paving of the street upon which his lots abutted; that the street was paved under the direction of the common council, which decided upon its necessity, and the expense was by the provisions of the Iowa statute assessed upon the abutting property, and the lotowner made personally liable for its payment; that the expense of the improvement was greater than the value of the lots assessed, and the common council knew it would be greater when the paving was ordered.

Various other facts were set up touching the invalidity of the assessment upon the lots, but no allegation was made attacking its validity by reason of any violation of the Federal Constitution. Under stipulation of the parties various allegations of fraud upon the part of the members of the common council, which had been included in the petition, were withdrawn, and the allegations of the petition as thus amended were not denied.

The contractor who did the work of paving the street was made a party to this proceeding, and he set up a counterclaim asking that the certificates given him by the city in payment for his services, and which by statute were made a lien upon the lots abutting upon the street, might be foreclosed and the lots sold, and a personal judgment pursuant to the same statute rendered against the plaintiff in error.

By stipulation certain motions which were made to strike out allegations in the petition were treated as demurrers to the petition, and the case was thus placed at issue.

Upon the trial the district court of Polk county gave judgment dismissing the petition, with costs, and in favor of the contractor on his counterclaim, foreclosing the lien of the latter, and ordering the sale of the lots; and the judgment also provided for the issue of a personal or general execution *against the plaintiff in error to collect any **[196]** balance remaining unpaid after sale of the lots.

Plaintiff took the case to the state supreme court, and there made an assignment of errors, one of which is as follows:

"The court erred in holding and deciding that plaintiff was personally liable to said

Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and, further, that as plaintiff was at all times a nonresident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him in excess of the value of all the lots was not due process of law, and was in contravention of the provisions on that subject of the Fourteenth Amendment to the Constitution of the United States, as well as in contravention of the provisions of the Constitution of the state of Iowa on the same subject."

The supreme court affirmed the judgment of the district court, and plaintiff brought the case here by writ of error.

Messrs. **Andrew E. Harvey** and *Amasa Cobb* for plaintiff in error.

Mr. **N. T. Guernsey** for defendant in error.

[196] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

The only one of the assignments of error made in the state supreme court, which has reference to any Federal question, is the one set forth in the statement of facts, and it will be seen that such assignment relates solely to the validity of the provision for the personal liability imposed upon plaintiff in error by the judgment of the district court.

[197] *None of the other assignments of error involves any Federal question.

In the brief for plaintiff in error in this court it is said that the "counsel for plaintiff in error in the state court seem to have relied upon one single proposition only as involving a Federal question, to wit: As plaintiff was at all times a nonresident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, the imposition of the personal liability against him in excess of the value of all the lots was not due process of law, and was in contravention of the provisions upon that subject of the Fourteenth Amendment of the Constitution of the United States."

The counsel, however, does not confine himself in this court solely to a discussion of the Federal question which was contained in the assignment of error above set forth, and which was argued in the court below, regarding the validity of a personal judgment; but counsel claims the further right to attack the validity of the assessment upon the lots themselves, because, as he asserts, it was laid without regard to any question of benefits, and that it exceeds the actual value of the property assessed, and that, even if permitted by the statute of Iowa, such an assessment constitutes a taking, under the guise of taxation, of private property for public use without just compensation, and is therefore void under the Federal Constitution as amounting to a taking of property without due process of law.

This is a very different question from that embraced in the assignment of errors and argued in the supreme court of the state.

It is objected on the part of the defendant in error that, as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.

Reference to the opinion of the supreme court of the state shows that it was not therein discussed or decided. If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with *it in substance as [198]
to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed. Having, however, raised only one Federal question in the court below, can a party come into this court from a state court and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised?

The two questions, the one as to the invalidity of the personal judgment, and the other as to the invalidity of the assessment upon the lots, are not in anywise necessarily connected, any more than that they both arise out of the proceedings in paving the street and in levying the assessment. The assessment upon the lots might be valid, while the provision for a personal judgment might be void, each depending upon different principles; and the question as to the invalidity of the personal judgment might, as in this case, be raised and argued without in any manner touching the question as to the invalidity of the assessment upon the lots.

In *Oxley Stave Company* v. *Butler County*, 166 U. S. 648 [41: 1149], it was held that the Federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the Constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so this court is without jurisdiction to re-examine the final judgment of the state court upon that matter. See also *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175 [42: 126]; *Kipley* v. *Illinois*, 170 U. S. 182 [42: 998]. In other words the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. *Bridge Proprietors* v. **Hoboken Land & Improv.* [199]
Company, 1 Wall. 116, 143 [17: 571, 576]. In the case at bar no claim was made in the

state court that the assessment upon the lots was invalid as in violation of any provision of the Federal Constitution.

Nor does the record herein show by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it. In such case it has been held that the Federal question sufficiently appears. *Green Bay & M. Canal Company* v. *Patten Paper Company*, 172 U. S. 58, 68 [*ante*, 364], and cases cited. In substance the validity of the statute or the right under the Constitution must have been drawn in question. *Powell* v. *Brunswick County*, 150 U. S. 433 [37: 1134]; *Sayward* v. *Denny*, 158 U. S. 180 [39: 941]. The latest decision to this effect is *Capital National Bank of Lincoln* v. *First National Bank of Cadiz*, 172 U. S. 425 [*ante*, 502].

Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law. *Roby* v. *Colehour*, 146 U. S. 153, 159 [36: 922, 924]; *Chicago, B. & Q. Railroad Company* v. *Chicago*, 166 U. S. 226, 231 [41: 979, 983]; *Green Bay & M. Canal Company* v. *Patten Paper Company*, and *Bank of Lincoln* v. *Bank of Cadiz*, *supra*.

In all these cases it did appear from the record that the rights were set up or claimed in such a way as to bring the subject to the attention of the state court. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature. *Hamilton Mfg. Company* v. *Massachusetts*, 6 Wall. 632 [18: 904]. In order to be available in this court some claim or right must have been asserted
[200] *in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether express or implied, must be of some right or claim founded upon the Constitution or the laws or treaties of the United States, which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case.

A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. *Hamilton Company* v. *Massachusetts*, *supra*. A point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.

No question of a Federal nature claimed under the Constitution of the United States can be said to have been made by the mere allegation "that the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce, as against plaintiff, not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same." There is nothing else in the record which can be said to raise this Federal right or claim.

Upon these facts we are compelled to hold that we are confined to a discussion of the only Federal question which this *record pre- [201]
sents, *viz.*, the validity of the personal judgment against the plaintiff in error. The assignment of error above set out is broad enough to raise the question, not only as to the sufficiency of notice, but as to the validity of such a judgment against a nonresident.

It is asserted in the petition that the defendant Dillworth, the treasurer of Holt county, is attempting to enforce the assessment levied by the common council, and that he claims plaintiff in error is personally liable for the taxes and interest, and will enforce payment thereof unless restrained, and that plaintiff's personal property is liable to be illegally seized for the payment of the tax. These allegations are substantially admitted by the answers of the defendants, except as to the illegality of the possible seizure of plaintiff's personal property. By filing the counterclaim the contractor makes a direct attempt to enforce, not only the lien upon the lots, but the personal liability of the lotowner. Thus a nonresident, simply because he was the owner of property on a street in a city in the state of Iowa, finds himself by the provisions of the state statute, and without the service of any process upon him, laid under a personal obligation to pay a tax assessed by the common council or by the board of public works and city engineer under the statute, upon his property abutting upon the street, for the purpose of paying the expenses incurred in paving the street, which expenses are greater than the benefit the lots have received by virtue of the improvement. The plaintiff, prior to the imposition of that assessment, had never submitted himself to the jurisdiction of the state of Iowa, and the only jurisdiction that state had in the assessment proceedings was over the real property belonging to him and abutting on the street to be improved. An

assessment upon lots for a local improvement is in the nature of a judgment.

It is said that the statute (Code of Iowa, § 478) provides for the personal liability of the owner of lots in a city in the state of Iowa, to pay the whole tax or assessment levied to pay the cost of a local improvement, and that the same statute provides that the assessment shall also be a lien upon the respective lots from the time of the as-
[202]sessment. It is also said *that the statute has been held to be valid by the Iowa supreme court. This seems to be true. *City of Burlington* v. *Quick*, 47 Iowa, 222, 226; *Farwell* v. *The Des Moines Brick Manufacturing Company et al.* 97 Iowa, 286 [35 L. R. A. 63]. The same thing is also held in the opinion of the state court delivered in the case now before us.

In this case no question arises with regard to the validity of a personal judgment like the one herein against a resident of the state of Iowa, and we therefore express no opinion upon that subject. This plaintiff was at all times a nonresident of that state, and we think that a statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lotowner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute, which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident. There is no course of reasoning as to the character of an assessment upon lots for a local improvement, by which it can be shown that any jurisdiction to collect the assessment personally from a nonresident can exist. The state may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther, and impose a personal liability upon a nonresident to pay the assessment or any part of it. To enforce an assessment of such a nature against a nonresident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution.

In this proceeding of the lotowner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid, the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous, but it was so far erroneous as to constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned. By resorting to
[203]the state *court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counterclaim made by the defendant contractor give any such authority.

The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax of this nature is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in this court. One of the leading cases is *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565], and many other cases therein cited. *Mexican Central Railway Company* v. *Pinkney*, 149 U. S. 194, 209 [37: 699, 705].

The lotowner never voluntarily or otherwise appeared in any of the proceedings leading up to the levying of the assessment. He gave no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.

A judgment without personal service against a nonresident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken. This is as true in the case of an assessment against a nonresident, of such a nature as this one, as in the case of a more formal judgment.

The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. Cooley, Taxation, 1st ed. pp. 3, 4; Burroughs, Taxation, *sec. 6. The power of the state to tax [204]
extends to all objects within the sovereignty of the state. Per Mr. Justice Clifford, in *Hamilton Mfg. Company* v. *Massachusetts*, 6 Wall. 632, at 638 [18: 904, 906]. The power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a nonresident. *Case of the State Tax on Foreign-held Bonds*, 15 Wall. 300, 319 [21: 179, 187]. In Cooley, Taxation, 1st ed. p. 121, it is said that "a state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state than it can subject all the citizens or all the property of such other state to its power." These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a nonresident to pay such an assessment as this oversteps the sovereign power of a state.

In this case the contractor, by filing his counterclaim herein, has commenced the enforcement of an assessment and a personal liability imposed by virtue of just such a statute, and the judgment under review gives him the right to do so. The lotowner is called upon to make such defense as he can

to the claim of personal liability, or else be forever barred from setting it up. He does claim that as a nonresident he did not have such notice, and the state or city did not obtain such jurisdiction over him, with regard to the original assessment, as would authorize the establishment of any personal liability on his part to pay such assessment.

The contractor nevertheless has obtained a judgment, not alone for a foreclosure of his lien, but also for the personal liability of the lotowner, and unless he can in this proceeding have the provision in the judgment, for a personal liability, stricken out, the lotowner cannot thereafter resist it, even when the lots fail (if they should fail) to bring enough on their sale to satisfy the judgment.

The case of *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616], has been cited as authority for the proposition that the rendering of a personal judgment for the amount of an assessment for a local improvement is a matter in which the state authorities cannot be controlled by the Federal Constitution. It [205] does not *appear in that case that the complaining party, in regard to the state statute was a nonresident of the state, but, on the contrary, it would seem that she was a resident thereof. That fact is a most material one, and renders the case so unlike the one at bar as to make it unnecessary to further refer to it.

The statute upon which the right to enter this personal judgment depends being as to the nonresident lotowner an illegal enactment, it follows that the judgment should and must be amended by striking out the provision for such personal liability. For that purpose *the judgment is reversed*, and the cause remanded to the supreme court of Iowa, for further proceedings therein not inconsistent with this opinion. So ordered.

FIRST NATIONAL BANK OF WELLINGTON, OHIO, *Plff. in Err.*,

v.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio.

(See S. C. Reporter's ed. 205-220.)

Meaning of the term "moneyed capital"—discrimination in taxation—value of national bank shares—judicial notice—meaning of the term "credit."

1. The term "moneyed capital" as used in U. S. Rev. Stat. § 5219, forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of national banks, such as deposits in savings banks or moneys of charitable institutions, the exemption of which from taxation is not forbidden by the Federal statute.
2. The law of Ohio that the shares of national banks shall be assessed at their true value, which in effect requires the deduction of the debts of the banks, and that unincorporated banks and bankers shall be assessed upon the moneyed capital belonging to the bank or banker and employed in the business, after deducting the debts existing in the business, makes no discrimination between unincorporated banks and bankers on the one hand and shareholders in national banks on the other.
3. The increase of the value of national bank shares by reason of the franchises of the bank itself, while there is no such added value in the case of unincorporated banks, does not make the taxation of such shares at their true value a discrimination against the shareholders and in favor of the unincorporated banks.
4. This court will not take judicial notice of the report of the auditor of the state, nor refer to any statement or alleged fact stated therein, unless that fact is found by the trial court.
5. The term "credits" in the Ohio statute includes claims for labor or services, but these claims are not moneyed capital within the meaning of U. S. Rev. Stat. § 5219, respecting discrimination against national banks.

[No. 137.]

Argued January 13, 16, 1899. Decided February 27, 1899.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment of that court reversing the judgment of the Circuit Court of Lorain County, Ohio, and affirming the judgment of the Court of Common Pleas of Lorain County dismissing an action brought by the First National Bank of Wellington, Ohio, against H. P. Chapman, Treasurer of Lorain County, to restrain the collection of taxes, through or by means of the bank, by the defendant, levied under a statute of Ohio upon individual shareholders in the bank. *Affirmed.*

See same case below, 56 Ohio St. 310.

Statement by Mr. Justice **Peckham:**

This action was brought to restrain the collection of taxes, through or by means of the bank, by the defendant in error, levied under a statute of Ohio upon certain individual shareholders in the bank, on the ground, as alleged, that the assessments upon such specified shareholders were illegal as having been made without regard to the debts of such individual *owners, contrary to the case [206]
of other moneyed capital in the hands of individual citizens, whose debts were permitted to be deducted from the value of such capital before the assessment of taxes thereon.

The petition contained allegations intended to show a case for the interposition of a court of equity, and a tender was therein made of the amount of the taxes which the plaintiff admitted to be due on such shares after deducting the debts.

The answer, while not taking any objection that a case for equitable relief by in-

junction was not made, provided the contention of the petition as to the assessments being illegal was well founded, claimed, substantially, that by the laws of the United States and of Ohio the assessments were legal, and the petition should therefore be dismissed. Upon trial in the court of common pleas of Lorain county the court found the following facts:

"First. Plaintiff is a national banking association incorporated under and by virtue of an act of Congress entitled 'An Act to Provide for the National Currency, Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof,' approved June 3, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, county of Lorain, and state of Ohio.

"Second. The defendant is the duly elected and qualified treasurer of the county of Lorain and state of Ohio.

"Third. The plaintiff has a capital stock of $100,000, divided into 1,000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons.

"Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that
[207] included in said return so *made by said cashier was the real estate owned by the plaintiff, valued at $3,420, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded, as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and fixed the same at $74,710, exclusive of the assessed value of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said state board of equalization, acting under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at $74,710, exclusive of the assessed value of plaintiff's real estate, and the auditor of said state did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

"Fifth. That the following named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr.	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

"That said shares were valued by said state board of equalization for the year 1893 at $36,607.90, and certified by said board to the auditor of Lorain county as the taxable value of the same; that the rate of taxation for all tax *assessed and collected for [208]
the year 1893 within said county and village was $0.0255 on a dollar's valuation, and amounted on said value of said shares to $933.50.

"Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the share holders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893,—to wit, between the first and second Mondays of May of said year,—each of said above named shareholders was indebted and owing to others of legal bona fide debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate delivered to the treasurer the entire valuation of said shares so made, without allowing any deductions therefrom, by reason of any bona fide indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

"Seventh. That the plaintiff tendered to said treasurer of Lorain county on the 28th day of December, 1893, and offered to pay to said treasurer, the sum of $485.80, if he would receive the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893; and said treasurer refused to accept the same; and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock."

The court also found as a conclusion of law from the above facts that the injunction should be denied and the petition dismissed. The plaintiff appealed to the circuit court *of [209]
Lorain county, where, after argument, the judgment for defendant was reversed and judgment ordered for plaintiff enjoining the collection of the tax. The defendant, the treasurer of Lorain county, brought the case

to the supreme court of the state, where, after hearing, the court reversed the circuit court and affirmed the judgment of the common pleas dismissing the petition. *Chapman* v. *First National Bank of Wellington*, 56 Ohio St. 310.

The state law on the subject of taxation, so far as it may be claimed to in any way affect the question, is contained in the various sections of the Revised Statutes of Ohio, which are set out in the margin.†

Mr. **W. W. Boynton** for plaintiff in error.

Messrs. **F. S. Monnett,** Attorney General of Ohio, and **S. W. Bennett** for defendant in error.

*Mr. Justice **Peckham,** after stating the [211] facts, delivered the opinion of the court:

Complaint is made in behalf of the shareholders of the national bank in question that they are, by means of the system *of taxa- [212]

†Section 2730 gives definitions of the terms used in the article relating to taxation. This section is not set out in so many words, but as therein used the following terms are thus defined:

a. "Real property" and "lands" mean not only land itself, but everything connected therewith in the way of buildings, structures, and improvements, and all rights and privileges appertaining thereto.

b. "Investment in bonds" includes moneys in bonds or certificates of indebtedness of whatever kind, issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States.

c. "Investment in stocks" includes all moneys invested in the capital stock of any association, corporation, joint-stock company, or other company, where the capital or stock is divided into shares transferable by each owner without the consent of the other shareholders, for the taxation of which no special provision is made by law.

d. "Personal property" includes (1) every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part or any parcel of real property; (2) the capital stock, undivided profits, and all other means not forming part of the capital stock of a company, whether incorporated or unincorporated, and all interest in such stock, profits, or means, including shares in a vessel as therein stated; (3) money loaned on pledge or mortgage of real estate, although a deed may have been given, provided the parties consider it as security merely.

e. The term "moneys" includes surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession and every deposit which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money on demand.

f. The term "credits" means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon, including deposits in banks, or with persons in or out of the state, other than such as are held to be money as defined in this section, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts owing, no obligation can be taken into account (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint-stock company; (3) for any subscription for any religious, scientific, or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc.

Other sections read as follows:

Sec. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, annuities, or otherwise, in his possession or under his control on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise; and also of all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, held on said day by another, residing in or out of this state, for and belonging to the person so listing, or anyone residing in this state, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this state.

Sec. 2737. Such statement shall truly and distinctly set forth, first, the number of horses and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind) and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint-stock companies, annuities or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property

tion adopted and enforced in the state of Ohio, subjected to taxation at a greater rate than is imposed upon other moneyed capital [213] in the hands of individual citizens, *contrary to section 5219 of the Revised Statutes of the United States.

The complaint is founded upon the allegation that the owners of what is termed credits in the law of Ohio (Rev. Stat. § 2730) are permitted to deduct certain kinds of their debts from the total amount of their credits, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the same as credits, and their owners permitted to deduct their debts from the valuation. The owners of property other than credits are not permitted to deduct their debts from the valuation of that property.

It is also claimed that there is an unfavorable discrimination against the national bank shareholder and in favor of an unincorporated bank or banker.

At the outset it is plain that the system of taxation adopted in Ohio was not intended to be unfriendly to or to discriminate against the owners of shares in national banks, for, as observed by the state supreme court, that system was adopted long prior to the passage of the law by Congress providing for the incorporation of national banks. Under this system the owner of shares in national banks is taxed precisely like the owner of shares in incorporated state banks. Rev. Stat. Ohio, § 2762.

The main purpose of Congress in fixing lim-

---

covered by the first nine items of this section, and allow the assessor to affix the value thereof; and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

Sec. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint-stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.

UNINCORPORATED BANKS AND BANKERS.

Sec. 2758. Every company, association, or person not incorporated under any law of this state or of the United States for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidence of indebtedness, with a view to profit, shall be deemed a bank, banker, or bankers, within the meaning of this chapter.

Sec. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First. The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated bank, banker, or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, bonds, including United States government bonds, or evidences of indebtedness, held as an investment or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

Eighth. The average amount of United States government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker, or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward, or township.

Sec. 2759*a*. The said bank, banker, or bankers shall, at the same time, make statement under oath of the amount of capital paid in or employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership.

INCORPORATED BANKS.

Sec. 2762. All the shares of the stockholders in any incorporated bank or banking association located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located, and not elsewhere.

Sec. 2763. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals.

Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and the second Monday of May, annually, a report in duplicate under oath, exhibiting in detail and under appropriate heads the resources and liabilities of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

Sec. 2766. Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor.

its to state taxation on investments in national banks was to render it impossible for the state in levying such a tax to create and [214]*fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. "Moneyed capital" does not mean all capital the value of which is measured in terms of money; neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property, which, in the hands of individuals, none would think of calling moneyed capital; and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from *Mercantile Bank* v. *New York*, 121 U. S. 138, 155 [30: 895, 901]. That case has been cited with approval many times, especially in *First National Bank of Garnett* v. *Ayres*, 160 U. S. 660 [40: 573], and in *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440 [41: 1069].

The result seems to be that the term "moneyed capital" as used in the Federal statute does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute.

The case last cited contains a full and careful reference to most of the prior cases decided in this court upon the subject, and gives the meaning (as above stated) of the term "moneyed capital," when used in the Federal statute.

With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks, state and national, pre-[215]cisely *the same, the question is whether this system of taxation in Ohio, in its practieal operation, does materially discriminate against the national-bank shareholder in the assessment upon his bank shares.

Under the Ohio law the shares in national and also in state banks are what is termed stocks or investments in stocks, and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers. In regard to this latter class, there is no capital stock so-called, and section 2759 of the Revised Statutes therefore makes provision, in order to determine the amount to be assessed for taxation, for deducting the debts existing in the business itself from the amount of moneyed capital belonging to the bank or banker and employed in the business, and the remainder is entered on the tax book in the name of the bank or banker, and taxes assessed thereon. This does not give the unincorporated bank or banker the right to deduct his general debts disconnected from the business of banking, and ont incurred therein, from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted, so that the real value of the capital that is employed may be determined and the taxes assessed thereon.

This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks. Under the sections of the Revised Statutes which relate to the taxation of these latter classes of banks (§ 2762, etc.) the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. In order to arrive at their true value in money the bank returns to the auditor the *amount of the liabilities as well as its re-[216] sources. Thus in both incorporated and unincorporated banks the same thing is desired, and the same result of assessing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks which have a capital stock divided into shares. That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers on the one hand and holders of shares in national banks on the other.

If the value of national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where added elements of value exist in the national bank shares, which are absent in the case of unincorporated banks; but in both cases all the debts of the business itself are deducted from the capital employed before

reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation.

The court below did not hold, as erroneously suggested by counsel for plaintiff in error, that, as the state and national banks were placed on an exact equality regarding taxation, therefore there was no discrimination made against national banks and in favor of other moneyed capital in the hands of individual citizens. The state court said upon this subject that if the state and national banks were treated equally the latter were not assessed at a greater rate than the
[217] former; *that national-bank shareholders were not, in such event, illegally assessed, *unless* there were a clear discrimination in favor of moneyed capital other than that employed in either state or national banks. This statement, we think, is plainly correct.

The question recognized by the state court, therefore, remains whether there is any such discrimination.

The chief ground for maintaining that there is, exists in the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national-bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation.

It is claimed in substance that all credits are moneyed capital, and that they are large enough in amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

There is no finding of the trial court upon the subject of the total amount of credits in the state. Reference was made on the argument to the report of the auditor of the state for 1893, from which it is said to appear that the total credits, after deducting the debts allowed, were $106,000,000 or $111,000,000, the amounts differing to that extent as presented by the counsel for the different parties. The case does not show that the trial court received the report in evidence and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court upon which we must decide this case.

However, if we were to look at this report we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals, which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this
[218] *court, in its decisions above cited, holds is moneyed capital within the meaning of the act of Congress.

Indeed, there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits," amounts to, even under the widest definition of that term.

In looking at the statutory definition of the term "credits" we find that so far from its including all legal claims and demands of every conceivable kind, except investments in bonds of the classes described in section 2730, and investments in stocks, it does not include any claim or demand for deposits which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand, nor the surplus or undivided profits held by societies for savings or banks having no capital stock, nor bank notes of solvent banks in actual possession, and from the credits as defined their owner cannot deduct certain kinds of indebtedness therein mentioned. It cannot be contended that all credits, as defined in the statute, are moneyed capital within the meaning of the act of Congress. The term "credits" includes among other things, as stated in the statute, "all legal claims and demands . . . for labor or service due or to become due to the person liable to pay taxes thereon." These claims are not in any sense of the statute moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed manual labor, and their total must amount to a large sum. What proportion that total bears to the whole sum of credits we do not know, and the record contains no means of ascertaining.

It is impossible to tell from anything appearing in the record what proportion of the whole sum of credits consists of moneyed capital within the meaning of the Federal act. We know that claims for labor or services do not consist of that kind of capital. We also know that there are probably large amounts of other forms of property which might enter into the class of credits as defined in the act, which would not be moneyed capital within the meaning of the act of Congress, as that meaning has been defined by this court in *the cases above cited. It is [219]
thus seen that there are large and unknown amounts of what are in the act termed credits, which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens, included in the term credits (and from which some classes of debts can be deducted), bears to the amount invested in national bank shares. We are, therefore, unable to say whether there has or has not been any material discrimination such as the Fed-

eral statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and that of *First Nat. Bank* v. *Ayres*, 160 U. S. 660 [40: 573], and *Aberdeen Bank* [*First Nat. Bank*] v. *Chehalis County*, 166 U. S. 440 [41: 1069], and *Bank of Commerce* v. *Seattle*, 166 U. S. 463 [41: 1079].

As a result we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court.

It is stated, however, that this specific question has been otherwise decided in *Whitbeck* v. *Mercantile National Bank of Cleveland*, 127 U. S. 193 [32: 118]. If this were true, we should be guided by and follow that decision. Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks, made by the state board of equalization, from sixty per cent of their true value in money, as fixed by the auditor of Cuyahoga county, to sixty-five per cent as fixed by the board (other property being valued at only sixty per cent), amounted to such a discrimina-
[220]tion in the taxation of the *shareholders of such banks as is forbidden by the Federal statute. It was held that it did.

Coming to the question of the deduction of the bona fide indebtedness of shareholders, the court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.

For the reasons already stated, we think *the judgment in this case should be affirmed*, and it is so ordered.

HENRIETTA MINING & MILLING COM-[221]
PANY, *Appt.*,
v.
HENRY JOHNSON.

(See S. C. Reporter's ed. 221-225.)

Service of summons upon foreign corporation—Arizona Code, §§ 348, 712, 713, as to such service.

1. Under Ariz. Code Civ. Proc. § 704, service of a summons upon the general manager of a foreign corporation is a sufficient service upon the corporation itself.
2. Sections 348, 712, and 713 of the same Code, providing specially for service upon foreign corporations, are not exclusive, and merely provide a special mode of service in case the corporation has ceased to do business in the territory, or has no agent appointed in pursuance of § 348.

[No. 139.]

Submitted January 16, 1899. Decided February 27, 1899.

ON APPEAL from a judgment of the Supreme Court of the Territory of Arizona modifying and affirming as modified the judgment of the District Court of Yavapai County, Arizona, in favor of Henry Johnson, plaintiff, and against the Henrietta Mining & Milling Company, the defendant, for work and labor done and material furnished by plaintiff for defendant, amounting to $5,-748.57. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was an action instituted by Johnson in the district court of Yavapai county, Arizona, to obtain a judgment against, and to establish a lien upon, the property of the Mining Company, an Illinois corporation, for work and labor done and material furnished, and to fix the priority of such lien over certain other lienholders who were also made defendants. The plaintiff, in an affidavit annexed to the complaint, made oath that "H. N. Palmer is the general manager of the said Henrietta Mining & Milling Company, and in charge of the property of the said company in the said county of Yavapai," and that said company "has no resident agent in the said county of Yavapai and territory of Arizona, as is required by law; and this affiant causes a copy of this notice of lien to be served upon the said H. N. Palmer, as the general manager of said company."

A summons was issued, and a return made by the sheriff that he had "personally served the same on the 9th day of July, 1894, on the Henrietta Mining & Milling Company, by delivering to H. N. Palmer, superintendent and general manager of said company, . . . being the defendants named in said

summons, by delivering to each of said defendants personally, in the city of Prescott, county of Yavapai, a copy of summons, and a true copy of the complaint in the action named in said summons, attached to said summons."

Default having been made, judgment was entered against the company personally, with a further clause that plaintiff have a lien upon its property in the sum of $5,748. 57.

[222]The case *was taken to the supreme court of the territory by writ of error, where the judgment was modified by striking out the lien upon the property, and in all other respects was affirmed, and a new judgment entered against the sureties upon the supersedeas bond.

Whereupon the Mining & Milling Company sued out a writ of error from this court, insisting, in its assignments of error, that "the said court below did not have jurisdiction of the person of defendant for the reason that no service had been had upon said defendant, either personal or constructive."

Messrs. **William H. Barnes** and **Frank Asbury Johnson** for appellant.

Messrs. **E. M. Sandford** and *Robert E. Morrison* for appellee.

[222] *Mr. Justice **Brown** delivered the opinion of the court:

The affidavit of the plaintiff, and the return of the sheriff, each stated that Palmer was the general manager of the company. No evidence to the contrary was introduced, and the fact must therefore be assumed upon this record.

As the judgment of the district court was modified by the supreme court, it became simply a personal judgment against the company, and the only question presented is whether the service of a summons upon the general manager of the company was, under the laws of Arizona, a sufficient service upon the company itself.

Our attention is called to several sections of the Revised Statutes of Arizona (1887), the first of which is part of the chapter entitled "Foreign Corporation" and provides: "Sec. 348. It shall be the duty of any association, company, or corporation organized or incorporated under the laws of any other state or territory . . . to file with the secretary of this territory and the county recorder of the county in which such enterprise, business, pursuit, or occupation is proposed to be located, or is located, the lawful

[223]appointment of an agent, upon *whom all notices and processes, including service of summons, may be served, and when so served shall be deemed taken and held to be a lawful, personal service," etc. There is no penalty provided for a failure to file such appointment, though in the next section, 349, it is declared that "every act done by it, prior to the filing thereof, shall be utterly void." Beyond this disability it is left optional with the corporation to file such appointment, and the record of this case shows that none such was filed by the plaintiff in error.

The second section is taken from that chapter of the Code of Civil Procedure entitled "Process and Returns:" "Sec. 704. In suits against any incorporated company or joint-stock association the summons may be served on the president, secretary, or treasurer of such company or association, or upon the local agent representing such company or association, in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours," etc.

There is a further provision in the same chapter, sec. 712, that when it is made to appear by affidavit that the defendant "is a corporation incorporated under the laws of any other state or territory or foreign country, and doing business in this territory, or having property therein, but having no legally appointed or constituted agent in this territory, . . . the clerk shall issue the summons, . . . and said sheriff shall serve the same by making publication thereof in some newspaper," etc.; and by section 713, when the residence of defendant is known, the plaintiff, his agent or attorney, shall forthwith deposit a copy of the summons and complaint in the postoffice, postage prepaid, directed to the defendant at his place of residence.

It is insisted by the plaintiff in error that the service in this case upon its manager was ineffectual to bind the corporation, and that a personal judgment under it could only be obtained by complying with section 348, and serving upon an agent appointed in pursuance of that section; and that this position holds good notwithstanding such appointment had never been made. We are of opinion, however, that sections 348, 712, and 713, providing *specially for services upon [224]
foreign corporations, were not intended to be exclusive, and were merely designed to secure a special mode of service in case the corporation had ceased to do business in the territory, or had no local or official agent appointed in pursuance of section 348. Not only is the language of section 348 permissive in the use of the words "may be served" upon the agent appointed under the statute, but the general language of section 704, taken in connection with the general subject of the statute, "Process and Returns," indicates that no restriction was intended to domestic corporations; and that the words "any incorporated company or joint-stock association" are as applicable to foreign as to domestic companies. No penalty is imposed upon foreign corporations for failure to file the appointment of an agent under section 348, and the only disability which such failure entails is its incompetence to enforce its rights by suit. If, as contended by the plaintiff in error, the remedy against the foreign corporation be confined to service of process upon such appointed agent, it results that, if the corporation does not choose to file such appointment, intending suitors are confined to the remedy by publi-

cation provided by section 712, which, under the decisios of this court, would be ineffectual to sustain a personal judgment. *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565].

It is incredible that the legislature should have intended to limit its own citizens to such an insufficient remedy, when the corporation is actually doing business in the territory and is represented there by a manager or local agent.

The cases cited by the plaintiff in error do not sustain its contention. In the *Southern Building and Loan Association* v. *Hallum* [59 Ark. 583], 28 S. W. Rep. 420, it was held by the supreme court of Arkansas, under a statute similar to section 348, that a service made on an agent in a county other than that in which the action was begun, and which failed to show that he had been designated as prescribed, was insufficient to authorize a judgment by default. Obviously, by section 348, it is intended that service may be begun in any county and served upon the appointed agent, and all for which this
[225] case *is authority is that, if it be served upon any other agent, the action must be brought in the county where such agent is served. The opinion of the court was put upon this ground. In the case under consideration, Palmer, the superintendent, was served in the county of Yavapai, where the suit was begun.

The case of the *State* v. *The United States Mutual Accident Association*, 67 Wis. 624, is against the proposition for which it is cited. In that case service of a summons upon an unlicensed foreign insurance company, by delivering a copy to an agent of the company, was held to be sufficient, the defendant never having made an appointment of an agent under the statute. Said the court: "If the argument of counsel to the effect that section 1977 only relates to agents of such foreign insurance companies as are duly licensed to do business within this state is sound, then there would be no possible way of commencing an action against an unlicensed foreign insurance company doing business in this state in violation of law. In other words, such construction would reward such foreign insurance companies as refused to pay the requisite license, by enabling them to retain the license money, and then shielding them from the enforcement of all liability, whether on their contracts or otherwise, in the courts of Wisconsin. Such construction would defeat the whole purpose and scope of the statute."

The cases from Michigan are too imperfectly reported to be of any practical value. In *Desper* v. *The Continental Water Meter Company*, 137 Mass. 252, the service of a bill in equity by subpœna upon the treasurer of a foreign corporation was held to be unauthorized by any statute, and also that there was no method of bringing it in except by means of an attachment of its property. Neither this nor that of *Lewis* v. *Northern R. R.* 139 Mass. 294, is in point.

We are of opinion that the service upon Palmer was sufficient, and *the judgment of the Supreme Court of Arizona is therefore affirmed.*

HENRIETTA MINING & MILLING COMPANY, *Appt.*,
v.
SAMUEL HILL.

(See S. C. Reporter's ed. 225-226.)

[No. 138.]

Submitted January 15, 1899. Decided February 27, 1899.

ON APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming as modified a judgment of the District Court in and for Yavapai County, Arizona, in favor of the plaintiff, Samuel Hill, against the Henrietta Mining & Milling Company. *Affirmed.*

Messrs. **William H. Barnes** and **Frank Asbury Johnson** for appellant.

No counsel for appellee.

BY THE COURT: The *facts in this case, so [226]
far as they bear upon the question in controversy, are precisely similar to the one just decided, and *the judgment of the Supreme Court of Arizona is therefore affirmed.*

BALTIMORE & OHIO RAILROAD COMPANY, *Plff. in Err.*,
v.
DAVID JOY, Admr. of the Estate of John A. Hervey, Deceased.

(See S. C. Reporter's ed. 226-231.)

Action for injuries in the United States circuit court sitting in Ohio, when does not abate on death of plaintiff—removal of case to Federal court—U. S. Rev. Stat. § 955—revivor of actions governed by the laws of the forum.

1. An action pending in the circuit court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, does not finally abate upon the death of the plaintiff, notwithstanding the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if a suit had been brought in Indiana, the action would have abated in that state.
2. A right given by the statute of a state to revive a pending action for personal injuries, in the name of a personal representative of a deceased plaintiff, is not lost upon the removal of the case into a Federal court.
3. U. S. Rev. Stat. § 955, does not apply to an action brought in one of the courts of a state whose statutes permit a revivor in the event of the death of a party before final judgment.
4. The question of the revivor of actions brought in the courts of a state for personal

injuries is governed by the laws of that state, rather than by the law of the state in which the injuries occurred.

[No. 129.]

Submitted January 12, 1899. Decided February 20, 1899.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit of a question of law for the decision of this court in an action brought by John A. Hervey against the Baltimore & Ohio Railroad Company, in the Common Pleas Court of Hancock County, Ohio, to recover damages for personal injuries caused by the negligence of the railroad company, which action was removed into the Circuit Court of the United States for the Northern District of Ohio. After such removal plaintiff died, and the action was revived in the name of his administrator appointed in Ohio. *Question answered in the negative.*

Messrs. **Hugh L. Bond,** *Jr.,* and *J. H. Collins* for plaintiff in error.

No counsel for defendant in error.

[226] *Mr. Justice **Harlan** delivered the opinion of the court:

This case is before us upon a question of law certified by the judges of the United States circuit court of appeals for the sixth circuit under the sixth section of the act of March 3d 1891, chap. 517 (26 Stat. at L. 826).

[227] *It appears from the statement accompanying the certificate, that on the 18th day of October, 1891, John A. Hervey, a citizen of Ohio residing in Hancock county in that state, was a passenger on a train of the Baltimore & Ohio Railroad Company between Chicago, Illinois, and Fostoria, Ohio. While upon the train as passenger he was injured at Albion, Indiana, in a collision caused by the negligence of the railroad company. He brought suit in the common pleas court of Hancock county, Ohio, to recover damages for the personal injuries he had thus received.

Upon the petition of the railroad company the suit was removed into the circuit court of the United States for the northern district of Ohio upon the ground of diverse citizenship. After such removal Hervey died, and, against the objection of the railroad company, the action was revived in the name of the administrator of the deceased plaintiff, appointed by the proper court in Ohio.

At the time of Hervey's death the common-law rule as to the abatement of causes of action for personal injuries prevailed in Ohio. But by section 5144 of the Revised Statutes of that state, then in force, it was provided that, "except as otherwise provided, no *action or proceeding pending* in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office, which shall abate by the death of either party." Rev. Stat. Ohio 1890, vol. 1, p. 1491. That section was construed in *Ohio & Penn. Coal Co.* v. *Smith, Admr.* 53 Ohio St. 313, which was an action for personal injuries caused by the negligence of a corporation and its agents. The supreme court of Ohio said: "The action was a pending one at the time of the death of the plaintiff. It is not within any of the enumerated exceptions of section 5144, and was therefore properly revived and prosecuted to judgment in the name of the administrator of the deceased plaintiff."

The Revised Statutes of Indiana, in which state the injury was received, provide that "no action shall abate by the *death or dis- [228]
ability of a party, or by the transfer of any interest therein, if the cause of action survive or continue" (§ 271); also, that "a cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment and malicious prosecution." (§ 282).

By section 955 of the Revised Statutes of the United States, brought forward from the judiciary act of September 24th, 1789 (1 Stat. at L. 90, chap. 20, § 31), it is provided that "when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the *cause of action* survives by law, prosecute or defend any such suit to final judgment."

The question upon which the court below desires the instruction of this court is this:

"Does an action pending in the circuit court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that state?"

If the case had not been removed to the circuit court of the United States, it is clear that under the statutes of Ohio as interpreted by the highest court of that state the action might have been revived in the state court in the name of the personal representative of Hervey, and proceeded to final judgment. We think that the right to revive attached under the local law when Hervey brought his action in the state court. It was a right of substantial value, and became inseparably connected with the cause of action so far as the laws of Ohio were concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the circuit court of the United States? Was it not, rather, a right that inhered in the action, and *accompanied it when in the lifetime of [229]
Hervey the Federal court acquired jurisdiction of the parties and the subject-matter? This last question must receive an affirma-

tive answer, unless section 955 of the Revised Statutes of the United States is to be construed as absolutely prohibiting the revival in the Federal court of an action for personal injuries instituted in due time and which was removed from one of the courts of a state whose laws modified the common law so far as to authorize the revival, upon the death of either party, of a pending action of that character.

We are of opinion that the above section is not to be so construed. In our judgment, a right given by the statute of a state to revive a pending action for personal injuries in the name of the personal representative of a deceased plaintiff is not lost upon the removal of the case into a Federal court. Section 955 of the Revised Statutes may reasonably be construed as not applying to an action brought in one of the courts of a state whose statutes permit a revivor in the event of the death of a party before final judgment. Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced. If an action be brought in a Federal court, and is based upon some act of Congress, or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject. But if at the time an action is brought in a state court the statutes of that state allow a revivor of it on the death of the plaintiff before final judgment,—even where the right to sue is lost when death occurs before any suit is brought—then we have a case not distinctly or necessarily covered by section 955. Suppose Hervey had died while the action was pending in the state court, and it had been revived in that court, nevertheless after such revival, if diverse citizenship existed, it could have been removed for trial into the Federal court and there proceeded to final judgment, notwithstanding section 955 of the Revised Statutes of the United States. If this be so, that section ought not to be
[230] construed *as embracing the present case. Nor ought it to be supposed that Congress intended that, in case of the removal of an action from a state court on the petition of the defendant prior to the death of the plaintiff, the Federal court should ignore the law of the state in reference to the revival of pending actions, and make the question of revivor depend upon the inquiry whether the cause of action would have survived if no suit had been brought. If Congress could legislate to that extent it has not done so. It has not established any rule that will prevent a recognition of the state law under which the present action was originally instituted, and which at the time the suit was brought conferred the right, when the plaintiff in an action for personal injuries died before final judgment, to revive in the name of his personal representative. Cases like this may reasonably be excepted out of the general rule prescribed by section 955.

These views are in harmony with section 721 of the Revised Statutes which was brought forward from the judiciary act of 1789 (1 Stat. at L. 92, chap, 20, § 34), and provides that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply;" and also with section 914, providing that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding." They are in accord also with what was said in *Martin* v. *Baltimore & Ohio Railroad Co.* 151 U. S. 673, 692 [38: 311, 318], in which, after referring to *Schreiber* v. *Sharpless,* 110 U. S. 76, 80 [28: 65, 67], this court said: "In that case, the right in question being of an action for a penalty under a statute of the United States the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has *a right of action depends [231]
upon the law of West Virginia, where the action was brought and the administrator appointed. Rev. Stat. § 721; *Henshaw* v. *Miller,* 17 How. 212 [15: 222]."

It is scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the state of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that state, rather than by the law of the state in which the injuries occurred.

The question propounded to this court must be answered in the negative. It will be so certified to the Circuit Court of Appeals.

CITY OF COVINGTON, *Plff. in Err.,*
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 231-243.)

When statute exempting waterworks property of a city from taxes is not a contract —charter of municipal corporation, or law as to the use of its property, is not a contract, within the meaning of the national Constitution.

1. **The statute of Kentucky providing that the waterworks property of the city of Covington**

"shall be and remain forever" exempt from taxes does not constitute a contract, but was passed subject to a general statute of the state that all statutes shall be subject to amendment or repeal unless a contrary intent be therein plainly expressed.

2. Neither the charter of a municipal corporation, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the national Constitution.

[No. 152.]

Submitted January 18, 1899. Decided February 20, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming a judgment of the Campbell Circuit Court of that State in favor of the Commonwealth of Kentucky for the possession of certain lands on which the waterworks of defendant, the City of Covington, are situate, and sustaining the validity of the taxation of the waterworks property. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William Goebel** and *W. S. Pryor* for plaintiff in error.

Messrs. **W. S. Taylor,** Attorney General of Kentucky, and **Ramsey Washington** for defendant in error.

[232] *Mr Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, a municipal corporation of Kentucky, insists that by the final judgment of the court of appeals of that commonwealth sustaining the validity of certain taxation of its waterworks property it has been deprived of rights secured by that clause of the Constitution of the United States which prohibits any state from passing a law impairing the obligation of contracts. That is the only question which this court has jurisdiction to determine upon this writ of error. U. S. Rev. Stat. § 709.

By an act of the general assembly of Kentucky approved May 1st, 1886, the city of Covington was authorized to build a water reservoir or reservoirs within or outside its corporate limits, either in the county of Kenton or in any county adjacent thereto, and acquire by purchase or condemnation in fee
[233] *simple the lands necessary for such reservoirs, and connect the same with the water-pipe system then existing in the city; to build a pumping house near or adjacent to the Ohio river, and to provide the same with all necessary machinery and appliances, together with such lands as might be needed for the pumping house, and for connecting it with said reservoir or reservoirs. § 21.

The declared object of that legislation was that the city and its citizens might be provided with an ample supply of pure water for all purposes. To that end the city was authorized and empowered, by its board of trustees, to issue and sell bonds to an amount not exceeding $600,000, payable in not more than forty years after date, with interest at a rate not exceeding five per cent per annum,—such bonds not, however, to be issued until the question of issuing them and the question of the location of the reservoir or reservoirs, whether above or below the city, should first be submitted to the qualified voters of the corporation at an election held for that purpose and approved by a majority of the votes cast.

By section 31 of that act it was provided that "said reservoir or reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, shall be and remain, forever exempt from state, county, and city tax." Ky. Acts 1885-6, chap. 897, p. 317.

A subsequent act, approved February 15th, 1888, authorized the city, in execution of the provisions of the act of 1886, to issue and sell bonds to the additional amount of $400,000. Ky. Acts 1887-8, chap. 137, p. 221.

The scheme outlined in these acts received the approval of the majority of the votes cast at an election held in the city, and thereafter bonds to the amount of $600,000 and $400,000 were issued in the name of the city and disposed of.

The proceeds of the bonds were duly applied by the city in building water reservoirs, in constructing the requisite approaches, pipes, and mains, in acquiring the lands necessary for the reservoirs and for its approaches and connections, in erecting a pumping house and providing it with necessary machinery and appliances, and in buying land for a pumping house *and the con- [234]
nection thereof by pipes and mains with the reservoirs.

The entire works upon their completion passed under the control of the city, which managed the same until March 19th, 1894, by the commissioners of waterworks, under the act of March 31st, 1879, chap. 121 (Ky. Acts 1879, p. 93); and since March 19th, 1894, they have been controlled under the act of that date, chap. 100, by a board, subject to such regulations as the city by ordinance might provide. Ky. Acts 1894, p. 278. By the latter act it was also provided that the net revenue derived from its waterworks by any city of the second class—to which class the city of Covington belongs—should be applied exclusively to the improvement or reconstruction of its streets and other public ways.

When the above act of May 1st, 1886, was passed there was in force a general statute of Kentucky, passed February 14th, 1856, which provided, as to all charters and acts of incorporation granted after that date, that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided,* That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" and that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall

be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 2 Ky. Rev. Stat. 121.

This statute was not modified by the general revenue statute of May 17th, 1886, which took effect September 14th, 1886, and became part of chapter 68 of the General Statutes of 1888. It constitutes § 1987 of the Revision known as the Kentucky Statutes of 1894. Nor has it been changed by any subsequent legislation in Kentucky.

[235] *The present Constitution of Kentucky, adopted in 1891, contains the following provisions:

"§ 170. There shall be exempt from taxation public property used for public purposes.

"§ 171. The general assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"§ 172. All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer or other person authorized to assess values for taxation who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

By the Kentucky Statutes of 1894 it is provided:

"§ 4020. All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"§ 4022. For the purposes of taxation, real estate shall include all lands within this state and improvements thereon; and personal estate shall include every other species and character of property,—that which is tangible as well as that which is intangible."

"§ 4026. The following property is exempt from taxation: Public property used for public purposes. . . ."

[236] *This act repealed all acts and parts of acts in conflict with its provisions except the act of June 4th, 1892, providing additional funds for the ordinary expenses of the state government, and the act amendatory thereof approved July 6th, 1892.

In the year 1895 certain lands acquired under the above act of May 1st, 1886, and constituting a part of the Covington Waterworks, were assessed for state and county taxation, pursuant to the statutes enacted after the passage of that act, and conformably as well to the Constitution of Kentucky if that instrument did not exempt them from taxation. The taxes so assessed not having been paid, those lands after due notice were sold at public outcry by the sheriff (who by law was the collector of state and county revenue), and, no other bidder appearing, the Commonwealth of Kentucky purchased them for $2,187.24, the amount of the taxes, penalty, commission, and cost of advertising.

The present action was brought by the commonwealth to recover possession of the property so purchased.

The principal defense is that the provision in the act of May 1st, 1886, that the reservoir or reservoirs, pumping house, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, "shall be and remain forever exempt from state, county, and city taxes," constituted, in respect of the lands in question, a contract between the city of Covington and the commonwealth of Kentucky, the obligation of which was impaired by the subsequent legislation to which reference has been made.

Referring to section 170 of the present Constitution of Kentucky, declaring that "there shall be exempt from taxation public property used for public purposes," the court of appeals of Kentucky in this case said: "It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation as prescribed by the Constitution; and accordingly, in section 4020, Kentucky Statutes, adopted for the purpose of carrying out the provisions of section 170, is the identical language we have quoted. As it was manifestly intended by both the Constitution and statute *to make subject to taxation all prop- [237]
erty not thereby in express terms exempted, it results that, unless the waterworks property of the city of Covington be, in the language or meaning of section 170, 'public property used for public purposes,' it must be held, like similar property in other cities, subject to taxation, and the special act of May 1st, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires us to do, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it, for in the cases cited and others where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to mean in that connection the same as the words 'for governmental purposes,' and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, waterworks property

of a city has been invariably treated by this court as belonging to the latter class, and consequently subject to state and county taxation. In our opinion, the property in question is under the Constitution subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886."

However much we may doubt the soundness of any interpretation of the state Constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation—one of the instrumentalities or agencies of the state, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the Constitution of that commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase "pub-
[238] lic *purposes" in that section means "governmental purposes," and that the property here taxed is not held by the city of Covington for such purposes, but only for the "profit or convenience" of its inhabitants, and is liable to taxation at the will of the legislature, unless at the time of the adoption of the Constitution of Kentucky it was exempt from taxation in virtue of some contract the obligation of which is protected by the Constitution of the United States.

The fundamental question in the case, then, is whether at the time of the adoption of that Constitution the city of Covington had, in respect of the lands in question, any contract with the state the obligation of which could not be impaired by any subsequent statute or by the present Constitution of Kentucky adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that Constitution any more than by a legislative enactment.

We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky above referred to, that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." If that act in any sense constituted a contract between the city and the commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. *Griffin* v. *Kentucky Ins. Co.* 3 Bush, 592 [96 Am. Dec. 259]. The city accepted the act of 1886 and acquired under it the property taxed subject to that reservation. There was in that act no "plainly expressed" intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from state, county, and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of *amending or repealing the act under which [239]
the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared, that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute —particularly one relating to taxation— should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture.

The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal are supported by many adjudged cases. *Tomlinson* v. *Jessup*, 15 Wall. 454, 457 [21: 204, 205]; *Maine C. Railroad Co.* v. *Maine*, 96 U. S. 499, 510 [24: 836, 841]; *Atlantic & G. Railroad Co.* v. *Georgia*, 98 U. S. 359, 365 [25: 185, 188]; *Hoge* v. *Richmond & D. Railroad Co.* 99 U. S. 348, 353 [25: 303, 304]; *Sinking Fund Cases*, 99 U. S. 700, 720 [25: 496, 502]; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13, 21 [26 L. ed. 961, 965]; *Close* v. *Greenwood Cemetery*, 107 U. S. 466, 476 [27: 408, 412]; *Spring Valley Waterworks Co.* v. *Schottler*, 110 U. S. 347, 352 [28: 173, 176]; *Louisville Gas Co.* v. *Citizens' Gas Co.* 115 U. S. 683, 696 [29: 510, 515]; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 408 [32: 978, 984]; *Sioux City Street Railway* v. *Sioux City*, 138 U. S. 98, 108 [34: 898, 902]; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 12 [36: 55, 58]. In *Tomlinson* v. *Jessup*, above cited, referring to the reserved power to amend and repeal, this court said: "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, *would be irrepealable and [240]
protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the state to preserve its power than that of taxation. . . Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power

such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state." So in *Railroad Co.* v. *Maine*, above cited: "By the reservation in the law of 1831, which is to be considered as if embodied in that act [one subsequently passed], the state retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities. The existence of the corporation, and its franchises and immunities, derived directly from the state, were thus kept under its control."

In our consideration of the question of contract we have assumed, in harmony with the judgment of the court of appeals of Kentucky, that the property in question was held by the city only for the profit or convenience of its people collectively, that is, in its proprietary, as distinguished from its governmental, character. There are cases adjudging that the extent of legislative power over the property of municipal corporations, such as incorporated towns and cities, may depend upon the character in which such property is held. Mr. Dillon, in his work on Municipal Corporations, says: "In its *governmental or public character*, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the govern-
[241]mental machinery of the sovereignty *which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular state. But in its *proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality or corporate individual;* and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights presented by it is omnipotent." 1 Dill. Mun. Corp. 4th ed. pp. 107, 108, § 67, and authorities cited.

If, however, the property in question be regarded as in some sense held by the city in its governmental or public character, and therefore as public property devoted to public purposes,—which is the interpretation of the state Constitution for which the city contends,—there would still be no ground for holding that the city had in the act of 1886 a contract within the meaning of the Constitution of the United States. A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the state. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes is a contract within the meaning of the Constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the state for public purposes, the validity of such legislation, so far as the national Constitution is concerned, could not be questioned.

In *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79, 91 [35: 943, 947], after referring to previous adjudications, this court said that the authorities were full and conclusive to the point that a municipal corporation, being a mere agent of the state, "stands in its governmental or public character in no contract relations with its sovereignty, at whose pleasure its charter may *be amended, changed, or revoked without the [242]
impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." Chancellor Kent, in his Commentaries, says: "In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities, and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain, or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation instituted for purposes connected with the administration of the government may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent, Com. 12th ed. p. *306. Dillon says: "Public, including municipal corporations, are called into being at the pleasure of the state, and while the state may, and in the case of municipal corporations usually does, it need not obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the state and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation, or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes exclusively,— that is, for purposes connected with the administration of civil or of local government,—and corporations are public only when, in the language of Chief Justice Marshall, 'the whole interests and franchises are the exclusive property and domain of the government itself,' such as quasi corporations (so-called), counties and towns or cities upon which are conferred the powers

of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhi-
[243]bition, erect, change, *divide, and even abolish them, at pleasure, as it deems the public good to require." 1 Dill. Mun. Corp. 4th ed. p. 93, § 54.

In any view of the case there is no escape from the conclusion that the city of Covington has no contract with the state exempting the property in question from taxation, which is protected by the contract clause of the national Constitution.

Perceiving no error in the record of which this court may take cognizance, *the judgment is affirmed.*

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, COLORADO, *Petitioner,*

v.

HARRY H. DUDLEY.

(See S. C. Reporter's ed. 243–255.)

Coupons of bonds of a corporation, payable to bearer, suable in Federal courts—one who is not the real owner cannot bring the action.

1. Coupons of bonds made by a county, payable to bearer, are excepted by the judiciary act of 1888 from the general rule that an assignee of a chose in action cannot sue unless his assignor can in a Federal court.
2. One who is not the real owner of coupons, but in whom the apparent title was collusively put, without his knowledge or request, merely to make a case cognizable by a Federal court on the grounds of diverse citizenship, cannot bring an action on them in such court.

[No. 177.]

Argued December 14, 15, 1898. Decided February 20, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court reversing the judgment of the Circuit Court of the United States for the District of Colorado in favor of defendant in an action brought by Harry H. Dudley, plaintiff, against the Board of County Commissioners of the County of Lake, Colorado, a governmental corporation, to recover the amount of certain coupons of bonds issued by that corporation. Judgment of Circuit Court and of Circuit Court of Appeals *reversed,* and cause remanded for a new trial and for further proceedings.

See same case below, 49 U. S. App. 336.

The facts are stated in the opinion.

Messrs. **George R. Elder, Charles S. Thomas,** *W. H. Bryant,* and *H. H. Lee,* for petitioner:

The court erred in holding that under the testimony in this case Harry H. Dudley was a bona fide holder for value of the coupons in controversy, and entitled to bring suit thereon.

Marvin v. *Ellis,* 9 Fed. Rep. 367; *Coffin* v. *Haggin,* 11 Fed. Rep. 219; *Fountain* v. *Angelica,* 12 Fed. Rep. 8; *Farmington* v. *Pillsbury,* 114 U. S. 138, 29 L. ed. 114; *Detroit* v. *Dean,* 106 U. S. 537, 27 L. ed. 300; *McLean* v. *Valley County,* 74 Fed. Rep. 389.

The court erred in refusing to hold the bonds in controversy void because they created a debt by loan in one year greater than that allowed by the Constitution of Colorado.

Lake County v. *Graham,* 130 U. S. 674, 32 L. ed. 1065; *Lake County* v. *Rollins,* 130 U. S. 662, 32 L. ed. 1060; *Dixon County* v. *Field,* 111 U. S. 83, 28 L. ed. 360; *Hedges* v. *Dixon County,* 150 U. S. 182, 37 L. ed. 1044.

The court erred in holding that the bonds in controversy were valid obligations of Lake county.

Buchanan v. *Litchfield,* 102 U. S. 278, 26 L. ed. 138; *Litchfield* v. *Ballou,* 114 U. S. 190, 29 L. ed. 132; *Doon Twp.* v. *Cummins,* 142 U. S. 366, 35 L. ed. 1044; *Nesbitt* v. *Riverside Independent Dist.* 144 U. S. 610. 36 L. ed. 562; *Sutliff* v. *Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145; *Graves* v. *Saline County,* 161 U. S. 359, 40 L. ed. 732.

The court erred in holding that Lake county could, by receiving the benefit of and paying the interest on the bond issue in controversy, validate the same.

Marshall County Supers. v. *Schenck,* 5 Wall. 772, 18 L. ed. 556; *Clay County* v. *Society for Savings,* 104 U. S. 579, 26 L. ed. 856; *Anderson County Comrs.* v. *Beal,* 113 U. S. 227, 28 L. ed. 966.

The payment of interest will not validate a municipal bond issue without authority of law.

Graves v. *Saline County,* 161 U. S. 359, 40 L. ed. 732; *Merchants' Bank* v. *Bergen County,* 115 U. S. 384, 29 L. ed. 430.

Messrs. **John F. Dillon, Edmund F. Richardson,** *Harry Hubbard, John M. Dillon,* and *Daniel E. Parks,* for respondent:

The plaintiff was a bona fide holder, or entitled to the rights of a bona fide holder, of the coupons in question.

Douglas County Comrs. v. *Bolles,* 94 U. S. 104, 24 L. ed. 46; *Montclair* v. *Ramsdell,* 107 U. S. 147, 27 L. ed. 431.

A bona fide holder is a purchaser for value without notice, or the successor of one who was such a purchaser.

McClure v. *Oxford Twp.* 94 U. S. 429, 24 L. ed. 129.

If any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff can avail himself of such previous holder's position without showing that he has himself paid value.

Montclair v. *Ramsdell,* 107 U. S. 147, 27 L. ed. 431; *Douglas County Comrs.* v. *Bolles,* 94 U. S. 104, 24 L. ed. 46; *Marion County Comrs.* v. *Clark,* 94 U. S. 278, 24 L. ed. 59; *Cromwell* v. *Sac County,* 96 U. S. 51, 24 L. ed. 681; *San Antonio* v. *Mehaffy,* 96 U. S. 312, 24 L. ed. 816; *Nauvoo* v. *Ritter,* 97 U. S. 389, 24 L. ed. 1050.

The recital in the bonds is conclusive in favor of the bona fide holder that the debt limit prescribed by the statute and by the Constitution has not been exceeded.

Marcy v. *Oswego Twp.* 92 U. S. 637, 23 L.

ed. 748; *Turner* v. *Woodson County Comrs.* 27 Kan. 314; *Independent School Dist.* v. *Stone*, 106 U. S. 183, 27 L. ed. 90; *Buchanan* v. *Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Douglas County Comrs.* v. *Bolles*, 94 U. S. 104, 24 L. ed. 46.

The circuit court of appeals properly held that the bonds did not create a debt by loan in any one year greater than that allowed by the Constitution of Colorado.

Sutliff v. *Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145; *Lake County* v. *Rollins*, 130 U. S. 662, 32 L. ed. 1060.

In the absence of any statutory public record, a county or municipality may be estopped, by recitals in bonds, from showing that when the bonds were issued there was an aggregate outstanding indebtedness rendering the issue of the bonds illegal.

Marcy v. *Oswego Twp.* 92 U. S. 637, 23 L. ed. 748; *Humboldt Twp.* v. *Long*, 92 U. S. 642, 23 L. ed. 752; *Buchanan* v. *Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Sherman County* v. *Simons*, 109 U. S. 735, 27 L. ed. 1093; *Dallas County* v. *McKenzie*, 110 U. S. 686, 28 L. ed. 285; *Wilson* v. *Salamanca*, 99 U. S. 499, 25 L. ed. 330.

[244] *Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the circuit court of the United States for the district of Colorado by the defendant in error Dudley, a citizen of New Hampshire, against the plaintiff in error the board of county commissioners of the county of Lake, Colorado, a governmental corporation organized under the laws of that state. Its object was to recover the amount of certain coupons of bonds issued by that corporation under date of July 31st, 1880, and of which coupons the plaintiff claimed to be the owner and holder.

Each bond recites that it is "one of a series of fifty thousand dollars, which the board of county commissioners of said county have issued for the purpose of erecting necessary public buildings, by virtue of and in compliance with a vote of a majority of the qualified voters of said county, at an election duly held on the 7th day of October, A. D. 1879, and under and by virtue of and in compliance with an act of the general assembly of the state of Colorado, entitled 'An Act Concerning Counties, County Officers, and County Government, and Repealing Laws on These Subjects,' approved March 24th, A. D. 1877, and it is hereby certified that all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond."

The board of county commissioners by their answer put the plaintiff on proof of his cause of action, and made separate defenses upon the following grounds: 1. That the bonds to which the coupons were attached were issued in violation of section 6, article 11 of the Constitution of Colorado, and the laws enacted in pursuance thereof. 2. That the aggregate amount of debts which the county of Lake was permitted by law to incur at the date of said bonds, as well as when they were in fact issued, had been reached and exceeded. 3. That the plaintiff's cause of action, if any he ever had, upon certain named coupons in suit, was barred by *the statute of limitations. 4. That when [245]
the question of incurring liability for the erection of necessary public buildings was submitted to popular vote, the county had already contracted debts or obligations in excess of the amount allowed by law.

One of the questions arising on the record is whether Dudley had any such interest in the coupons in suit as entitled him to maintain this suit. The evidence on this point will be found in the margin.†

†At the trial George W. Wright was introduced as a witness on behalf of the plaintiff. He stated at the outset that Dudley was the owner of the bonds, but his examination showed that he had really no knowledge on the subject, and that his statement was based only upon inference and hearsay. In connection with his testimony certain transfers or bills of sale to Dudley of bonds of the above issue of $50,000 were introduced in evidence as follows: One dated December 5th, 1888, purporting to be "for value received" by Susan F. Jones, executrix of the estate of Walter H. Jones, deceased, of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66; one dated February 11th, 1885, by David Creary, Jr., J. H. Jagger, Henry D. Hawley, and L. C. Hubbard, all of Connecticut, for bonds Nos. 80, 81, and 82, and Nos. 83 to 86, both inclusive, the consideration recited being $5,380.56, "paid by Harry H. Dudley of Concord" in the county of Merrimac and state of New Hampshire; one dated March 20th, 1885, by the Nashua Savings Bank of Nashua, New Hampshire, for twenty bonds, Nos. 92 to 111, both inclusive, the consideration recited being $11,869.45, "paid by Harry H. Dudley of Concord," New Hampshire; one dated March 20th, 1885, by the Union Five Cents Saving Bank of Exeter, New Hampshire, of bonds Nos. 112 to 129, both inclusive, the consideration recited being $10,695, "paid by Harry H. Dudley of Concord," New Hampshire; one, undated, by Susan F. Jones, "for value received," of bonds Nos. 55 to 64, both inclusive, and Nos. 65 and 66, together with coupons falling due in 1884 of bonds Nos. 55 to 69, both inclusive; and one dated December 10th, 1884, by Joseph Standley, of Colorado, of twelve bonds, Nos. 68 to 79, both inclusive, and six bonds, numbered 67 and 87 to 91, both inclusive, the consideration recited being $15,887.50, "paid by Harry H. Dudley of Concord," New Hampshire.

Here were transactions which, if genuine, indicated the actual payment by Dudley in 1882 and 1884 on his purchase of bonds of many thousand dollars.

Dudley's deposition was taken twice; first on written interrogatories, January 14th, 1895, and afterwards, March 2d, 1895, on oral examination.

In his first deposition Dudley was asked whether he owned any bonds issued by Lake county, and he answered: "Yes, I own certain Lake county bonds which I hold under written bills of sale transferred to me from several different parties." Being asked whether he owned any bonds of Lake county, Colorado, numbered 92 to 111 inclusive, 83 to 86, inclusive, 55 to 64 inclusive, 68 to 79 inclusive, 80 to 82 inclusive, 65, 66, and 67, and 87 to 91 inclusive, he answered: "I own, under the aforesaid bills of sale, bonds mentioned in interrogatory 3." He was then asked (interrogatory 4) if in answer to the preceding interrogatory he said that he owned any of said bonds or the coupons cut therefrom, to state when he pur-

[246] *At the close of the plaintiff's evidence in chief the defendant asked for a peremptory instruction in its behalf, but this request was denied at that time. When the entire
[247]evidence *on both sides was concluded, the defendant renewed its request for a peremptory instruction, and the plaintiff asked a like instruction in his favor. The plain-
[248]tiff's request was denied, *an exception to the ruling of the court being reserved. Other instructions asked by the plaintiff were refused, and in obedience to a peremptory instruction by the court the jury returned a
[249]*verdict for the defendant, and judgment was accordingly entered upon that verdict. Upon writ of error to the circuit court of appeals the judgment was reversed, Judge Thayer dissenting. 49 U. S. App. 336.

1. In the oral argument of this case some
inquiry was made *whether Dudley's right to [250]
maintain this action was affected by that clause in the first section of the judiciary act of August 13th, 1888, chap. 866 (25 Stat. at L. 433, 434), providing that no circuit or district court of the United States shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose

chased the same, from whom he purchased them, and what consideration he paid therefor. In his answer he referred to each of the above-mentioned bills of sale, and said that he owned the bonds described in it *by virtue of* such instruments. He did not say that he paid the recited consideration, but contented himself with stating what was the consideration named in the bill of sale. Being asked (interrogatory 5), "If you are not the owner of said bonds, or any coupons cut therefrom, please state what, if any, interest you have in the same," he answered, "I have stated my interest in the bonds in my answer to interrogatory 4." He was asked (interrogatory 9): "If you say you authorized suit to be commenced in your name, please state under what circumstances you authorized it to be brought, and whether or not the bonds or coupons upon which it was to be brought were your own individual property, or were to be transferred to you simply for the purpose of bringing said suit." His answer was: "I understand said bonds and coupons were transferred to me, as aforesaid, for the purpose of bringing suit against the county to make them pay the honest debts of the county."

It should be stated that before the witness appeared before the commissioner who took his deposition upon interrogatories, he prepared his answers to the interrogatories with the aid of counsel, and read his answers so prepared when he came before the commissioner.

When Dudley gave his second deposition his attention was called to his answer to interrogatory 4, in his first deposition, in relation to the bill of sale running to him from Craig [Creary], Jagger, Hawley, and Hubbard. We make the following extract from his last deposition, giving questions and answers as the only way in which to show what the witness intended to say and what he intended to avoid saying:

Q. You also say in the answer to which I have referred, that the consideration in the said bill of sale was $5,380.56. Did you pay that consideration for the bonds mentioned in the bill of sale? *A.* No, I did not. *Q.* Did you pay any part of it? *A.* No, sir. *Q.* Why was that bill of sale made to you, Mr. Dudley? *A.* I think I have answered that in some interrogatory here; my answer to interrogatory 9 in the deposition I gave before in this case. *Q.* Are not the bonds mentioned in the said bill of sale, together with the coupons, still owned in fact by the grantors named in said bill of sale? *A.* Not as I understand the bill of sale. I understand I am absolute owner. *Q.* Was not that bill of sale made to you for the purpose of enabling you to prosecute this claim upon them? *A.* My answer to interrogatory 9 in my former deposition answers that also. *Q.* I repeat the question and ask for a categorical answer. *A.* I cannot more fully answer the question than I have in answer to interrogatory 9, former deposition. *Q.* Do you decline to answer it, yes or no? *A.* I think this answer is sufficient. *Q.* If you are successful in the suit brought upon the coupons heretofore attached to the bonds mentioned in said bill of sale, do you not intend to pay the amount of those coupons so recovered to the grantors in said bill of sale, less any legitimate expenses attendant upon the prosecution of this case? *A.* Yes, my understanding in the matter would be something might be paid them. *Q.* Is there something to be paid them different from the amount involved in the suit represented by the coupons cut from said bonds? *A.* I should think there was. *Q.* In what respect is the difference? *A.* They would not be paid the full amount. *Q.* What deduction would you make? *A.* I do not know just what deduction would be made. *Q.* When you took this bill of sale, did you execute some sort of a written statement back to the grantors of said bill of sale? *A.* No, sir. *Q.* Did you make a verbal agreement at the time with them or any of them? *A.* No, sir. *Q.* Were you present when the bill of sale was drawn? *A.* No, sir. *Q.* Where was it drawn? *A.* My impression is that it was drawn at Hartford, Conn., this particular one that you refer to. *Q.* Yes. Who represented you at the drawing of the bill of sale? *A.* I have no knowledge of being represented there. *Q.* When did you first know that such bill of sale had actual existence? *A.* When I received it. *Q.* When was that? *A.* I cannot tell the date. It was in the year 1894. *Q.* Then you knew nothing of it until some nine years after it was made? *A.* That was the first I knew of it, the year 1894.

In reference to the bonds referred to in the bill of sale from Stanley, the witness testified:

Q. When did you first know of the existence of the bill of sale? *A.* I think it was in the year 1894. *Q.* Some ten years after it was made? *A.* Do you want me to answer that? *Q.* Yes. *A.* I received it as I have stated heretofore, that was the first I knew of it. *Q.* Are you personally acquainted with Joseph Stanley? *A.* I am not; no, sir. *Q.* Did you ever meet him? *A.* Don't remember that I ever met him. *Q.* Did you at any time ever pay him $15,877.50 for the bonds mentioned in his bill of sale to you? *A.* No, sir. *Q.* Is it not a fact that Mr. Stanley still owns these bonds? *A.* I have answered in a former deposition that I hold a bill of sale of certain bonds of Joseph Stanley. *Q.* Do you refuse to answer the last question I asked of you, yes or no? *A.* I prefer to answer it as I have stated above. *Q.* If you should recover in this suit, are not the amounts represented by the coupons cut from the bonds mentioned in the Stanley bill of sale to be paid to Joseph Stanley less the expenses of this suit? *A.* I could not answer that definitely. *Q.* Why not? *A.* Because I haven't enough knowledge of the matter to answer it definitely. *Q.* You have no knowledge of it at all personally, have you? *A.* My understanding of the matter

in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The provision on the same subject in the act of March 3d, 1875, but which was, of course, displaced by the clause on the same subject in the act of 1888, was as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." 18 Stat. at L. 470, chap. 137, § 1.

Without stopping to consider the full scope and effect of the above provision in the act of 1888, it is only necessary to say that the instruments sued on, being payable to bearer and having been made by a corporation, are expressly excepted by the statute from the general rule prescribed that an assignee or subsequent holder of a promissory note or chose in action could not sue in a circuit or district court of the United States unless his assignor or transferrer

---

would be, Joseph Stanley would have a certain amount of money if the suit was won. *Q.* Was not the bill of sale drawn in Denver,—the Stanley bill of sale? *A.* I have no actual knowledge where it was drawn. *Q.* Do you know who had the bill of sale before it was sent on to you in 1894? *A.* I do not think I have any actual knowledge. *Q.* Did you have any sort of knowledge? *A.* Yes. I imagined it came from Rollins & Son. *Q.* By letter? *A.* It came through the mail. *Q.* Have you the letter now? *A.* I do not think that I have; no, sir. *Q.* What did you do with it? *A.* I could not swear that it was. *Q.* It came in December of 1894, did it not? *A.* I should say it did.

As to the bonds referred to in the bill of sale by Susan F. Jones, executrix, the witness testified:

Q. What did you pay for that bill of sale, Mr. Dudley? *A.* For consideration not named in the bill of sale. *Q.* That does not answer my question. What did you pay for it? *A.* I do not remember as I paid anything. *Q.* Do you remember that you did not pay anything? *A.* It is my impression that I did not. *Q.* Were you present when it was drawn? *A.* No, sir. *Q.* In the event you recover a judgment in this case, are not the amounts of the coupons belonging to the bonds mentioned in the bill of sale from Mrs. Jones to be paid to Mrs. Jones, less her proportion of [the expenses of] the case? *A.* I could not state definitely about that. *Q.* Why? *A.* For the reason that I answered similar questions above. *Q.* Going back to the bonds of Mr. Stanley, I will ask you one or two other questions. Is Mr. Stanley a citizen of Colorado? *A.* I think he is. *Q.* Now, why did you not include in this case the coupons belonging to the Stanley bonds for 84, 85, and 86, and the coupons to bonds 68 to 72, included in the Stanley bill of sale of 1888, and the coupons on 67, 87–91 for 1884–'5? *A.* If they were not included I do not know why they were not. *Q.* Is Mrs. Jones a citizen of the state of Colorado? *A.* I think she is. *Q.* Were not those bonds of Stanley and Jones assigned to you in order that you might as a citizen of another state bring suit upon them and upon the coupons belonging to them in the Federal court in Colorado? *A.* I should answer that by referring to my answer in former deposition to interrogatory 9.

In reference to the other bills of sale and the bonds mentioned in them, the witness testified:

Q. In your answer to interrogatory 4 of your former deposition you also say that you own bonds of Lake county by the written bill of sale from the Nashua Savings Bank, numbered 92–111, both inclusive, together with all coupons originally attached and unpaid. You also say that the consideration for the said bill of sale is $11,689.45. Did you pay any part of that, Mr. Dudley? *A.* No, sir. *Q.* Were you present when the bill of sale was drawn? *A.* No, sir. *Q.* When did you first know that there was such a bill of sale? *A.* As soon as I received it, in the year 1894. *Q.* In the event of a recovery in this case, are not the amounts of the coupons belonging to the said bonds to be paid over to the Nashua Savings Bank, less their proportion of the expense of this litigation? *A.* I do not know how much will be paid them. *Q.* Do you know anything about it? *A.* Indirectly, yes. *Q.* Do you mean by that you have some hearsay evidence upon it? *A.* Yes; I have an impression from hearsay that the bank would have some equivalent for these bonds if suit was won. *Q.* You say here that you own bonds of Lake county by virtue of a bill of sale from the Union Five Cent Savings Bank of Exeter, numbered 112–129, inclusive, together with all coupons, the first being No. 4, and the subsequent ones being consecutive up to and including No. 21. What is the date of that bill of sale? *A.* I think it was dated March 25th, 1885. *Q.* Were you present when it was made? *A.* No, sir. *Q.* When did you first know of its existence? *A.* In the year 1894. *Q.* At the time that you were informed of the existence of the others? *A.* Nearly at the same time, I should say. *Q.* Did you pay the bank of Exeter $10,695, or any other sum for the bonds mentioned in that bill of sale? *A.* No, sir. *Q.* You also say in the same answer to the same interrogatory in your former deposition that you hold a bill of sale and assignment from Susan F. Jones for coupons Nos. 55 to 64 and Nos. 65 to 66 for the years 1886, '7, '8, 1891, also coupons amounting to $600 from bonds 55-6-7-8-9-60 falling due in the year 1894. What is the date of that bill of sale and assignment? *A.* I could not tell. *Q.* When did you first know of its existence? *A.* I should say in 1894. *Q.* Did you pay anything for it? *A.* No, sir. . . . *Q.* Did you ever have in your possession any of the coupons or any of the bonds to which this examination has thus far been directed? *A.* Strictly speaking, I don't think I ever had them in my own possession. I have seen some of the bonds and handled them, had them in a safe. *Q.* Where? *A.* In Boston. *Q.* When? *A.* Well, I should say in the year 1893. *Q.* But that was before you knew they had been assigned to you by bill of sale, was it not? *A.* I was really handling them as agent for other parties. *Q.* Who were the other parties you were handling them as agent for? *A.* I don't know as I was exactly an agent. I was an officer of another company. They came into our hands. *Q.* What was that company? *A.* E. H. Rollins & Sons. *Q.* Were you a stockholder of that company? *A.* Yes. *Q.* Are you now? *A.* Yes, sir. *Q.* Is not that the only interest which you have in these bonds or any of them—your interest as a stockholder in the firm of E. H. Rollins & Sons? *A.* Yes, probably it is.

could have sued in such court. It is immaterial to inquire what were the reasons that induced Congress to make such an exception. Suffice it to say that the statute is clear and explicit, and its mandate must be respected.

2. There is, however, a ground upon which the right of Dudley to maintain this action must be denied.

By the fifth section of the above act of March 3d, 1875, it is provided "that if, in any suit, commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed
[251]*thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." 18 Stat. at L. 470, 472, chap. 137. This provision was not superseded by the act of 1887, amended and corrected in 1888. 25 Stat. at L. 433. *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 339 [40: 444, 449].

Prior to the passage of the act of 1875 it had been often adjudged that if title to real or personal property was put in the name of a person for the purpose only of enabling him, upon the basis of the diverse citizenship of himself and the defendant, to invoke the jurisdiction of a circuit court of the United States for the benefit of the real owner of the property, who could not have sued in that court, the transaction would be regarded in its true light, namely, as one designed to give the circuit court cognizance of a case in violation of the acts of Congress defining its jurisdiction; and the case would be dismissed for want of jurisdiction. *Maxwell's Lessee* v. *Levy*, 2 Dall. 381 [1: 424]; *Hurst's Lessee* v. *McNeil*, 1 Wash. C. C. 70, 80; *M'Donald* v. *Smalley*, 1 Pet. 620, 624 [7: 287, 289]; *Smith* v. *Kernochen*, 7 How. 198, 216 [12: 666, 673]; *Jones* v. *League*, 18 How. 76, 81 [15: 263, 264]; *Barney* v. *Baltimore City*, 6 Wall. 280, 288 [18: 825, 827]. These cases were all examined in *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S. 327, 339 [40: 444, 449]. In the latter case it appeared that a Virginia corporation claimed title to lands in that commonwealth, which were in the possession of certain individuals, citizens of Virginia. The stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania, in order that the Pennsylvania corporation, after receiving a conveyance from the Virginia corporation, could bring suit in the circuit court of the United States sitting in Virginia, against the citizens in that com-
[252]monwealth *who held possession of the lands. The contemplated conveyance was made, but no consideration actually passed or was intended to be passed for the transfer. This court held that within the meaning of the act of 1875 the case was a collusive one, and should have been dismissed as a fraud on the jurisdiction of the United States court. It said: "The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—and no other purpose is stated or suggested—of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States, and as being in law a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case." And this conclusion, the court observed, was "a necessary result of the cases arising before the passage of the act of March 3d, 1875."

From the evidence in this cause, of Dudley himself, it is certain that he does not in fact own any of the coupons sued on and that his name, with his consent, is used in order that the circuit court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the board of commissioners of Lake county, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire, who could themselves have sued in the circuit court of the United States. But if part of the coupons in question could not, by reason of the citizenship of the owners, have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the circuit court of the United States, and if all the causes of actions were thus united for the collusive purpose of making "a case" cognizable by the Federal court as to every issue made in it, then the act *of 1875 must be held to apply, and the [253]
trial court on its own motion should have dismissed the case without considering the merits.

In *Williams* v. *Nottawa*, 104 U. S. 209, 211 [26: 719, 720], this court said that Congress when it passed the act of 1875 extending the jurisdiction of the courts of the United States "was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties, against frauds upon its jurisdiction."

So, in *Farmington* v. *Pillsbury*, 114 U. S 138, 146 [29: 114, 117], which was a suit upon coupons, brought by a citizen of Mas-

sachusetts against a municipal corporation of Maine, and in which one of the questions was as to the real ownership of the coupons, this court said: "It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. No money was paid, and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay." It was consequently held that the transfer of the coupons was "a mere contrivance, a pretense, the result of a collusive arrangement to create a fictitious ground of Federal jurisdiction."

In *Little* v. *Giles*, 118 U. S. 596, 603 [30: 269, 271], reference was made to the act of 1875, and the court said that where the interest of the nominal party was "simulated and collusive, and created for the very pur-
[254]pose of giving jurisdiction, the courts *should not hesitate to apply the wholesome provisions of the law."

We have held that if, for the purpose of placing himself in a position to sue in a circuit court of the United States, a citizen of one state acquires a domicil in another state without a present intention to remain in the latter state permanently or for an indefinite time, but with the present intention to return to the former state as soon as he can do so without defeating the jurisdiction of the Federal court to determine his suit, the duty of the circuit court is on its own motion to dismiss such suit as a collusive one under the act of 1875. *Morris* v. *Gilmer*, 129 U. S. 315 [32: 690]. The same principle applies where there has been a simulated transfer of a cause of action in order to make a case cognizable under the act.

The cases cited are decisive of the present one. As the coupons in suit were payable to bearer and were made by a corporation, Dudley, being a citizen of New Hampshire, could have sued the defendant, a Colorado corporation, in the circuit court of the United States without reference to the citizenship of his transferrers, or the motive that may have induced the transfer of the coupons to him, or the motive that may have induced him to buy them, provided he had really purchased them. But he did not buy the coupons at all. He is not the owner of any of them. He is put forward as owner for the purpose of making a case cognizable by the Federal court as to all the causes of action embraced in it. The apparent title was put in him without his knowledge and without his request, and only that he might represent the interests of the real owners. He never requested the execution of the pretended bills of sale referred to, nor did he hear of their being made until more than nine years after they were signed. And, notwithstanding the evasive character of his answers to questions, it is clear that his transferrers are the only real parties in interest, and his name is used for their benefit. The transfer was collusive and simulated for the purpose of committing a fraud upon the jurisdiction of the circuit court in respect at least of part of the causes of action that make the case before the court.

For the reasons stated the trial court, when the evidence *was concluded, should on [255]
its own motion have dismissed the suit. *The judgment of the Circuit Court and the judgment of the Circuit Court of Appeals must both be reversed,* and the cause remanded for a new trial and for further proceedings consistent with this opinion.

It is so ordered.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, STATE OF COLORADO, *Petitioner,*

v.

E. H. ROLLINS & SONS.

(See S. C. Reporter's ed. 255-276.)

When bill of exceptions may be taken as containing all the evidence—when recital in county bonds estops the county—when indorsee of commercial paper can recover upon the title of the indorser—innocent holder.

1. Although a bill of exceptions does not state, in words, that it contains all the evidence, yet it may be taken as containing all where the entries sufficiently show that fact.
2. A recital in county bonds that the debt thereby created does not exceed the limit prescribed by the state Constitution estops the county from asserting, as against a bona fide holder for value, that the contrary is the fact.
3. A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with defenses existing against the paper.
4. One who surrenders county warrants for county bonds is as much an innocent holder of the bonds as if he had bought them in open market, and is entitled to the benefit of the rule above stated as to the conclusiveness of the recital in the bonds.

[No. 178.]

Argued December 15, 16, 1898. Decided February 20, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court reversing the judgment of the Circuit Court of the United States for the District of Colorado in favor of defendant in an action brought by E. H. Rollins & Sons, a corporation of New Hampshire, against the

County Commissioners of the County of Gunnison for the amount of certain coupons of bonds. The Circuit Court of Appeals gave judgment for only a portion of the amount claimed. Judgment of the Circuit Court and of the Circuit Court of Appeals *reversed*, and cause remanded for further proceedings.

See same case below, 49 U. S. App. 399.

The facts are stated in the opinion.

Messrs. **Thomas C. Brown, C. S. Thomas,** *W. H. Bryant,* and *H. H. Lee,* for petitioner:

The court errs in reversing the judgment on errors committed in the admission or exclusion of testimony, when the record shows that all the testimony was not contained in the bill of exceptions, and the court below directed a verdict for the defendant.

Where a court takes a case away from a jury and directs a verdict, the same rules apply as though the court had tried the case alone without a jury.

Robbins v. *Potter,* 98 Mass. 532; *Daly* v. *Wise,* 132 N. Y. 306, 16 L. R. A. 236; *Maier* v. *Davis,* 57 Wis. 212.

Every presumption will be indulged in to sustain the judgment of a trial court; and although improper evidence may have been admitted, it will be presumed that in arriving at a conclusion only proper evidence was considered, and that the judgment of the court below is correct.

Hinckley v. *Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967; *Mammoth Mining Co.* v. *Salt Lake Foundry & Mach. Co.* 151 U. S. 447, 38 L. ed. 229; *Parker* v. *Van Buren,* 20 Colo. 217; *White* v. *White,* 82 Cal. 427, 7 L. R. A. 799; *Smith* v. *Long,* 106 Ill. 485; *Tower* v. *Fetz,* 26 Neb. 706; *Kirkland* v. *Telling,* 49 Wis. 634; *Minton* v. *Pickens,* 24 S. C. 592; *State* v. *Seabright,* 15 W. Va. 590.

The court below erred in holding that it was error in the trial court to admit in evidence the financial statements of Gunnison county for the six months ending respectively on December 31, 1881, June 30, 1882, and December 30, 1882.

Dixon County v. *Field,* 111 U. S. 83, 28 L. ed. 360; *Lake County* v. *Graham,* 130 U. S. 674, 32 L. ed. 1065; *Hedges* v. *Dixon County,* 150 U. S. 182, 37 L. ed. 1044; *Lake County Comrs.* v. *Standley,* 24 Colo. 1.

The court erred in holding that the recitals contained in the bonds estopped the county from proving against an innocent purchaser that the bonds had been issued in excess of the limit of indebtedness authorized by the Constitution of Colorado.

Lake County v. *Graham,* 130 U. S. 674, 32 L. ed. 1060; *Graves* v. *Saline County,* 161 U. S. 359, 40 L. ed. 732; *Sutliff* v. *Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145.

Messrs. **John F. Dillon, Edmund F. Richardson,** *Harry Hubbard,* and *John M. Dillon,* for respondent:

Moral justice and equity and fair dealing equally entitle the plaintiff to a recovery.

Jasper County v. *Ballou,* 103 U. S. 745, 26 L. ed. 422; *Graves* v. *Saline County,* 161 U. S. 359, 40 L. ed. 732.

That the bill of exceptions contains all of the evidence need not be shown in any particular or technical form.

Spangler v. *Green,* 21 Colo. 505.

The instructions to the jury, duly excepted to, were reviewable by the circuit court of appeals, and are open to consideration in this court.

Pennock v. *Dialogue,* 2 Pet. 1; *Worthington* v. *Mason,* 101 U. S. 149, 25 L. ed. 848; *United States* v. *Rindskopf,* 105 U. S. 418, 26 L. ed. 1131; *Ward* v. *Cochran,* 150 U. S. 597, 37 L. ed. 1195.

The rulings of the court, which were duly objected and excepted to at the time, were reviewable by the circuit court of appeals.

Vicksburg & M. R. Co. v. *O'Brien,* 119 U. S. 99, 30 L. ed. 299; *Mexia* v. *Oliver,* 148 U. S. 664, 37 L. ed. 602; *Lincoln* v. *Claflin,* 7 Wall. 132, 19 L. ed. 106; *Lees* v. *United States,* 150 U. S. 476, 37 L. ed. 1150; *Hickman* v. *Jones,* 9 Wall. 197, 19 L. ed. 551; *Michigan Ins. Bank* v. *Eldred,* 143 U. S. 293, 36 L. ed. 162.

Plaintiff was a bona fide holder of the coupons in question.

San Antonio v. *Mehaffy,* 96 U. S. 312, 24 L. ed. 816; *Lexington* v. *Butler,* 14 Wall. 282, 20 L. ed. 809; *Macon County* v. *Shores,* 97 U. S. 272, 24 L. ed. 889.

A bona fide holder is a purchaser for value without notice, or the successor of one who was such a purchaser.

McClure v. *Oxford Twp.* 94 U. S. 429, 24 L. ed. 129.

If any previous holder of the bonds in suit was a bona fide holder for value, the plaintiff can avail himself of such previous holder's position without showing that he himself has paid value.

Montclair v. *Ramsdell,* 107 U. S. 147, 27 L. ed. 431.

Though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a bona fide holder before maturity takes it as free from such infirmities as it was in the hands of such holder.

Cromwell v. *Sac County,* 96 U. S. 51, 24 L. ed. 681; *Douglas County Comrs.* v. *Bolles,* 94 U. S. 104, 24 L. ed. 46; *Marion County Comrs.* v. *Clark,* 94 U. S. 278, 24 L. ed. 59; *Nauvoo* v. *Ritter,* 97 U. S. 389, 24 L. ed. 1050.

The plaintiff Standley was a bona fide holder of the $5,000 of bonds received by him in exchange for warrants which he surrendered to Gunnison county.

Douglas County Comrs. v. *Bolles,* 94 U. S. 104, 24 L. ed. 46; *Montclair* v. *Ramsdell,* 107 U. S. 147, 27 L. ed. 431.

The recital in the bonds, "that the total amount of this issue does not exceed the limit prescribed by the Constitution of the state of Colorado," is conclusive as an estoppel in favor of a bona fide holder of the bonds in question.

Chaffee County v. *Potter,* 142 U.S.355,35 L. ed. 1040; *Buchanan* v. *Litchfield,* 102 U. S. 278, 26 L. ed. 138; *Independent School Dist.* v. *Stone,* 106 U. S. 183, 27 L. ed. 90; *Sherman County* v. *Simons,* 109 U. S. 735, 27 L. ed. 1093; *Dallas County* v. *McKenzie,* 110 U. S. 686, 28 L. ed. 285; *Dixon County* v. *Field,* 111 U. S. 83, 28 L. ed. 360.

The recital in the bond in question, that

it is issued "for valid floating indebtedness of the said county," creates an estoppel which is conclusive in favor of the bona fide holder of such bonds.

Jasper County v. *Ballou,* 103 U. S. 745, 26 L. ed. 422; *Graves* v. *Saline County,* 161 U. S. 359, 40 L. ed. 732; *Huron* v. *Second Ward Sav. Bank,* 57 U. S. App. 593, 86 Fed. Rep. 272, 30 C.C.A.38; *West Plains Twp.* v. *Sage,* 32 U. S. App. 725, 69 Fed. Rep. 943, 16 C. C. A. 553; *Kiowa County Comrs.* v. *Howard,* 49 U. S. App. 642, 83 Fed. Rep. 296, 27 C. C. A. 531; *Cadillac* v. *Woonsocket Inst. for Sav.* 16 U. S. App. 546, 58 Fed. Rep. 935, 7 C. C. A. 574; *National L. Ins. Co.* v. *Huron Bd. of Edu.* 27 U. S. App. 244, 62 Fed. Rep. 778, 10 C. C. A. 637.

The issue of bonds to pay off or refund an existing indebtedness does not increase the debt or create a new debt. It merely changes the form of the old debt.

Powell v. *Madison,* 107 Ind. 106; *Blanton* v. *McDowell County Comrs.* 101 N. C. 532; *Los Angeles* v. *Tweed,* 112 Cal. 319; *Sioux City* v. *Weare,* 59 Iowa, 95; *Opinion of the Justices* in 81 Me. 602, Appx.

The so-called "financial statements" cannot be introduced in evidence as against a bona fide holder of the bonds in question containing such recitals as these bonds contain.

Sutliff v. *Lake County Comrs.* 147 U. S. 230, 37 L. ed. 145; *Chaffee County* v. *Potter,* 142 U. S. 355, 35 L. ed. 1040; *Evansville* v. *Dennett,* 161 U. S. 434, 40 L. ed. 760.

No record is constructive notice as to any negotiable paper unless a statute expressly so provides.

Burck v. *Taylor,* 152 U. S. 634, 38 L. ed. 578.

The purchaser of negotiable paper does not have constructive notice of any litigation pending, or any judgments which may have been previously rendered, regarding such paper.

Warren County v. *Marcy,* 97 U. S. 96, 24 L. ed. 977; *Carroll County* v. *Smith,* 111 U. S. 556, 28 L. ed. 517; *Orleans* v. *Platt,* 99 U. S. 676, 25 L. ed. 404; *Cass County* v. *Gillett,* 100 U. S. 585, 25 L. ed. 585; *Thompson* v. *Perrine,* 103 U. S. 806, 26 L. ed. 612.

Where it is sought to affect a bona fide purchaser for value of commercial paper with constructive notice, the question is not whether he had the means of obtaining, or might have obtained by prudent caution, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.

Wilson v. *Wall,* 6 Wall. 83, 18 L. ed. 727; *Ware* v. *Egmont,* 4 DeG. M. & G. 460; *Goetz* v. *Bank of Kansas City,* 119 U. S. 551, 30 L. ed. 515.

A person may estop himself from relying upon the constructive notice which records furnish.

Brookhaven v. *Smith,* 118 N. Y. 634, 7 L. R. A. 755; *Wilde* v. *Gibson,* 1 H. L. Cas. 605; *Stone* v. *Covell,* 29 Mich. 359.

If the plaintiff proves the payment of value, then the burden is on the defendant to show that the plaintiff had notice of the illegality or fraud.

Lexington v. *Butler,* 14 Wall. 282, 20 L. ed. 809; *Macon County* v. *Shores,* 97 U. S. 272, 24 L. ed. 889; *Cromwell* v. *Sac County,* 96 U. S. 51, 24 L. ed. 681; *Montclair* v. *Ramsdell,* 107 U. S. 147, 27 L. ed. 431.

*Mr. Justice **Harlan** delivered the opin- **[256]** ion of the court:

This action was brought by E. H. Rollins & Sons, a corporation of New Hampshire, to obtain a judgment against the board of commissioners of Gunnison county, Colorado, a municipal corporation of that state, for the amount of certain coupons of bonds issued by the defendant in 1882. At the close of the evidence the defendant requested a peremptory instruction in its behalf. The circuit court charged the jury at some length, but concluded with a direction to find a verdict for the defendant, which was done, and a judgment in its favor was entered. That judgment was reversed in the circuit court of appeals, and the case is here upon writ of certiorari. 49 U. S. App. 399.

The case made by the complaint is as follows:

By the laws of Colorado, boards of county commissioners were authorized to examine, allow, and settle all accounts against their respective counties, and to issue county warrants therefor; to build and keep in repair the county buildings, to insure the same, and to provide suitable rooms for county purposes, and to represent the county, and have the care of county property and the management of the business and concerns of the county in all cases where the law did not otherwise provide.

On the 1st day of December, 1882, the defendant board caused to be made and executed certain bonds acknowledging the county of Gunnison to be indebted and promising to pay to ——— or bearer the sum therein named, for value received, redeemable at the pleasure of the county after ten years, and absolutely due and payable twenty years after date, at the office of the county treasurer, with interest at eight per cent *per annum, payable semi-annually on the **[257]** first days of March and September in each year at the county treasurer's office, or at the Chase National Bank in the city of New York, at the option of the holder, upon the presentation and surrender of the annexed coupons as they severally became due.

Each bond contained this recital: "This bond is issued by the board of county commissioners of said Gunnison county in exchange, at par, for valid floating indebtedness of the said county outstanding prior to September 2d, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the state of Colorado, entitled 'An Act to Enable the Several Counties of the State to Fund Their Floating Indebtedness,' approved February 21st, 1881; and it is hereby certified that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond. It is further certified that the total amount of this issue *does not exceed the limit prescribed by the Constitution of the state of Colorado,* and that this

issue of bonds has been authorized by a vote of a majority of the duly qualified electors of the said county of Gunnison, voting on the question at a general election duly held in said county on the seventh day of November, A. D. 1882. The bonds of this issue are comprised in three series, designated 'A,' 'B' and 'C' respectively, the bonds of series 'A' being for the sum of one thousand dollars each, those of series 'B' for the sum of five hundred dollars each, and those of series 'C' for the sum of one hundred dollars each. This bond is one of series 'A.' The faith and credit of the county of Gunnison are hereby pledged for the punctual payment of the principal and interest of this bond."

To each bond were attached coupons for the semi-annual interest, signed by the county treasurer.

On the first day of December, 1882, for the bonds of the county with coupons attached as above specified, the defendant board made an exchange with the parties then holding county warrants, which before that time, in accordance with the statutes in such case made and provided, had been issued to them in settlement of claims pre-
[258] sented by them against the county. *In every case when warrants were presented they were exchanged for the bonds of the county at par for their face and interest. In each case the blanks were filled out with the name of the party receiving the bonds or exchanging the warrants, and the blank for the place of payment filled in as the banking house of the Chase National Bank in the city of New York. Thereupon the bonds were signed by the chairman of the board of county commissioners, countersigned by the county treasurer, and attested by the county clerk with the seal of the county, and the coupons attached were also filled out, stating the place of payment to be in the city of New York, at the banking house of the Chase National Bank, and stating also the number of the funding bond and the series to which it was attached.

The issue of bonds as above set forth was authorized by a vote of the qualified electors to be exchanged for warrants, and the amount thereof was spread upon the records of the county as provided for by the act of February 21st, 1881, entitled "An Act to Enable the Several Counties of the State to Fund Their Floating Indebtedness." In all other respects the terms and conditions of the act were fully complied with. The bonds were duly registered in the office of the auditor of the state.

In every case where bonds were issued and delivered to the payee or to any person for him, the parties received them in exchange for warrants, the amount of the bonds being the same as the amount of the warrants and interest thereon that had theretofore been issued by the county.

From the 1st day of December, 1882, and up until the 1st day of March, 1886, the county paid the interest on the bonds semi-annually in accordance with their terms and of the coupons attached to them.

The defendant board made default in the payment of interest due on the first day of September, 1886, and made like default thereafter up to and including September 1st, 1892.

The plaintiff was the holder and owner of coupons formerly attached to and belonging to certain bonds of the above issue. It asked judgment for the aggregate amount of the principal *of the coupons, with interest on the [259]
amount of each coupon as it became due.

The answer of the county contained a general denial of all the allegations of the complaint, and in addition set out eleven affirmative defenses, which were chiefly based upon the alleged fact that the county in issuing the bonds set forth in the complaint had attempted to incur an indebtedness not authorized by the Constitution of Colorado, or by the statute referred to in the bonds.

The provision of the Constitution of Colorado prescribing the extent to which counties may become indebted, and to which the bonds referred, is as follows:

"No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon taxable property in such county, following, to wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof. Counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of the Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; provided that this section shall not apply to counties having a valuation of less than one million of dollars." Laws of Col. 1877, p. 62.

*The act of February 21st, 1881, referred [260]
to in the bonds in question, contains among other provisions the following:

"§1. It shall be the duty of the county commissioners of any county having a floating indebtedness exceeding ten thousand dollars, upon the petition of fifty of the electors of said counties [county] who shall have paid taxes upon property assessed to them in said county in the preceding year, to publish for the period of thirty days in a newspaper published within said county, a notice requesting the holders of the warrants of such county to submit in writing to the board of county commissioners, within thirty days from the date of the first publication of such no-

tice, a statement of the amount of the warrants of such county which they will exchange at par, and accrued interest, for the bonds of such county, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such board of county commissioners at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforementioned, upon the petition of fifty of the electors of such county who shall have paid taxes upon property assessed to them in said county in the preceding year, to submit to the vote of the qualified electors of such county who shall have paid taxes on property assessed to them in said county in the preceding year, the question whether the board of county commissioners shall issue bonds of such county under the provisions of this act, in exchange at par for the warrants of such county issued prior to the date of the first publication of the aforesaid notice; or they may submit such question at a special election, which they are hereby empowered to call for that purpose at any time after the expiration of thirty days from the date of the first publication of the notice aforementioned, on the petition of fifty qualified electors as aforesaid; and they shall publish for the period of at least thirty days immediately preceding such general or special election in some newspaper published within such county, a notice that such question will be submitted to the duly qualified electors as aforesaid, at such election. The county treasurer of such county shall make out and [261] cause to be delivered to the judges *of election in each election precinct in the county, prior to the said election, a certified list of the taxpayers in such county who shall have paid taxes upon property assessed to them in such county in the preceding year; and no person shall vote upon the question of the funding of the county indebtedness, unless his name shall appear upon such list, nor unless he shall have paid all county taxes assessed against him, in such county in the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the floating county indebtedness shall be for the funding of such indebtedness, the board of county commissioners may issue to any person or corporation holding any county warrant or warrants issued prior to the date of the first publication of the aforementioned notice, coupon bonds of such county in exchange therefor at par. No bonds shall be issued of less denomination than one hundred dollars, and if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent per annum. The interest to be paid semi-annually at the office of the county treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the county after ten years from the date of their issuance, but absolutely due and payable twenty years after date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same and made a part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond." Laws of Col. 1881, pp. 85, 86, 87.

1. The circuit court of appeals held that the bill of exceptions did not purport to contain all the evidence adduced at the trial, and for that reason it did not consider the question whether error was committed in directing the jury to find for the defendant. We are of opinion that the bill of exceptions *should be taken as containing all the evi- [262] dence. It appears that, as soon as the jury was sworn to try the issues in the cause, "the complainants to sustain the issues on their part offered the following oral and documentary evidence." Then follow many pages of testimony on the part of the plaintiffs, when this entry appears: "Whereupon complainants rested." Immediately after comes this entry: "Thereupon the defendants to sustain the issues herein joined on their part produced the following evidence." Then follow many pages of evidence given on behalf of the defendant, and the evidence of a witness recalled by the defendant, concluding with this entry: "Whereupon the further proceedings herein were continued until the 20th day of May, 1896, at 10 o'clock A. M." Immediately following is this entry: "Wednesday, May 20th, at 10 o'clock, the further trial of this cause was continued as follows." The transcript next shows some discussion by counsel as to the exclusion of particular evidence, after which is this entry: "Thereupon counsel for defendant made a formal motion under the evidence on both sides that the court instruct the jury to return a verdict for the defendant." Although the bill of exceptions does not state, in words, that it contains all the evidence, the above entries sufficiently show that it does contain all the evidence. It is therefore proper to inquire on this record whether the circuit court erred in giving a peremptory instruction for the defendant.

2. We have seen that the bonds to which were attached the coupons in suit recited that they were issued by the board of county commissioners "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2d, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the state of Colorado, entitled 'An Act to Enable the Several Counties of the State to Fund Their Floating Indebtedness,' approved February 21st, 1881;" that "all the requirements of law have been fully complied with by the proper officers in the issuing of this bond;" that the total amount of the issue did "not exceed the limit prescribed by the Constitution of the state of Colorado;" and that such issue had been authorized by a vote *of [263] a majority of the duly qualified electors of the county voting on the question at a gen-

eral election duly held in the county on the 7th day of November, 1882.

Do such recitals estop the county from asserting against a bona fide holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the Constitution of Colorado? An answer to this question can be found in former decisions of this court. It is necessary to advert to those decisions, particularly those in which the court considered the effect of recitals importing compliance with constitutional provisions.

In *Buchanan* v. *Litchfield*, 102 U. S. 278, 290, 292 [26: 138, 140, 141], which was a suit on interest coupons of municipal bonds, the defense was made that the bonds were issued in violation of that clause of the Constitution of the state providing that "no county, city, township, school district, or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness." This court said: "As, therefore, neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their 'existing indebtedness,' it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met,—that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit,—then the city, under the decisions of this court, might have been estopped from disputing the truth of such representations as against a bona fide holder of its bonds. The case might then, perhaps, have been brought within the rule announced by this court in *Town of Coloma* v. *Eaves*, 92 U. S. 484 [23: 579], in which case we said, and now repeat, that 'where legislative authority has been given to a municipality, or to
[264]its officers, to subscribe for the *stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made on the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' So, in the more recent case of *Orleans* v. *Platt*, 99 U. S. 676 [25: 404] it was said that 'where the bonds on their face recite the circumstances which bring them within the power the corporation is estopped to deny the truth of the recital.'" Again: "A recital that the bonds were issued under the authority of the statute and in pursuance of the city ordinance did not necessarily import a compliance with the Constitution. Had the bonds made the additional recital that they were issued in accordance with the Constitution, or had the ordinance stated in any form that the proposed indebtedness was within the constitutional limit, or had the statute restricted the exercise of the authority therein conferred to those municipal corporations whose indebtedness did not at the time exceed the constitutional limit, there would have been ground for holding that the city could not, as against the plaintiff, dispute the fair inference to be drawn from such recital or statement as to the extent of its existing indebtedness."

In *Northern Bank* v. *Porter Township*, 110 U. S. 608, 616, 619 [28: 258, 261, 262], which was an action on municipal bonds, and involved a question respecting the conclusiveness, as between the municipality and a bona fide holder for value, of recitals in the bonds that they had been issued in conformity to law, the court referred to the above rule established in *Town of Coloma* v. *Eaves*, and said: "We are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation issuing bonds in aid of the construction of a railroad was not permitted, against a *bona fide holder, to [265]
question in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. . . . The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but, the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance."

A leading case on this subject is *Dixon County* v. *Field*, 111 U. S. 83, 92–94 [28: 360, 363, 364], which involved the validity of bonds issued in the name of Dixon county, Nebraska, the Constitution of which state prescribed conditions upon which donations could be made to a railroad or other work of internal improvement by cities, towns, precincts, municipalities, or other subdivisions of the state, and imposed limitations upon the amount thereof and upon the mode of creating municipality debts of that kind. The principal question was as to the conclu-

siveness of certain recitals in the bonds sued on in that case. This court said: "The estoppel does not arise, except upon matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recital should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds have been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where [266] more than one is *involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated, or nonenumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact, as shown by the record, and not upon its ascertainment and determination by anyone; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in that instrument This principle is the essence of the rule declared upon this point, by this court, in the well-considered words of Mr. Justice Strong, in *Town of Coloma* v. *Eaves,* 92 U. S. 484 [23: 579], where he states (p. 491 [23: 582]) that it is 'where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with,' that 'their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive [267] *of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' The converse is embraced in the proposition, and is equally true. If the officers authorized to issue bonds upon a condition are not the appointed tribunals to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject."

In *Lake County* v. *Graham,* 130 U. S. 674, 680, 683, 684 [32: 1065, 1067, 1068], the question was as to the validity of certain bonds issued by Lake county, Colorado, under the very statute of that state referred to in the bonds the coupons of which are here in suit, namely, the above act of February 21st, 1881, authorizing the several counties of the state to fund their floating indebtedness. It was recited in each of the bonds sued on in that case that they were issued under and by virtue of and in full compliance with that act, and that "all the provisions and requirements of said act have been fully complied with by the proper officers in the issuing of this bond." No one of the bonds, let it be observed, contained any recital that it was issued in conformity to the provisions of the state Constitution. This court said: "Nothing is better settled than this rule—that the purchaser of bonds, such as these, is held to know the constitutional provisions and the statutory restrictions bearing on the question of the authority to issue them; also the recitals of the bonds he buys; while, on the other hand, if he act in good faith and pay value, he is entitled to the protection of such recitals of facts as the bonds may contain. In this case the Constitution charges each purchaser with knowledge of the fact that, as to all counties whose assessed valuation equals one million of dollars, there is a *maximum limit beyond [268]
which those counties can incur no further indebtedness under any possible conditions, provided that in calculating that limit debts contracted before the adoption of the Constitution are not to be counted. The statute, on the other hand, charges the purchaser with knowledge of the fact that the county commissioners were to issue bonds, at par, in exchange for such warrants of the county as were themselves issued prior to the date of the first publication of the notice provided for; that the only limitation on the issue of bonds in the statute was that the bonds should not exceed in amount the sum of the county indebtedness on the day of notice aforesaid; that while the commissioners were empowered to determine the amount of such indebtedness yet the statute does not refer that board, for the elements of its computation, to the Constitution or to the standards prescribed by the Constitution, but leaves it open to them, without departing from any direction of the statute, to adopt solely the basis of the county warrants. The

recitals of the bonds were merely to the effect that the issue was 'under and by virtue of and in full compliance with' the *statute;* 'that all the provisions and requirements of *said act* have been fully complied with by the proper officers in the issuing of this bond;' and that the issuing was 'authorized by a vote of a majority of the duly qualified electors,' etc.; no express reference being made to the Constitution, nor any statement made that the constitutional requirements had been observed. There is, therefore, no estoppel as to the *constitutional* question, *because there is no recital in regard to it.* *Carroll County* v. *Smith*, 111 U. S. 556" [28: 517]. In disposing of the contention that, under the doctrines of certain adjudged cases, the county was estopped to deny that the bonds were issued in conformity to the Constitution, the court said: "The question here is distinguishable from that in the cases relied on by counsel for defendant in error. In this case the standard of validity is created by the Constitution. In that standard two factors are to be considered; one, the amount of assessed value, and the other the ratio between that assessed value and the debt proposed. These being exac-
[269]tions of the Constitution itself, *it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts. In the case of *Sherman County* v. *Simons*, 109 U. S. 735 [27: 1093], and others like it, the question was one of estoppel as against an exaction imposed by the legislature; and the holding was that the legislature, being the source of exaction, had created a board authorized to determine whether its action had been complied with, and that its finding was conclusive to a bona fide purchaser. So also in *Oregon* v. *Jennings*, 119 U. S. 74 [30: 323], the condition violated was not one imposed by the Constitution, but one fixed by the subscription contract of the people."

This brings us in our reference to the authorities to the important case of *Chaffee County* v. *Potter*, 142 U. S. 355, 363, 364, 366 [35: 1040, 1043, 1044]. That was an action upon coupons of bonds issued by Chaffee county, Colorado, under the act of February 21st, 1881, under which the bonds here in suit were issued. The bonds and coupons were in the same form and contained the *same recitals* as the above bonds issued by Gunnison county, and were of like date. The defense in part in the Chaffee county case was that the bonds, and each of them, were issued in violation of the Constitution of the state. After referring to the decision in *Lake County* v. *Graham* (the bonds in which did not contain any express recitals as to the constitutional limit of indebtedness), and stating that it was based largely on the ruling in *Dixon County* v. *Field*, this court said: "To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and in the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from *Lake County* v. *Graham* and *Dixon County* v. *Field*, and *are sufficient to operate as an estoppel against the county.* Of course the purchaser of bonds in open market was bound to take notice of *the constitutional [270]
limitation on the county with respect to indebtedness which might incur. But when, upon the face of the bonds, there was *any* express recital that the limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no further. An examination of any particular bond would not disclose, as it would in the *Lake County Case* and in *Dixon County* v. *Field*, that, as a matter of fact, the constitutional limitation had been exceeded in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the Constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the Constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is, What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in *Lake County* v. *Graham* and *Dixon County* v. *Field.* But that is not this case. Here, by virtue of the statute under which the bonds were issued, *the county commissioners were to determine the amount to be issued,* which was not to exceed the total amount of the indebtedness at the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the Constitution of the state and the statute under which they *were issued, and required them [271]
to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and *that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue,* under the law, *estops the county from saying that it is untrue.* *Town of Coloma* v. *Eaves*, 92

U. S. 484 [23 : 579]; *Town of Venice* v. *Murdock*, 92 U. S. 494 [23 : 583]; *Marcy* v. *Township of Oswego*, 92 U. S. 637 [23 : 748]; *Wilson* v. *Salamanca*, 99 U. S. 499 [25 : 330]; *Buchanan* v. *Litchfield*, 102 U. S. 278 [26 : 138]; *Northern Bank* v. *Porter Township*, 110 U. S. 608 [28 : 258]." After referring to what was said in *Town of Coloma* v. *Eaves* and *Buchanan* v. *Litchfield*, the court thus concludes its opinion: "We think this case comes fairly within the principles of those just cited; and that it is not governed by *Dixon County* v. *Field* and *Lake County* v. *Graham*, but is distinguishable from them in the essential particulars above noted."

It is contended that the present case is controlled by *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230, 235, 237-8 [37 : 145, 149], rather than by *Chaffee County* v. *Potter*. The action in the *Sutliff Case* was upon coupons of bonds issued by a county of Colorado, each bond reciting that it was issued under and by virtue of and in compliance with the act of Assembly entitled "An Act Concerning Counties, County Officers, and County Government, and Repealing Laws on These Subjects," approved March 24th, 1877, and it was certified in each bond that "all the provisions of said act have been fully complied with by the proper officers in the issuing of this bond." It was a vital fact in that case that there was no recital in the bonds that the indebtedness thus created was not in excess of the constitutional limit. Still, the defense was that the bonds in fact increased the indebtedness of the county to an amount in excess of the limit prescribed by the State Constitution, and therefore were illegal and void. The court, upon the facts certified and in the light of previous decisions, held it to be clear that "the plaintiff, although a purchaser for value and before maturity of the bonds, was charged with the
[272] duty *of examining the records of indebtedness provided for in the statute of Colorado, in order to ascertain whether the bonds increased the indebtedness of the county beyond the constitutional limit; and that the recitals in the bonds did not estop the county to prove by the records of the assessment and the indebtedness that the bonds were issued in violation of the Constitution. "In those cases," it continued, "in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the Constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the facts existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. *Marcy* v. *Oswego Twp.* 92 U. S. 637 [23 : 748]; *Humboldt Twp.* v. *Long*, 92 U. S. 642 [23 : 752]; *Dixon County* v. *Field*, 111 U. S. 83 [28 : 360]; *Lake County* v. *Graham*, 130 U. S. 674, 682 [32 : 1065, 1068]; *Chaffee County* v. *Potter*, 142 U. S. 355, 363 [35 : 1040, 1043]. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of everyone, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds." After referring to *Dixon County* v. *Field*, above cited, the court proceeded to show the precise grounds upon which the decisions in *Lake County* v. *Graham* and *Chaffee County* v. *Potter* were rested: "That decision [*Dixon County* v. *Field*] and the ground upon which it rests were approved and affirmed in *Lake County* v. *Graham* and *Chaffee County* v. *Potter*, above cited, each of which arose under the article of the Constitution of Colorado now in question, but under a different statute, which did not require the amount of indebtedness of the county to be stated on its records. In *Lake County* v. *Graham* each bond showed on its face the whole amount of bonds issued, and the recorded valuation of property showed that amount to be in excess of the constitutional limit; and for this reason, as well as because the bonds contained no recital upon that point, the county was held not to *be estopped to [273]
plead that limit. 130 U. S. 682, 683 [32 : 1068]. In *Chaffee County* v. *Potter*, on the other hand, the bonds contained an express recital *that the total amount of the issue did not exceed the constitutional limit*, and did not show on their face the amount of the issue, and the county records showed only the valuation of property, so that, as observed by Mr. Justice Lamar in delivering judgment: 'The purchaser might even know, indeed it may be admitted that he would be required to know, the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll whether the county had exceeded its power, under the Constitution, in the premises.' 142 U. S. 363 [35 : 1043]. The case at bar does not fall within *Chaffee County* v. *Potter*, and cannot be distinguished in principle from *Dixon County* v. *Field* or from *Lake County* v. *Graham*. The only difference worthy of notice is that in each of these cases the single fact required to be shown by the public record was the valuation of the property of the county, whereas here two facts are to be so shown, the valuation of the property, and the amount of the county debt. But, as both these facts are equally required by the statute to be entered on the public records of the county, they are both facts of which all the world is bound to take notice, and as to which, therefore, the county cannot be concluded by any recitals in the bonds."

It thus appears that in the *Sutliff Case* the court neither modified nor intended to modify, but distinctly recognized, the principle announced in *Chaffee County* v. *Potter*, namely, that the recital in the bonds that the debt thereby created did not exceed the limit prescribed by the Constitution estopped the county from asserting, as against a bona fide holder for value, that the contrary was the fact.

We have made this extended reference to adjudged cases because of the wide difference among learned counsel as to the effect

of our former decisions. This course has also been pursued in order to bring out clearly the fact that the present case is controlled by the judgment in *Chaffee County* v. *Potter*. The views of the circuit court, as expressed
[274]in its charge in *this case and as enforced by its peremptory instruction to find for the defendant, cannot be approved without overruling that case. It was expressly decided in the Chaffee county case that the statute under which the bonds there in suit (the bonds here in suit being of the same class) authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the Constitution and the statute; and that the recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County* v. *Potter*, and upon the authority of that case, and without re-examining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question, to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law.

We have assumed thus far that the plaintiff corporation was a bona fide purchaser or holder of the bonds to which the coupons in suit were attached. Upon this question we concur in the views expressed by the circuit court of appeals. Speaking by Judge Thayer, that court said: "The testimony contained in the present record shows, we think, without contradiction, that the plaintiff was a bona fide holder when the suit was brought of at least five of the bonds which are involved in the present controversy, because it holds the title of Joseph Stanley, who was himself an innocent purchaser of said bonds before maturity, for the price of ninety-eight cents on the dollar. The rights which Stanley acquired by virtue of such purchase inure to the plaintiff, by virtue of its purchase of the bonds from Stanley in June, 1892, and this without reference to any knowledge which the plaintiff may have had at the latter date affecting the validity of
[275]the securities. *A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 286 [24: 59, 62]; *Hill* v. *Scotland County*, 34 Fed. Rep. 208; Dan. Neg. Inst. (4th ed.) § 803, and cases there cited." 49 U. S. App. 399, 413.

The remaining five bonds owned by the plaintiff corporation were also purchased from Stanley, who received them directly from the county in exchange for warrants that he owned and held. There is no reason why upon the surrender of county warrants for county bonds he was not entitled to the benefit of the rule above declared as to the conclusiveness of the recital in the bonds, or why he may not be regarded as much an innocent holder of the bonds exchanged for county warrants as of the other bonds purchased by him in open market. There is no proof that at the time of such exchange he had or was chargeable with knowledge or notice that the debt created by the bonds exceeded the constitutional limit; consequently, in taking the bonds in exchange he was entitled, for the reasons heretofore given, to rely upon the truth of the recitals contained in them. When the board of county commissioners, proceeding under the act of 1881, offered to exchange county bonds for the warrants held by him, he was entitled under the circumstances disclosed to assume it to be true, as recited in the bonds, that the constitutional limit was not being exceeded.

It is insisted with much earnestness that the principles we have announced render it impossible for a state by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a state Constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded, or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test. whatever might be the hardship in the case of those who purchased them in the open market *in [276]
good faith. Indeed, it is entirely competent for a state to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that everyone understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities.

It follows that the circuit court erred in directing the jury to return a verdict for the defendant.

What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the circuit court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. Those rulings were inconsistent with the principles herein announced.

As neither the circuit court nor the circuit court of appeals proceeded in accordance with the principles herein announced, *the judgment of each court is reversed*, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

STATE OF OHIO, *Appt.*,
v.
J. B. THOMAS.

(See S. C. Reporter's ed. 276-285.)

Governor of soldiers' home not subject to state law as to use of oleomargarine.

A governor of a soldiers' home which is under the sole jurisdiction of Congress is not subject to the state law concerning the use of oleomargarine, when he furnishes that article to the inmates of the home as part of the rations furnished for them under appropriations made by Congress therefor.

[No. 353.]

Argued and Submitted January 10, 1899. Decided February 27, 1899.

APPEAL from an order of the United States Circuit Court of Appeals for the Sixth Circuit affirming the order of the Circuit Court of the United States for the Southern District of Ohio, Western Division, discharging the appellee, J. B. Thomas, governor of the soldiers' home in the county of Montgomery, Ohio, from the custody of a constable under a mittimus from the justice of the peace before whom he was tried and by whom he was convicted and sentenced to pay a fine of $50 and to be imprisoned until such fine was paid, for a violation of the Ohio act of 1895 (92 Ohio State Laws, 23) in relation to the use of oleomargarine. *Affirmed.*

See same case below, 82 Fed. Rep. 304, and 58 U. S. App. 431, 87 Fed. Rep. 453.

Statement by Mr. Justice **Peckham:**

[277] *In this case complaint was made by affidavit by the dairy commissioner of Ohio against the appellee, alleging that on March 2, 1897, he violated the act of the legislature of the state of Ohio, passed in 1895 (92 Ohio State Laws, 23), in relation to the use of oleomargarine. Appellee was arrested and brought before a justice of the peace, and declined to plead to the charge on the ground that the act complained of in the affidavit of the complainant was performed by him as governor of the soldiers' home, located in the county of Montgomery and state of Ohio, and what he did was done by the authority of the board of managers of the home. He therefore moved to dismiss the complaint for want of jurisdiction in the magistrate. This motion was denied. He then consented to be tried without a jury upon the following agreed statement of facts:

"1. That on the 2d day of March, 1897, Joseph E. Blackburn was and now is the food and dairy commissioner of the state of Ohio.

"2. That on the 2d day of March, 1897, J. B. Thomas was and now is the duly chosen and acting governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, located in the county of Montgomery, state of Ohio, and as said governor was in charge of the eating house at the said Central Branch of the National Home for Disabled Volunteer Soldiers.

"3. Said eating house is used by said J. B. Thomas for serving and furnishing to the inmates of said Central Branch of the National Home for Disabled Volunteer Soldiers their daily *food or rations, and is the only [278]
place so provided at said National Home, and is known as the mess room of the said Central Branch of the National Home for Disabled Volunteer Soldiers, situate on the grounds purchased, held and used by the United States therefor, and the acts complained of herein consisted in causing oleomargarine to be served and furnished, on the 2d day of March, 1897, as food and as part of the rations furnished to the inmates thereof, under appropriations made by the Congress of the United States for the support of said inmates; and that no placard in size not less than 10 x 14 inches, having printed thereon in black letters not less in size than 1½ inches square, the words 'oleomargarine sold and used here,' was displayed in said eating house.

"4. The affidavit in the cause is made in conformity with an act of the general assembly of the state of Ohio (Ohio Laws, vol. 92, page 23), passed in 1895, and entitled 'An Act to Amend Section 3 of an Act Entitled "An Act to Prevent Fraud and Deception in the Manufacture and Sale of Oleomargarine and Promote Public Health in the State of Ohio,"' passed May 16, 1894."

Section 3 of the act, as so amended, reads as follows:

"Sec. 3. Every proprietor, keeper, manager, or person in charge of any hotel, boat, railroad car, boarding house, restaurant, eating house, lunch counter, or lunch room, who therein sells, uses, serves, furnishes, or disposes of or uses in cooking, any oleomargarine, shall display and keep a white placard in a conspicuous place, where the same may be easily seen and read, in the dining room, eating house, restaurant, lunch room, or place where such substance is furnished, served, sold, or disposed of, which placard shall be in size not less than ten by fourteen inches, upon which shall be printed in black letters, not less in size than one and a half inches square, the words 'oleomargarine sold and used here,' and said card shall not contain any other words than the ones above described; and such proprietor, keeper, manager, or person in charge shall not sell, serve, or dispose of such substance as or for butter, when butter is asked for or purported to be furnished or served."

In addition to the above statement, reference was made to *the following acts of Con- [279]
gress providing for the creation and government of the National Homes for Disabled Volunteer Soldiers, *viz.*: Act of March 3, 1865, chap. 91 (13 Stat. at L. 509); act of March 21, 1866, chap. 21 (14 Stat. at L. 10); act of March 3, 1875, chap. 129 (18 Stat. at L. 343, at 359). By the last-cited statute, on page 359, it is made the duty of the managers of the home, on or before the first day of August in each year, "to furnish to the Secretary of War estimates, in detail, for the support of said home for the fiscal year commencing on the first day of July thereafter; and the Secretary of War shall an-

nually include such estimates in his estimates for his department. And no moneys shall, after the first day of April, 1875, be drawn from the Treasury for the use of said home, except in pursuance of quarterly estimates, and upon quarterly requisitions by the managers thereof upon the Secretary of War, based upon such quarterly estimates, for the support of said home, for not more than three months next succeeding such requisition. . . . And the managers of said home shall, at the commencement of each quarter of the year, render the Secretary of War an account of all their receipts and expenditures for the quarter immediately preceding, with vouchers for such expenditures; and all such accounts and vouchers shall be authenticated by the officers of said home thereunto duly appointed by said managers, and audited and allowed as required by law for the general appropriations and expenditures of the War Department."

By the act (chapter 902) approved August 4, 1886 (24 Stat. at L. 222, at 251), it was also provided that "hereafter the estimates for the support of the Home for Disabled Volunteer Soldiers shall be submitted by items." Also by the act (chapter 1069) approved October 2, 1888 (25 Stat. at L. 505, at 543), it was "*Provided further,* That it shall be the duty of the managers of said home, on or before the first day of October in each year to furnish to the Secretary of War estimates, in detail, for the support of said home for the fiscal year commencing on the first day of July thereafter, and the Secretary of War shall annually include such estimates in his estimates for his department." Also by the act (chapter 420) approved June 11, 1896
[280] (29 Stat. at L. 413, at 445), an *appropriation was made for the support of the home at Dayton, Ohio, and for "the cost of all articles purchased for the regular ration, their freight, preparation, and serving."

The material portions of the acts of March 3, 1865, and March 21, 1866, have been enacted in the Revised Statutes of the United States, being sections 4825 to 4837, both inclusive.

On the third of April, 1867, the legislature of the state of Ohio passed an act ceding jurisdiction to the United States over the lands and their appurtenances within the state of Ohio, which might be acquired by donation or purchase by the managers of the National Asylum for Disabled Volunteer Soldiers within the state of Ohio, for the uses and purposes of the asylum.

By the act, chapter 24, approved January 21, 1871 (16 Stat. at L. 399), Congress ceded back to the state of Ohio jurisdiction over the place named, and relinquished such jurisdiction on the part of the United States, and the act contained the following: "And the United States shall claim or exercise no jurisdiction over said place after the passage of this act: *Provided,* That nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers of the National Asylum for Disabled Volunteer Soldiers, incorporated under said act, in and over said territory."

Upon these facts the appellee was convicted by the magistrate before whom he was tried, and was sentenced to pay a fine of $50, and to be imprisoned until such fine was paid. He refused to pay the fine, and applied to the circuit court of the United States for the southern district of Ohio, western division, for a writ of habeas corpus, on the ground that the state tribunal before which he was tried had no jurisdiction to try him. The writ was granted and the constable made return thereto, setting up that he held appellee under the mittimus from the justice of the peace before whom he was tried. Upon the hearing the court made an order discharging appellee. 82 Fed. Rep. 304. The state appealed from that order to the circuit court of appeals for the sixth *circuit, where it was af- [281]
firmed (58 U. S. App. 431, 87 Fed. Rep. 453), and the state then appealed to this court.

Messrs. **Charles H. Bosler** and **Otto J. Renner** for appellant.

Messrs. **Judson Harmon** and *D. W. Bowman* for appellee.

*Mr. Justice **Peckham,** after stating the [281]
facts, delivered the opinion of the court:

The act of the legislature of the state of Ohio, passed May 16, 1868, ceding jurisdiction to the United States, if it had remained in force would have prevented the state officials from taking jurisdiction in this case. Congress, however, by the act of January 21, 1871, ceded back and relinquished the jurisdiction that had been granted, and provided that it would claim or exercise no jurisdiction thereafter, except as therein mentioned.

If we assume, what the state court decided, that the provisions of the state statute relating to the sale of oleomargarine were intended to apply to and cover the soldiers' home, the question then arises whether the state had the power to legislate so as to control the governor of the home, acting under the direction of the board of managers and by the authority of Congress, in regard to the internal administration of the affairs of the home, and in respect to the conditions upon which an article of food might be provided by the governor under such directions and authority.

The home is a Federal creation, and is under the direct and sole jurisdiction of Congress. The board of managers have certain powers granted them (Rev. Stat. § 4825), and among other things to make by-laws, rules, and regulations not inconsistent with law for carrying on the business and government of the home.

The persons entitled to the benefits of the home are "officers and soldiers who served in the late war for the suppression of the rebellion," and also other soldiers and sailors. The inmates *are subject to the rules [282]
and articles of war, the same as if they were in the army. Rev. Stat. §§ 4832, 4835.

Under the statutes above cited, in which it is provided that the board of managers shall furnish to the Secretary of War, in each year,

estimates, in detail, for the support of the home for the succeeding fiscal year, it would naturally be the duty of the governor of each home, in order to enable the board of managers to perform their own duty, to report to the board the same kind of detailed estimates that the board is by law directed to report to the Secretary of War, and which are to be included by the Secretary in the estimates for his department. At all events, the duty is laid upon the board of managers, by the very terms of the statute, to make these estimates in detail. It is admitted in the record that the oleomargarine complained about herein was served and furnished by the appellee as food and as part of the rations furnished the inmates under the appropriations made by Congress for the support of such inmates.

From these facts the inference is plain that oleomargarine had been included in the detailed estimates for rations to be furnished the inmates, and that the appropriation for rations included oleomargarine as part thereof. Otherwise we should have to infer a dereliction of duty on the part of the board of managers in not making out estimates in detail, and we should adopt an inference contrary to the admission, which states that the oleomargarine was furnished as food under an appropriation of Congress. The appropriation does not precede the detailed estimates, but is made subsequently and is presumably enacted with reference thereto. Congress has therefore in effect provided oleomargarine as part of the rations for the inmates of the home. It is given them in the mess room of the institution and under the rules and regulations for feeding them there. In making provision for so feeding the inmates, the governor, under the direction of the board of managers and with the assent and approval of Congress, is engaged in the internal administration of a Federal institution, and we think a state legislature has no constitutional power to interfere with such management as is provided by Congress.

[283] *Whatever jurisdiction the state may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers, and by Congress. Under such circumstances the police power of the state has no application.

We mean by this statement to say that Federal officers who are discharging their duties in a state and who are engaged, as this appellee was engaged, in superintending the internal government and management of a Federal institution, under the lawful direction of its board of managers and with the approval of Congress are not subject to the jurisdiction of the state in regard to those very matters of administration which are thus approved by Federal authority.

In asserting that this officer under such circumstances is exempt from the state law, the United States are not thereby claiming jurisdiction over this particular piece of land, in opposition to the language of the act of Congress ceding back the jurisdiction the United States received from the state. The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the state in which their duties are performed.

The claim is made that neither the board of managers nor the governor of the home can, through their officers or by himself, violate the statute law of a state having jurisdiction, when the acts constituting the infringement are not necessary for the government and management of the home for the purposes for which it was incorporated, or authorized by any act of the United States.

This claim might be conceded and still the conviction of the appellee would be invalid, because we find in this record the authority of the United States for the act of the governor. The statutes above referred to, when taken in connection with the admitted facts, show an appropriation by Congress for the *purchase of oleomargarine as part of the regular rations of the inmates of the home. The [284] act of the governor in serving it was authorized by Congress, and it was therefore legal, any act of the state to the contrary notwithstanding.

Under the facts herein the state court had no jurisdiction to try the appellee for the offense charged in the written complaint made to the magistrate. See authorities cited in *Re Waite*, 81 Fed. Rep. 359.

Assuming, in accordance with the decision of the state court, the act of the Ohio legislature applies in its terms to the soldiers' home at Dayton, in that state, we are of opinion that the governor was not subject to that law, and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the act complained of was performed as part of the duty of the governor as a Federal officer, in and by virtue of valid Federal authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio.

The authorities cited in the case of *Re Waite, supra*, and those cited by the learned circuit judge in this case, fully support the view we have taken herein. The cases of *Tennessee* v. *Davis*, 100 U. S. 257 [25: 648], *Ex parte Siebold*, 100 U. S. 371, 394, 395 [25: 717, 725], *Re Loney*, 134 U. S. 372 [33: 949], *Re Neagle*, 135 U. S. 1 [34: 55], all concur in upholding the paramount authority of the Federal government under circumstances similar, in effect, to those set forth in this record.

Some of the same authorities also show that this is one of the cases where it is proper to issue a writ of habeas corpus from the Federal court, instead of awaiting the slow process of a writ of error from this court to the highest court of the state where a decision could be had. One of the grounds for making such a case as this an exception to the general rule laid down in *Ex parte Royall*, 117 U. S. 241 [29: 868], *Whitten* v. *Tom-*

linson, 160 U. S. 231 [40: 406], and *Baker* v. *Grice*, 169 U. S. 284 [42: 748], consists in the fact that the Federal officer proceeded against in the courts of the state may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the Federal government might
[285] in the meantime be *obstructed. This is such a case. In *Ex parte Royall* it was stated by Mr. Justice Harlan, in naming some of the exceptions to the general rule there laid down, that "when the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations,—in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

For the reasons herein given we think *the order of the Circuit Court of Appeals, affirming the Circuit Court, was right, and it must be affirmed.*

The Chief Justice took no part in the consideration or decision of this case.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *Plff. in Err.*,
v.
STATE OF OHIO, *ex rel.* GEORGE L. LAWRENCE.

(See S. C. Reporter's ed. 285–338.)

Power of state to provide for the public convenience and public good—power of Congress—grounds of power of a state to provide for the public convenience—Ohio statute requiring railroad trains to stop at stations of over 3,000 inhabitants—condition of its charter—regulation of interstate commerce—U. S. Rev. Stat. § 5258.

1. The power exists in each state by appropriate enactments not forbidden by its own or the Federal Constitution, to regulate the relative rights and duties of all persons and corporations within its jurisdiction so as to provide for the public convenience and the public good.
2. When Congress acts with reference to a matter confided to it by the Federal Constitution, then its statutes displace all state regulations touching that matter.
3. The power of the state by appropriate legislation to provide for the public convenience stands upon the same grounds as its power by appropriate legislation to protect the public health, the public morals, or the public safety.
4. The Ohio statute (Ohio Laws 1889, p. 291, Rev. Stat. 1890, § 3220) requiring each railroad company whose road is operated within the state to cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over 3,000 inhabitants, long enough to receive and let off passengers, is for the public convenience, and is not a regulation of interstate commerce and unconstitutional when applied to the trains of a corporation of the state engaged in such commerce.
5. Such railroad accepted its charter subject to the condition that it would conform to such reasonable state regulations as were for the public interest and not in violation of the supreme law of the land.
6. State legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may, to some extent or under some circumstances, affect such commerce.
7. U. S. Rev. Stat. § 5258, authorizing railroad companies to carry government supplies, mails, etc., from one state to another, does not prevent the state from enacting such regulations, with respect, at least, to a railroad corporation of its own creation, as are not directed against interstate commerce, and are not regulations thereof, but only incidentally or remotely affect it, and are designed to promote the public convenience.

[No. 95.]

Argued December 13, 1898. Decided February 20, 1899.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment of that court affirming the judgment of the Circuit Court of Cuyahoga County, Ohio, affirming the judgment of the court of common pleas of said county against the Lake Shore & Michigan Southern Railway Company for the amount of the penalty prescribed by Ohio Rev. Stat. § 3320, requiring railroad companies to stop three, each way, of its regular passenger trains, if so many are run daily, Sundays excepted, at a station, city, or village, of over 3,000 inhabitants, to receive and let off passengers,—in an action brought by the State of Ohio *ex rel.* George L. Lawrence for the recovery of such penalty. *Affirmed.*

For decision of the Circuit Court of Cuyahoga County, see 8 Ohio C. C. 220.

The facts are stated in the opinion.

Mr. **George C. Greene** for plaintiff in error.

Mr. **W. H. Polhamus** for defendant in error.

*Mr. Justice **Harlan** delivered the opinion of the court: [286]

This action was commenced before a justice of the peace of the county of Cuyahoga, Ohio, to recover the penalty prescribed by section 3320 of the Revised Statutes of that state.

That section is a part of a chapter relating to railroad companies, and, as amended by the act of April 13th, 1889, provides:

"Each company shall cause three, each

way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers; if a company, or any agent or employee thereof, violate, or cause or permit to be violated, this provision, such company, agent, or employee, shall be liable to a forfeiture of not more than one hundred nor less than twenty-five dollars, to be recovered in an action in the name of the state, upon the complaint of any person, before a justice of the peace of the county in which the violation occurs, for the benefit of the general fund of the county; and in all cases in which a forfeiture occurs under the provi-
[287] sions of this section *the company whose agent or employee caused or permitted such violation shall be liable for the amount of the forfeiture, and the conductor in charge of such train shall be held prima facie to have caused the violation." Laws of Ohio 1889, vol. 86, p. 291; R. S. Ohio 1890, § 3320.

The case was removed for trial into the court of common pleas of Cuyahoga county, in which a judgment was rendered against the railroad company for the sum of one hundred dollars. Upon writ of error to the circuit court of that county the judgment was affirmed, and the judgment of the latter court was affirmed by the supreme court of Ohio.

The facts upon which the case was determined in the state court were as follows:

The plaintiff Lawrence is a resident of West Cleveland, a muncipal corporation of Ohio having more than three thousand inhabitants.

The defendant railway company is a corporation organized under the respective laws of Ohio, New York, Pennsylvania, Indiana, Michigan, and Illinois, and owns and operates a railroad located partly within the village of West Cleveland. Its line extends from Chicago through those states to Buffalo.

On the 9th day of October, 1890, as well as for some time prior thereto and thereafter, the company caused to run daily both ways over its road within the limits of West Cleveland three or more regular trains carrying passengers. And on that day (which was not Sunday) it did not stop or cause to be stopped within that village more than one of such trains each way, long enough to receive or let off passengers.

On the day above named and after that date the company was engaged in carrying both passengers and freight over its railroad, from Chicago and other stations in Indiana and Michigan, through each of said several states, to and into New York, Pennsylvania, and Ohio and to Buffalo, and from Buffalo through said states to Chicago. It did not on that day, nor shortly prior thereto, nor up to the commencement of the present suit, run daily both ways, or either way, over said road through the village of West Cleveland, three regular trains, nor more than one regular train each way, carrying passengers
[288] "which were *not engaged in interstate commerce, or that did not have upon them passengers who had paid through fare, and were entitled to ride in said trains going in the one direction from the city of Chicago to the city of Buffalo, through the states of Indiana, Ohio, and Pennsylvania, and those going the other direction from the city of Buffalo . . . through said states to the city of Chicago."

On or about the day named the company operated but one regular train carrying passengers each way, that was not engaged in carrying such through passengers, and that train did stop at West Cleveland on that day for a time sufficient to receive and let off passengers.

The through trains that passed westwardly through West Cleveland on the 9th day of October, 1890, were a limited express train having two baggage and express cars, one passenger coach, and three sleepers, from New York to Chicago; a fast mail train having five mail cars, one passenger coach, and one sleeper, from New York to Chicago; and a train having one mail car, two baggage and express cars, four passenger coaches, and one sleeper, from Cleveland to Chicago. The trains running eastwardly on the same day through West Cleveland were a limited express train having one baggage and express car and three sleepers, from Chicago to New York; a train having one baggage and express car, three passenger coaches, and two sleepers, from Chicago to New York; a train having one mail car, two baggage and express cars, and seven passenger coaches, from Chicago to Buffalo; and a train having three mail cars and one sleeper, from Chicago to New York.

The average time required to stop a train of cars and receive and let off passengers is three minutes.

The number of villages in Ohio containing three thousand inhabitants through which the above trains passed on the day named were thirteen.

The trial court found, as a conclusion of law, that within the meaning of the Constitution of the United States the statute of Ohio was not a regulation of commerce among the states, and was valid until Congress acted upon the subject. This general *view was affirmed by the circuit court of [289]
Cuyahoga county and by the supreme court of Ohio.

The plaintiff in error contends that, as the power to regulate interstate commerce is vested in Congress, the statute of Ohio in its application to trains engaged in such commerce is directly repugnant to the Constitution of the United States.

In support of this contention it insists that an interstate railroad carrier has the right to start its train at any point in one state, and pass into and through another state without taking up or setting down passengers within the limits of the latter state. As applied to the present case, that contention means that the defendant company, although an Ohio corporation deriving all its franchises and privileges from that state, may, if it so wills, deprive the people along its line in Ohio of the benefits of interstate communication by its railroad; in

short, that the company, if it saw fit to do so, could, beyond the power of Ohio to prevent it, refuse to stop within that state trains that started from points beyond its limits, or even trains starting in Ohio destined to places in other states.

In the argument at the bar, as well as in the printed brief of counsel, reference was made to the numerous cases in this court adjudging that what are called the police powers of the states were not surrendered to the general government when the Constitution was ordained, but remained with the several states of the Union. And it was asserted with much confidence that while regulations adopted by competent local authority in order to protect or promote the public health, the public morals, or the public safety have been sustained where such regulations only incidentally affected commerce among the states, the principles announced in former adjudications condemn as repugnant to the Constitution of the United States all local regulations that affect interstate commerce in any degree, if established merely to subserve the *public convenience*.

One of the cases cited in support of this position is *Hennington* v. *Georgia*, 163 U. S. 299, 303, 308, 317, [41: 166, 169, 171, 174], which involved the validity of a statute of Georgia providing that "if any freight train
[290] shall be run on any railroad in this *state on the Sabbath Day (known as Sunday) the superintendent of such railroad company; or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such trains shall pass, and on conviction shall be punished. . . . *Provided, always*, That whenever any train on any railroad in this state, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for the freight trains on the different railroads in this state, running over said roads on Saturday night, to run through to destination: *Provided*, The time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than eight o'clock on Sunday morning." This court said: "The well-settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

The contention in that case was that the running of railroad cars laden with interstate freight was committed exclusively to the control and supervision of the national government; and that, although Congress had not taken any affirmative action upon the subject, state legislation interrupting interstate commerce even for a limited time only, whatever might be its object and however essential such legislation might be for the comfort, peace, or safety of the people of the state, was a regulation of interstate commerce forbidden by the Constitution of the United States.

After observing that the argument in behalf of the defendant rested upon the erroneous assumption that the statute of Georgia was such a regulation of interstate commerce as was *forbidden by the Constitution [291]
without reference to affirmative action by Congress, and not merely a statute enacted by the state under its police power, and which, although in some degree affecting interstate commerce, did not go beyond the necessities of the case, and therefore was valid, at least until Congress intervened, this court, upon review of the adjudged cases, said: "These authorities make it clear that the legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." Again: "We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the *state by [292]
which it was established, and therefore not invalid by force alone of the Constitution of the United States."

It is insisted by counsel that these and observations to the same effect in different cases show that the police powers of the states, when exerted with reference to mat-

ters more or less connected with interstate commerce, are restricted in their exercise, so far as the national Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the *public convenience.*

This is an erroneous view of the adjudications of this court. While cases to which counsel refer involved the validity of state laws having reference directly to the public health, the public morals, or the public safety, in no one of them was there any occasion to determine whether the police powers of the states extended to regulations incidentally affecting interstate commerce, but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the states may legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the national Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, 729 [18: 96, 101], which involved the validity of a state enactment authorizing the construction of a permanent bridge over the Schuylkill river within the limits of Philadelphia, and which bridge in fact interfered with the use of the river by vessels of a certain size which had been long accustomed to navigate it, the court said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on
[293] the water it obstructs. **It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other.* The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation."

So, in *Pound* v. *Turck*, 95 U. S. 459, 464 [24: 525, 527], which was a case where obstructions—piers and booms—had been placed under the authority of the state of Wisconsin in the Chippewa river, one of the navigable waters of the United States, it was said: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to sawlogs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use *as will best reconcile and accommodate the interest of all concerned in the matter.* And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislatures."

The same principles were announced in *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 683 [27: 442, 445]. That case involved the validity of a certain local ordinance regulating the opening and closing of bridges over the Chicago river within the limits of the city of Chicago. That ordinance required the bridges to be closed at certain hours of the day, so as not to obstruct the passage over them of vast numbers of operatives and other *people going to and from their respec- [294]
tive places of business. It was conceded that by the closing of the bridges at those hours vessels were obstructed, in their use of the river. This court in that case said: "The Chicago river and its branches must therefore be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, *convenience, and prosperity of their people.* This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other state, and is more directly concerned for the prosperity of the city of Chicago, *for the convenience and comfort of its inhabitants, and the growth of its commerce.* And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to obstruct unnecessarily the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the

land. But until Congress acts on the subject the power of the state over bridges across its navigable streams is plenary." It was consequently adjudged that the city ordinance was not to be deemed such a regulation of interstate commerce as, in the absence of national legislation, should be deemed invalid.

[295] *In *Cardwell* v. *American Bridge Company*, 113 U. S. 205, 208 [28: 959, 960], it was held that a statute of California authorizing a bridge *without a draw or opening for the passage of vessels* to be constructed over a navigable water of the United States within that state was not, in the absence of legislation by Congress, to be deemed repugnant to the commerce clause of the Constitution. The court referring to prior cases, said: "In these cases the control of Congress over navigable waters within the states so as to preserve their free navigation under the commercial clause of the Constitution, the power of the states within which they lie to authorize the construction of bridges over them until Congress intervenes and supersedes their authority, and the right of private parties to interfere with their construction or continuance, have been fully considered, and we are entirely satisfied with the soundness of the conclusions reached. They recognize the full power of the states to regulate within their limits matters of internal police, which embraces, among other things, the construction, repair, and maintenance of roads and bridges and the establishment of ferries; that the states are more likely to appreciate the importance of these means of internal communication and to provide for their proper management than a government at a distance; and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. When Congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the streams." The doctrines of this case were reaffirmed in *Huse* v. *Glover*, 119 U. S. 543 [30: 487].

In *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 662 [40: 1105, 1109], the question was presented whether a state enactment requiring telegraph companies with lines of wires wholly or partly within the state to receive telegrams, and on payment of the charges thereon to deliver them with due diligence, was not a regulation of interstate commerce when applied to interstate telegrams. We held that such enactments
[296] did not in any *just sense regulate interstate commerce. It was said in that case: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject."

So, in *Richmond & A. Railroad Co.* v. *R. A. Patterson Tobacco Co.* 169 U. S. 311, 315 [42: 759, 761], it was adjudged that a statute of Virginia defining the obligations of carriers who accepted for transportation anything directed to points of destination beyond the termini of their own lines or routes was not, in its application to interstate business, a regulation of interstate commerce within the meaning of the Constitution. This court said: "Of course, in a latitudinarian sense any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." And the court cited in support of its conclusion the case of *Chicago, M. & St. P. Railway Co.* v. *Solan*, 169 U. S. 133, 137 [42: 688, 692], which involved the validity of state regulations as to the liability of carriers of passengers, and in which it was said: "They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

Now, it is evident that these cases had no reference to the health, morals, or safety of the people of the state, but only *to the pub- [297]
lic convenience. They recognized the fundamental principle that, outside of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state, and that its legislative enactments, relating to those subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced in the courts of the Union if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the national Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power "to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." *Com.* v. *Alger*, 7 Cush. 53, 85. Mr. Cooley well said: "It cannot be doubted that there is ample power in the legislative department of the state to adopt all necessary legislation for the pur-

pose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition." Cooley's Const. Lim. 6th ed. p. 715. It may be that such legislation is not within the "police power" of a state, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended.
[298] When Congress acts with reference *to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210 [6: 23, 73]; *Sinnot* v. *Davenport*, 22 How. 227, 243 [16: 243, 247]; *Missouri, Kansas, & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 626 [42: 878, 883].

It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the state of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains, or any of them carrying interstate passengers at a particular place or places in the state for a reasonable time, so directly affects commerce among the states as to bring the statute, whether Congress has acted or not on the same subject, into conflict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequence whatever; for, it is said, a state regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the state enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court upholding local regulations which in some degree or only incidentally affected commerce among the states, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the states and to be respected so long as Congress did not itself cover the subject by legislation. *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 320 [13: 996, 1005]; *Sherlock* v. *Alling*, 93 U. S. 99, 104 [23: 819]; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 463 [30: 237, 241]; *Smith* v. *Alabama*, 124 U. S. 465 [31: 508]; *Nashville, C. & St. L. Railway Co.* v. *Alabama*, 128 U. S. 96, 100 [32: 352, 354, 2 Inters. Com. Rep. 238]; *Hennington* v. *Georgia*, above cited; *Missouri, Kansas, and Texas Ry. Co.* v. *Haber*, above cited; and *New York*, **N. H. & H. Railroad Co.* v. *New* [299]
York, 165 U. S. 628, 631, 632 [41: 853, 854], were all cases involving state regulations more or less affecting interstate or foreign commerce, but which were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health, or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce, and valid until superseded by legislation of Congress on the same subject.

In the case last cited—*New York, N. H. & H. Railroad Co.* v. *New York*—the question was as to the validity, when applied to interstate railroad trains, of a statute of New York forbidding the heating of passenger cars in a particular mode. This court said: "According to numerous decisions of this court sustaining the validity of state regulations enacted under the police powers of the state, and which incidentally affected commerce among the states and with foreign nations, it was clearly competent for the state of New York, in the absence of national legislation covering the subject, to forbid under penalties the heating of passenger cars in that state by stoves or furnaces kept inside the cars or suspended therefrom, although such cars may be employed in interstate commerce. While the laws of the states must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution (*Gibbons* v. *Ogden*, 9 Wheat. 1, 211 [6: 23, 73]), the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people. The statute in question had for its object to protect all persons traveling in the state of New York on passenger cars moved by the agency of steam, against the perils attending a particular mode of heating such cars. . . . *The statute in ques- [300]
tion is not directed against interstate commerce. Nor is it within the necessary meaning of the Constitution a regulation of commerce, although it controls, in some degree, the conduct of those engaged in such commerce. So far as it may affect interstate commerce, it is to be regarded as legislation in aid of commerce and enacted under the power remaining with the state to regu-

late the relative rights and duties of all persons and corporations within its limits. Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several states, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

Consistently with these doctrines it cannot be adjudged that the Ohio statute is unconstitutional. The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the general government is to be determined by the same rules.

In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, does not go beyond the necessities of the case, and is not directed against interstate commerce. In *Hannibal & St. J. Railroad Co.* v. *Husen*, 95 U. S. 465, 473 [24: 527, 531], reference was made to some decisions of state courts in relation to statutes prohibiting the introduction into a state of cattle having infectious diseases, and in which it was contended that it was for the legislature, and not for the courts, to determine whether such legislation went beyond the danger to be apprehended, and was therefore something more than the exertion of the police power. This court said that it could not concur in that view; that as the police power of a state cannot obstruct either foreign or interstate commerce "beyond the necessity for its exercise," it was the duty of the courts to guard vigilantly against "need-
[301]less intrusion" upon the field *committed by the Constitution to Congress. As the cases above cited show, and as appears from other cases, the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the state to protect the public interests or promote the public convenience.

In our judgment the assumption that the statute of Ohio was not directed against interstate commerce, but is a reasonable provision for the public convenience, is not unwarranted. The requirement that a railroad company whose road is operated within the state shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city, or village of three thousand inhabitants, for a time sufficient to receive and let off passengers, so far from being unreasonable, will greatly subserve the public convenience. The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing three thousand inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train, and receive and let off passengers is only three minutes. Certainly, the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. "The question is no longer an open one," this court said in *Cherokee Nation* v *Southern Kansas Railway Co.* 135 U. S. 641, 657 [34: 295, 302], "as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed and by which it is to be maintained may be permitted, under legislative sanction, to appropriate property *for the purpose of a [302]
right of way, upon making just compensation to the owner, in the mode prescribed by law." In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the state. *Smyth* v. *Ames*, 169 U. S. 466, 544 [42: 819, 848]. The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns

at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the state to prevent it, the defendant railway company could run all its
[303] trains *through the state without stopping at any city within its limits, however numerous its population, and could prevent the people along its road within the state who desired to go beyond its limits from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned.

We perceive in the legislation of Ohio no basis for the contention that the state has invaded the domain of national authority or impaired any right secured by the national Constitution. In the recent case of *Jones* v. *Brim*, 165 U. S. 180, 182 [41: 677, 678], it was adjudged that embraced within the police powers of a state was the establishment, maintenance, and control of public highways, and that under such powers reasonable regulations incident to the right to establish and maintain such highways could be established by the state. And the state of Ohio by the statute in question has done nothing more than to so regulate the use of a public highway established and maintained under its authority as will reasonably promote the public convenience. It has not unreasonably obstructed the freedom of commerce among the states. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it. It has only forbidden one of its own corporations from discriminating unjustly against a large part of the public, for whose convenience that corporation was created and invested with authority to maintain a public highway within the limits of the state.

It has been suggested that the conclusion reached by us is not in accord with *Hall* v. *De Cuir*, 95 U. S. 485, 488 [24: 547, 548], *Wabash, St. L. & P. Railway Co.* v. *Illinois*, 118 U. S. 557 [30:244, 1 Inters. Com. Rep. 31], and *Illinois Central Railroad Company* v. *Illinois*, 163 U. S. 142, 153, 154 [41: 107, 111], in each of which cases certain state enactments were adjudged to be inconsistent with the grant of power to Congress to regulate commerce among the states.

In *Hall* v. *De Cuir* a statute of Louisiana relating to carriers of passengers within that state, and which prohibited any discrimination against passengers on account
[304] of race or color, was *held, looking at its necessary operation, to be a regulation of and a direct burden on commerce among the states, and therefore unconstitutional. The defendant who was sued for damages on account of an alleged violation of that statute, was the master and owner of a steamboat enrolled and licensed under the laws of the United States for the coasting trade, and plying as a regular packet for the transportation of freight and passengers between New Orleans, Louisiana, and Vicksburg, Mississippi, touching at the intermediate landings both within and without Louisiana as occasion required. He insisted that it was void as to him because it directly regulated or burdened interstate business. The court distinctly recognized the principle upon which we proceed in the present case, that state legislation relating to commerce is not to be deemed a regulation of interstate commerce simply because it may to some extent or under some circumstances affect such commerce. But, speaking by Chief Justice Waite, it said: "We think it may be safely said that state legislation which seeks to impose a *direct* burden upon interstate commerce, or to interfere *directly* with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The *river Mississippi [305]
passes through or along the borders of ten different states, and its tributaries reach many more. . . . No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by anyone who felt himself aggrieved because he had been excluded on account of his color." The import of that decision is that, in the absence of legislation by Congress, a state enactment may so directly and materially burden interstate commerce as to be in itself

a regulation of such commerce. We cannot perceive that there is any conflict between the decision in that case and that now made. The Louisiana statute as interpreted by the court, embraced every passenger carrier coming into the state. The Ohio statute does not interfere at all with the management of the defendant's trains outside of the state, nor does it apply to all its trains coming into the state. It relates only to the stopping of a given number of its trains within the state at certain points, and then only long enough to receive and let off passengers. It so manifestly subserves the public convenience, and is in itself so just and reasonable, as wholly to preclude the idea that it was, as the Louisiana statute was declared to be, a direct burden upon interstate commerce, or a direct interference with its freedom.

The judgment in *Wabash, St. L. & P. Railway Co.* v. *Illinois* is entirely consistent with
[306]the views herein expressed. *A statute of Illinois was construed by the supreme court of that state as prescribing rates, not simply for railroad transportation beginning and ending within Illinois, but for transportation between points in Illinois and points in other states under contracts for continuous service covering the entire route through several states. Referring to the principle contained in the statute, this court held that if restricted to transportation beginning and ending within the limits of the state it might be very just and equitable, but that it could not be applied to transportation through an entire series of states without imposing a direct burden upon interstate commerce, forbidden by the Constitution. In the case before us there is no attempt upon the part of Ohio to regulate the movement of the defendant company's interstate trains throughout the whole route traversed by them. It applies only to the movement of trains while within the state, and to the extent simply of requiring a given number, if so many are daily run, to stop at certain places long enough to receive and let off passengers.

Nor is *Illinois Central Railroad Company* v. *Illinois* inconsistent with the views we have expressed. In that case a statute of Illinois was held, in certain particulars, to be unconstitutional (although the legislation of Congress did not cover the subject) as directly and unnecessarily burdening interstate commerce. The court said: "The effect of the statute of Illinois, as construed and applied by the supreme court of the state, is to require a fast mail train carrying interstate passengers and the United States mail from Chicago, in the state of Illinois, to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railway company furnishes *other and ample accommodation. [307]
This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States." Again: "It may well be, as held by the courts of Illinois, that the arrangement made by the company with the postoffice department of the United States cannot have the effect of abrogating a reasonable police regulation of the state. But a statute of the state, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation." The statute before us does not require the defendant company to turn any of its trains from their direct interstate route. Besides, it is clear that the particular question now presented was not involved in *Illinois Central Railroad Company* v. *Illinois*, for it is stated in the court's opinion that "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, is not presented, and cannot be decided, upon this record." The above extracts show the full scope of that decision. Any doubt upon the point is removed by the reference made to that case in *Gladson* v. *Minnesota*, 166 U. S. 427, 431 [41: 1064,1066].

It has been suggested also that the statute of Ohio is inconsistent with section 5258 of the Revised Statutes of the United States authorizing every railroad company in the United States operated by steam, its successors and assigns, " to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." In *Missouri, Kansas, & Texas Railway* v. *Haber*, 169 U. S. 613, 638 [42: 878,887], above cited, it was held that the authority given by that statute to railroad companies to carry "freight and property" over their respective roads from one state to another state did not authorize a railroad company to carry into a state *cattle known, or which by due dili- [308]
gence might be known, to be in such condition as to impart or communicate disease to the domestic cattle of such state; and that a statute of Kansas prescribing as a rule of civil conduct that a person or corporation should not bring into that state cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, could not be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by section 5258 of the Revised Statutes. And we adjudge that the above statutory provision was not intended to interfere with the authority of the states to enact such regulations, with respect at

least to a railroad corporation of its own creation, as were not directed against interstate commerce, but which only incidentally or remotely affected such commerce, and were not in themselves regulations of interstate commerce, but were designed reasonably to subserve the convenience of the public.

Imaginary cases are put for the purpose of showing what might be done by the state that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the state, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds.

For the reason stated *the judgment of the Supreme Court of Ohio is affirmed.*

[309] *Mr. Justice **Shiras** filed the following dissenting opinion:

The Constitution of the United States, in its eighth section, confers upon Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, and to establish post-offices and post roads.

In pursuance of this power, Congress, on June 15, 1866, enacted that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." Rev. Stat. § 5258.

By the act of February 4, 1887, entitled "An Act to Regulate Commerce" (24 Stat. at L. 379), Congress created the Interstate Commerce Commission, and enacted that the provisions of that act should "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States . . . ;" and that it should be unlawful for any common carrier subject to the provisions of the act, to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedules, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination.

It was said by this court in *California* v. *California Pacific R. R. Company*, 127 U. S. 39 [32: 157, 2 Inters. Com. Rep. 153], that—

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for *postal accommodations and [310]
military exigencies, had authority to pass such laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent,—the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations."

In the case of *Cincinnati, New Orleans, and Texas Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935, 5 Inters. Com. Rep. 391], the validity of the act of February 4, 1887, was sustained, and its provisions were held applicable even to a railroad company whose entire road was within the limits of the state of its creation, when, by agreeing to receive goods by virtue of foreign through bills of lading and to participate in through rates and charges, it became part of a continuous line of transportation.

By an act approved February 23, 1869, the state of Louisiana forbade common carriers of passengers to make discrimination *on ac- [311]
count of race or color. A person of color took passage upon a steamboat plying between New Orleans and Vicksburg, in the state of Mississippi, and was carried from New Orleans to her place of destination within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons,

brought an action in the district court for the parish of New Orleans, under the provisions of the act above referred to. By way of defense it was insisted that the statute was void in respect to the matter complained of, because, as to the business of the steamboat, it was an attempt to regulate commerce between the states, and therefore in conflict with the Constitution of the United States. The state court held that the statute was valid, and the case was brought to this court, where the judgment of the state court was reversed. The reasoning of the court is so closely applicable to the case before us that we quote a considerable part of the opinion:

"We think that it may be safely said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

[312] *"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardships. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may as well be against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, exemplary as well as actual, by anyone who felt himself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress in effect adopts as its own regulations those which the common law, or the civil law where that prevails, has provided *for the [313]
government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton* v. *Missouri*, 91 U. S. 282 [23: 350]: 'Inaction by Congress is equivalent to a declaration that interstate commerce shall remain free and untrammeled.' Applying that principle to the circumstances of this case, congressional inaction left the captain of the steamboat to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the state court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites is unconstitutional and void. If the public good requires such legislation, it must come from Congress, and not from the states." *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547].

I am not able to think that this decision is satisfactorily disposed of, in the principal opinion, by citing it, and then dismissing it with the observation that it is not perceived that there is any conflict between it and that now made.

The state of Illinois enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, *for any distance within the state*, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation

in the same direction of any passenger or like quantity of freight, of the same class, over a greater distance of the same road, all [314]*such discriminating rates, charges, collections, or receipts, whether made directly or by the means of a rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad company as prima facie evidence of unjust discrimination prohibited by the provisions of the act. The act further provided a penalty of not over $5,000, and also that the party aggrieved should have a right to recover three times the amount of damages sustained, with costs and attorney's fees. Rev. Stat. Ill. chap. 114, § 126.

An action to recover penalties under this statute was brought by Illinois against the Wabash, St. Louis, and Pacific Railway Company, an Illinois corporation in which the allegations were that the railroad company had charged Elder & McKinney for transporting goods from Peoria, in the state of Illinois, to New York City, at the rate of fifteen cents per hundred pounds for a carload; that on the same day the railroad company had charged one Bailey for transporting similar goods from Gilman to New York City at the rate of twenty-five cents per hundred pounds per car-load; that the carload for Elder & McKinney was carred eighty-six miles further in the state of Illinois than the other carload of the same weight; that this freight, being of the same class in both instances, and over the same road, except as to the difference in the distance, made a discrimination forbidden by the statute, whether the charge was regarded for the whole distance from the terminal point in Illinois to New York City, or the proportionate charge for the haul within the state of Illinois. Judgment went against the company in the courts of the state of Illinois, and the case was brought to this court.

It was here strenuously contended that, in the absence of congressional legislation a state legislature has the power to regulate the charges made by the railroads of the state for transporting goods and passengers to and from places within the state, when such goods and passengers are brought from or carried to points without the state, and are therefore in the course of transportation from any state or to another state. And of that view were several justices of this court, who, in the opinion filed on their behalf, [315] cited the very cases *that art cited and relied on in the majority opinion in the present case.

But the court did not so hold, and its reasoning is so plainly applicable to the question now before us, it may well be quoted at some length.

After having reviewed some of the previous cases, and having quoted those passages in the opinion of the court in *Hall* v. *De Cuir*, 95 U. S. 485 [24: 547], which have hereinbefore been quoted, Mr. Justice Miller, giving the opinion of the court, proceeded as follows:

"The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature, so much as the charge for transportation; and, in the language just cited, if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for terms and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.'

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the states might choose to impose upon it, that the commerce clause was intended to secure. This clause giving to Congress the power to regulate commerce among the states and with foreign nations, as this court has said before, was among the most important of the *subjects which prompted the formation of [316] the Constitution. *Cook* v. *Pennsylvania*, 97 U. S. 574 [24:1018]; *Brown* v. *Maryland*, 12 Wheat. 446 [6: 688]. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

"The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 196 [6: 23, 69 70]. He there demonstrates that commerce among the states, like commerce with foreign nations, is necessarily a commerce which crosses state lines and extends into the states, and the power of Congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is, only as a means of transportation now largely superseded by railroads, he says: 'The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with commerce with foreign nations, or among the several states, or with the Indian tribes. It may, of consequence, pass the jurisdictional line of New York and act upon the very waters, the Hud-

son river, to which the prohibition now under consideration applies.' So the same power may pass the line of the state of Illinois and act upon its restriction upon the right of transportation extending over several states, including that one.

"In the case of *Western U. Telegraph Co.* v. *Texas*, 105 U. S. 460 [26: 1067], the court held that a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods, and that both companies are instruments of commerce, and their business is commerce itself. . . . In the case of *Welton* v. *Missouri*, 91 U. S. 275 [23:
[317]347], it was said: *It will not be denied that that portion of commerce with foreign nations and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation.' And in *County of Mobile* v. *Kimball*, 102 U. S. 702 [26: 241], the same idea is very clearly stated in the following language: 'Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce.' . . . We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court, that the statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.

"Let us see precisely what is the degree of interference with the transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the car-
[318]rier, 'I am free to make a fair *and reasonable contract for this carriage to the line of the state of Illinois, but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but he is compelled to pay at the rate of twenty-five cents per hundred pounds because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.

"The obvious injustice of such a rule as this, which railroad companies are compelled by heavy penalties to conform to, in regard to commerce among the states, when applied to transportation which includes Illinois in a long line of carriage* through several **[319]**
states shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rates.

"Of the justice or propriety of the principle which lies at the foundation of the Illinois statute, it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it certainly is the province of the state legislature, to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those

states cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution." *Wabash, St. Louis, & Pac. Railway Co.* v. *Illinois*, 118 U. S. 557 [30: 244, 1 Inters. Com. Rep. 31].

This case, so recent and so elaborately considered, has not received adequate attention in the opinion of the court in the present case.

The legislature of Illinois by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it to construct and maintain a railroad with one or more tracks, from the southern terminus of the Illinois & Michigan Canal to a point at the city of Cairo, with the same to the city of Chicago on Lake Michigan, and
[320] also a branch **via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa. The Chicago, St. Louis, & New Orleans Railroad Company was a consolidated company formed under the legislatures of the states of Louisiana, Mississippi, Tennessee, and Kentucky, whose line extended from New Orleans to the Ohio river, built a railroad bridge across the Ohio river to low-water mark on the Illinois side, to which the jurisdiction of the state of Kentucky extended. The north end of this bridge was at a part of Cairo about two miles north of the station of the Illinois Central Railroad Company in that city; and the peculiar conformation of the land and water made it impracticable to put the bridge nearer the junction of the Ohio and Mississippi rivers. By this bridge the road of the Illinois Central Railroad Company was thereby connected with that of the Chicago, St. Louis, & New Orleans Railroad Company. Thereafter the Illinois Central Railroad Company put on a daily fast mail train, to run from Chicago to New Orleans, carrying passengers as well as the United States mail, not going to or stopping at its station in Cairo; but local trains adequate to afford accommodations for passengers to or from Cairo were run daily on that part of the railroad between the Bridge Junction and Cairo. By a subsequent act of 1889 it was enacted by the legislature of Illinois that "every railroad corporation shall cause its passenger trains to stop upon its arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: *Provided*, All regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety."

In April, 1891, a petition was filed in the circuit court for Alexander county, in the state of Illinois, by the county attorney in behalf of the state, alleging that the Illinois Central Railroad Company ran its southbound fast mail train through the city of Cairo, two miles north of its station in that city, and over a bridge across the Ohio river, connecting its road with other roads south of that river, without stopping *at its station in [321]
Cairo, and praying for a writ of mandamus to compel it to cause all its passenger trains coming into Cairo to be brought down to that station, and there stopped a sufficient length of time to receive and let off passengers with safety.

The railroad company contended that the statute did not require its fast mail train to be run to and stopped at its station in Cairo, and that the statute was contrary to the Constitution of the United States, as interfering with interstate commerce and with the carrying of the United States mail. The court granted the writ of mandamus, and the railroad company appealed to the supreme court of the state, which affirmed the judgment, and held that the statute of Illinois concerning the stoppage of trains obliged the defendant to cause its fast mail train to be taken into its station at Cairo, and be stopped there long enough to receive and let off passengers with safety, and that the statute, so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the United States mails. The case was brought to this court, where the judgment of the supreme court of Illinois was reversed in a unanimous opinion delivered by Mr. Justice Gray. *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142 [41: 107]. After reciting several statutes of Illinois and of Congress, particularly the act of June 15, 1866, wherein Congress, for the declared purpose of facilitating commerce among the several states and the postal and military communications of the United States, authorized every railroad company in the United States, whose road was operated by steam, to carry over its road, bridges, and ferries, as well passengers and freight as government mails, troops, and supplies, from one state to another, and to connect, in any state authorizing it to do so, with roads of other states, so as to form a continuous line of transportation, the court proceeded to say:

"The effect of the statute of Illinois, as construed and applied by the supreme court of the state, is to require a fast mail train carrying interstate passengers and the United States mails from Chicago, in the state of Illinois, to places south of the Ohio river, over an interstate highway established
*by authority of Congress, to delay the trans- [322]
portation of such passengers and mail, by turning aside from the direct interstate route, and running to a station three miles and a half away from the point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course, before proceeding on its way; and

to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation. This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States. Upon the state of facts presented by this record the duties of the Illinois Central Railroad Company were not confined to those which it owed to the state of Illinois under the charter of the company and other laws of the state, but included distinct duties imposed upon the corporation by the Constitution and laws of the United States.

"The state may doubtless compel the railroad company to perform the duty imposed by its charter, of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States.

"The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic."

Beyond the bare allegation that the case of *Illinois Central R. R. Co.* v. *Illinois* is not inconsistent with the views expressed in the present case, no attempt is made to compare or reconcile the principles involved in the two cases. It is, indeed, said that the Ohio statute "does not require the defendant company to turn any of its trains from their direct interstate route;" and the remark of the
[323] court in the Illinois case is *cited, in which it was said "the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, is not presented and cannot be decided upon this record." Reference is also made to the case of *Gladson* v. *Minnesota*, 166 U. S. 427 [41: 1064], as removing any doubt as to the scope of the decision in the Illinois case.

But an examination of that case will show that no question was presented or decided as to the power of a state to compel interstate railroad trains to stop at all county seats through which they might pass. On the contrary, the court was careful to say, distinguishing it from the Illinois case: "But in the case at bar the train in question ran wholly within the state of Minnesota, and could have stopped at the county seat of Pine county without deviating from its course;" and to point out that the statute of Minnesota expressly provided that '*this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad.*"

On what, then, does the court's opinion rely to distinguish the Illinois case from the present case? Merely that the through train in the one case was obliged to go out of its direct route some three or four miles, while in the other the obligation is to stop at towns through which the trains pass. But what was the *reason* why this court held that the Illinois statute was void as an interference with interstate commerce? Was not the *delay* thus caused the sole reason? And is there any difference between a delay caused by having to go a few miles out of a direct course in a single instance, and one caused by having to stop at a number of unimportant towns? Probably the excursion to the Cairo station did not detain the Illinois train more than half an hour; and it is admitted in the present case that the number of villages in Ohio through which the trains passed were thirteen, and that the average time required to stop a train of cars and receive and leave off passengers would be three minutes at each station, to say nothing of the time expended in losing and in regaining headway. Besides the delays thus caused, there would be many *inconveniences to the [324]
railroad companies and to the traveling public occasioned by interfering with regulations made for the comfort and safety of through passengers.

Western Union Telegraph Co. v. *James*, 162 U. S. 650 [40: 1105], is cited by the court as sustaining its present position. But that was a case in which the legislation of the state was of a nature that was in aid of the performance of the duty of the company that would exist in the absence of any such statute, and was in nowise obstructive of its duty as a telegraph company, and the decision of this court was expressly put upon that ground. It was pointed out, in the opinion, that the legislation in question could in no way affect the conduct of the company with regard to the performance of its duties in other states, and that such important particular distinguished the case from *Hall* v. *De Cuir*, 95 U. S. 485 [24: 511], and from *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347 [30: 1187, 1 Inters. Com. Rep. 306].

Richmond & A. R. R. Co. v. *R. A. Patterson Tobacco Co.* 169 U. S. 311 [42: 759], is cited as adjudging that a statute of Virginia defining the obligations of carriers who accept for transportation anything directed to points of destination beyond the termini of their own lines or routes was not, in its application to interstate business, a regulation of interstate commerce within the meaning of the Constitution. But the holding in that case simply was that the statute in question did not attempt to substantially regulate or control interstate shipments, but merely established a rule of evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless by agreement its liability was limited to its own line, that the lawful exercise by a state of its power to determine the form in which contracts may be proved does not amount to a regulation of interstate commerce. The reasoning of the court went

upon the assumption that if the statute was not merely a rule of evidence, but an attempt to regulate interstate commerce, it would have been void.

Reference is also made, in the principal opinion, to *Missouri, Kansas, and Texas Railway* v. *Haber*, 169 U. S. 613 [42: 878].
[325] There an attack was made on the validity of legislation of the state *of Kansas, subjecting any person or persons who should bring into that state any cattle liable or capable of communicating "Texas or splenetic fever" to any domestic cattle of Kansas, to a civil action for damages. In such an action it was contended on behalf of the defendant that the Kansas statutes were an interference with the freedom of interstate commerce, and also covered a field of action actually occupied by congressional legislation known as the Animal Industry Act. But it appeared that the Kansas act under which the action was brought was passed in 1885 and amended in 1891, and that Congress had previously invited the authorities of the states and territories concerned to co-operate for the extinction of contagious or communicable cattle diseases. Act of May 29, 1884, 23 Stat. at L. 31. And accordingly a majority of this court held that the statutory provisions of Kansas were not inconsistent with the execution of the act of Congress, but constituted an exercise of the co-operation desired. Otherwise the case would have fallen within the ruling in *Hannibal & St. J. Railroad Co.* v. *Husen*, 95 U. S. 465 [24: 527], where a similar statute of the state of Missouri, passed before the legislation by Congress, and prohibiting the bringing of Texas cattle into the state of Missouri between certain times fixed by the statute, was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police power of the state.

The case of *Hennington* v. *Georgia*, 163 U. S. 299 [41: 166], demands notice. In it was involved the validity of what is known as the Sunday law of Georgia. That statute forbade the running in Georgia of railroad freight trains on the Sabbath Day. The supreme court of Georgia held the statute to be a regulation of internal police, and not of commerce, and that it was not in conflict with the Constitution of the United States even as to freight trains pasing through the state from and to adjacent states, and laden exclusively with freight received on board before the trains entered Georgia, and consigned to points beyond its limits.

It was shown in that case that it had been the policy of Georgia, from the earliest period of its history, to forbid all persons, under penalties, from using the Sabbath as
[326] a day of *labor and for pursuing their ordinary callings, and that the legislation in question was enacted in the exercise of that policy. It was said in the opinion of the supreme court of Georgia, which was brought to this court for review, that "with respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is notable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest." And it was said in the opinion of this court that "in our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath Day, are within the territorial jurisdiction of the state."

If, as has often been said, Christianity is part of the common law of the several states, and if the United States, in their legislative and executive departments throughout the country, since the foundation of the government, have recognized Sunday as a day of rest and freedom from compulsory labor, then such a law as that of Georgia, being based upon a public policy common to all the states, might be sustained.

But if put upon the ground now declared in the opinion of the court in the present case, namely, as an exercise of the police power of the state, and, as such, paramount to the control of Congress in administering the commerce clause of the Constitution, then it is apparent, as I think, that the decision in *Hennington* v. *Georgia* was wrong, and the judges dissenting in that case were right.

For if, as a mere matter of local policy, one state may forbid interstate trains from running on the Christian Sabbath, an adjoining state may select the Jewish, or Seventh Day Sabbath as the day exempt from business. Another state may choose to consecrate another day of the week in commemoration of the Latter Day Saint and Prophet who founded such state, as the proper day for cessation from daily labor. *Or, what is [327]
more probable, one or more of the states may think fit to declare that one day in seven is not a sufficient portion of the time that should be exempted from labor, and establish two or more days of rest. The destructive effect of such inconsistent and diverse legislation upon interstate commerce, carried on in trains running throughout the entire country, is too obvious to require statement or illustration.

But whatever may be said of the decision in *Hennington* v. *Georgia*, it is, as I think, quite apparent that the Ohio legislation now under consideration cannot be reconciled with the principles and conclusions of the other cases cited.

The principal facts of this case as found by the trial court were: "That the defendant company is a corporation organized under the laws of the states of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois, and that its railroad is operated from Chicago to Buffalo; that said defendant was, on and prior to October 9, 1890, and has been ever since, engaged in carrying passengers and freight over said railroad, through and into each of said several states, and is and was then engaged in the business of interstate commerce, both in the carriage of passengers and freight from, into, and through said states; that said defendant

did not on said 9th day of October, 1890, nor shortly prior thereto, or since, up to the time of the commencement of this suit, run daily, both ways or either way, over said road through the village of West Cleveland, three regular trains nor more than one regular train each, carrying passengers, which were not engaged in interstate commerce, and that did not have upon them passengers who had paid through fare, and were entitled to ride on said trains going in the one direction from the city of Chicago to the city of Buffalo, and those going in the other direction from the city of Buffalo through said states to the city of Chicago; that on or about the said day the defendant operated but one regular train carrying passengers each way, that was not engaged in carrying such through passengers; and said train did stop at West Cleveland, on the day aforesaid, for a time sufficient to receive and let off passengers; that the through trains that
[328] passed through West Cleveland *on the said day were train No. 1, limited express with two express cars, one coach, and three sleepers, from New York to Chicago; train No. 11, fast mail, with five United States mail cars, one coach, and sleeper, from New York to Chicago; train No. 21 had one United States mail car, two baggage and express cars, four coaches, and one sleeper, from Cleveland to Chicago (these were western trains); that the eastern trains were limited express No. 4, with one baggage and express car and three sleepers, from Chicago to New York; train No. 6, with one baggage and express car, three coaches, and two sleepers, from Chicago to New York; train No. 24, with one United States mail, two baggage and express cars, and seven coaches, from Chicago to Buffalo; train No. 14, with three United States mail cars and one sleeper from Chicago to New York. That the average time of delay necessarily required to stop a train of cars and sufficient time to receive and let off passengers would be three minutes; and that the number of cities and villages in the state of Ohio, containing three thousand inhabitants each, through which the aforesaid trains of the defendant passed on said day, were thirteen."

It is, therefore, a conceded fact in the case that the through trains which the legislature of Ohio seeks to compel to stop at prescribed villages and towns in that state are engaged in carrying on interstate commerce by the transportation of freight and passengers. It is obvious, further, that such trains are within section 5258 of the Revised Statutes of the United States, authorizing such railroad companies "to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

It is also plain that the defendant railroad company and such of its trains as were engaged in interstate commerce are within the scope and subject to the regulations contained in the "Act to Regulate Commerce," approved February 4, 1887, creating the Interstate Commerce Commission.

*The theory on which passenger trains to [329]
traverse several states, or the entire continent, are prepared, is necessarily and widely different from that followed in making up ordinary trains to do a wayside business. There must be provision for sleeping at night and for furnishing meals. In order that each and every passenger may receive the accommodation for which he pays, the seats are sold in advance and with reference to the number of through passengers. To enable such trains to maintain the speed demanded, the number of the cars for each train must be limited, and they are advertised and known as "limited" trains. A traveler purchasing tickets on such trains has a right to expect that he will be carried to his journey's end in the shortest possible time consistent with safety. The railroad companies compete for business by holding out that they run the fastest trains and those most certain to arrive on time. A company which by its own regulations or under coercion of a state legislature, stopped its through trains at every village, would soon lose its through business, to the loss of the company and the detriment of the traveling public.

Nor must the necessity of the speedy transit of the United States mails be overlooked. The government has not thought fit to build and operate railroads over which to transport its mails, but relies upon the use of roads owned by state corporations operating connecting roads. And it appears, from the findings in this case, that the defendant's through trains are engaged by the government in the transportation of its mails. The business, public and private, that depends on hourly and daily communication by mail, is enormous, and it would be intolerable if such necessary rapidity of intercourse could be controlled and trammeled by legislation like that in question.

It was pointed out in *Hall* v. *De Cuir* that, although the statute of Louisiana, which sought to regulate the manner in which white and colored passengers should be carried, was restricted by its own terms to the limits of the state, yet that such regulation necessarily affected steamboats running through and beyond the state, because such regulations might change at every state line.

*A similar but much greater inconvenience [330]
would be occasioned by attempting by state legislation to interfere with the movements of through trains. If, for instance, and as is often the case, the through trains were full of through passengers, there would be no advantage to local travel for them to stop at the way stations, for there would be no room or accommodation for the occasional passengers. Nor would that difficulty be obviated by attaching to each train coaches for use at the way stations. Such additional coaches would impede the speed of the through trains and interfere with the business of the local trains.

In *Wabash, St. L. & P. Railway Company*

v. *Illinois*, it was said, replying to the argument that the state statute applied in terms only to transportation within the state: "Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation, and if each one of the states through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. . . . As restricted to a transportation which begins and ends within the limits of the state, it, the regulation, may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in freights, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states cannot be overestimated."

In *Illinois Central R. R. Co.* v. *Illinois*,
[331] stress was justly *laid on the manifest purpose of Congress to establish a railroad in the center of the continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce, as well as of the military and postal departments of the government.

A similar purpose has been manifested by Congress in the legislation hereinbefore referred to, by authorizing the formation of continuous lines of transportation, by creating a permanent commission to supervise the transactions of railroad companies so far as they affect interstate commerce, and by employing such continuous and connecting roads for the transportation of its mails, troops, and supplies.

These views by no means result in justifying the railroad company defendant in failing to supply the towns and villages through which it passes with trains adequate and proper to transact local business. Such failure is not alleged in this case, nor found to be a fact by the trial court. And if the fact were otherwise, the remedy must be found in suitable legislation or legal proceedings, not in an enactment to convert through into local trains.

Some observations may be ventured on the reasoning employed in the opinion of the court. It is said:

"In what has been said we have assumed that the statute is not in itself *unreasonable*. In our judgment this assumption is not unwarranted. The requirement that a railroad company whose road is operated within the state shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city, or village of three thousand inhabitants, for a time sufficient to receive and let off passengers, so far from being *unreasonable*, will subserve the public convenience."

But the question of the *reasonableness* of a public statute is never open to the courts. It was not open even to the supreme court of the state of Ohio to say whether the act in question was reasonable or otherwise. Much less does the power of the legislature of Ohio to pass an act regulating a railroad corporation depend upon the judgment or opinion of *this* court as to the reasonableness of such an act.

*And again: "It was for the state of Ohio [332]
to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was not bound to ignore the convenience of its own people, whether traveling on this road from one point to another within the state, or from places in the state to places beyond its limits, or the convenience of those outside the state who wished to come into it, and look only to the convenience of those who desired to pass through the state without stopping."

It was, I respectfully submit, just such action on the part of the state of Ohio, and just such reasoning made to support that action, that are forbidden by the Constitution of the United States and by the decisions of this court hereinbefore cited. If each and every state through which these interstate highways run could take into consideration all the circumstances affecting passenger travel within its limits, and make such regulations as, in the opinion of its legislature, are *"just and for the convenience of its own people,"* then we should have restored the confusion that existed in commercial transactions before the adoption of the Constitution, and thus would be overruled those numerous decisions of this court nullifying state legislation proceeding on such propositions.

Again it is said:

"Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation, by reason of being engaged in interstate commerce, could build up cities and towns at the ends of its line, or at favored points, and by that means destroy or retard the growth and prosperity of intervening points. It would mean that the defendant railway company could, beyond the
*power of the state to prevent it, run all of [333]
its trains through the state without stop-

ping at any city within its limits, however numerous the population of such cities."

I am unable to perceive, in the views that prevailed in the Louisiana and Illinois cases, any foundation whatever for such observations. In those cases it was expressly conceded that, in the regulation of commerce within the state and in respect to the management of trains so engaged, the authority of the state legislature is supreme. And in the argument in behalf of the defendant company in this case a similar admission is made.

It is fallacious, as I think, to contend that the Ohio legislation in question was enacted to promote *the public interest.* That can only mean the public interest of the state of Ohio, and the reason why such legislation is pernicious and unsafe is because it is based upon a discrimination in favor of local interests, and is hostile to the larger public interest and convenience involved in interstate commerce. Practically there may be no real or considerable conflict between the public interest that is local and that which is general. But, as the state legislatures are controlled by those who represent local demands, their action frequently results in measures detrimental to the interests of the greater public, and hence it is that the people of the United States have, by their Constitution and the acts of Congress, removed the control and regulation of interstate commerce from the state legislatures.

Countenance seems to be given, in the opinion of the majority, to the contention that the power of Congress over the regulation of interstate commerce is not exclusive, by the observation that "the plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might, from time to time, establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us is in itself a regulation of interstate commerce when applied to trains carrying passengers from one state to another."

[334] *But it has already been shown that Congress has legislated expressly in relation to interstate trains and railroads, has made rules and regulations for their control, and has established a tribunal to make other rules and regulations.

Besides, as was observed by Mr. Webster, in his argument in *Gibbons* v. *Ogden,* 9 Wheat. 17 [6: 27]:

"The state may legislate, it is said, whenever Congress has not made a plenary exercise of its power. But who is to judge whether Congress has made this plenary exercise of power? It has done all that it deemed wise; and are the states now to do whatever Congress has left undone? Congress makes such rules as in its judgment the case requires, and those rules, whatever they are, constitute the system. All useful regulations do not consist in restraint: and that which Congress sees fit to leave free is a part of the regulation as much as the rest."

Attention is called to the fact that in the cases of *Hall* v. *De Cuir, Wabash, St. L. & P. Railway Company* v. *Illinois,* and *Illinois C. R. R. Company* v. *Illinois,* there were no specific regulations by Congress as to providing separate accommodations for white and black passengers, as to rates of freight to be charged on interstate commerce, or as to stopping through trains at prescribed places; yet legislation by the states on those subjects was held void by this court as a trespass on the field of interstate commerce.

"The power of Congress to regulate commerce among the several states when the subjects of that power are national in their nature is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states." *Re Rahrer,* 140 U. S. 545 [35: 572].

Justices **Brewer, White,** and **Peckham** concur in this dissent.

Mr. Justice **White** dissenting:

The statute is held not to be repugnant to the Constitution of the United States, because it is assumed to be but an exercise *of [335] the lawful police power of the state, providing for the local convenience of its inhabitants. On this hypothesis the statute is held valid, although it is conceded that it indirectly touches interstate commerce and remotely imposes a burden thereon. To my mind the Ohio statute, however, does not come within the purview of the reasoning advanced to support it, and therefore such considerations become irrelevant, and it is unnecessary to form any judgment as to their correctness.

My conception of the statute is that it imposes, under the guise of a police regulation for local convenience, a direct burden on interstate commerce, and, besides, expressly discriminates against such commerce, and therefore it is in conflict with the Constitution, even by applying the rules laid down in the authorities which are relied on as upholding its validity. Now, what does the statute provide? Does it require all railroads within the state to operate a given number of local trains and to stop them at designated points? Not at all. It commands railroads, *if they run three trains a day,* to cause at least three of such trains to be local trains, by compelling them to stop such trains at the places which the statute mentions. It follows, then, that under the statute one railroad operating in the state may be required to run only one local train a day and to stop such train, as the statute requires, and another railroad reaching exactly the same territory and passing the same places may be required to operate three trains a day and make the exacted stops with each of such trains. That is to say, although the same demands and the same

local interest may exist as to the two roads, upon one is imposed a threefold heavier burden than upon the other. That this result of the statute is a discrimination it seems to me, in reason, is beyond question. If, then, the discrimination is certain, the only question which remains is, Is it a discrimination against interstate commerce? If it is, confessedly the statute is repugnant to the Constitution of the United States. Whence, then, does the discrimination arise and upon what does it operate? It arises alone from the fact that the statute bases its requirement, not upon the demands of
[336]local convenience, *but upon the volume of business done by the road, since it requires the road operating three trains to stop three as local trains, and the road operating one train to stop only one. But the number of trains operated is necessarily dependent upon the amount of business done, and the amount of business embraces interstate commerce as well as local business. But making the number of local trains dependent upon the volume of business is but to say that if a railroad has enough interstate business, besides its local business, to cause it to run one local and two interstate commerce trains each way each day, the increased trains thus required for the essential purposes of interstate commerce shall be local trains, while another railroad which has no interstate commerce, but only local business requiring but one train a day, shall continue only to operate the one local train.

While the power of the state of Ohio to direct all the railroads within its territory to operate a sufficient number of local trains to meet the convenience of the inhabitants of the state may be, *arguendo*, conceded,—although such question does not arise in this case, and is not, therefore, necessary, in my opinion, to be decided,—that state cannot, without doing violence to the commerce clause of the Constitution of the United States, impose upon the railroads operating within its borders a burden based, not upon local convenience, but upon the amount of interstate commerce business which the roads may do, thereby causing every interstate commerce railroad to have a burden resting upon it entirely disproportioned to local convenience, and greatly more onerous than that resting upon roads doing a local business, and which have not a sufficient interstate business to compel them to operate three trains. To answer this reasoning by saying that the statute does not compel roads to operate the three trains and stop them, since it only compels them to stop them if they operate them, is to admit the discrimination, and to state the fact that the duty is not made by the statute dependent upon the local convenience, but upon the whole volume of business, which of course, therefore, includes interstate commerce business.

As the statute makes its exaction depend,
[337]not upon a rule *by which the local wants are ascertained and supplied, but upon the business done, it therefore directly operates upon the volume of business, and only indirectly considers the possible local convenience. Under a law which thus proceeds, my mind refuses the conclusion that the law directly considers local convenience, and only indirectly and remotely affects interstate commerce, when the reverse, it seems to me, is patent on the face of the statute. The repugnancy of the statute to the Constitution of the United States is shown by the principle decided by this court in *Osborne* v. *Florida*, 164 U. S. 650 [41: 586]. In that case the state of Florida imposed a license on the business of express companies. In construing the statute the supreme court of the state held that it applied only to business done solely within the state, and not to business interstate in its character. This court, in reviewing and affirming the decision of the state court, said that as construed by the Florida court the statute was not repugnant to the Constitution, because it applied to business done solely within the state, and that the contrary would have been manifestly the case if, for the purpose of taxation, the state had taken into consideration the whole volume of business, including that of an interstate character. Now, if a taxing law of a state is repugnant to the Constitution because it operates upon the whole volume of business, both state and interstate, a law of the character of that now under consideration, which operates upon the whole volume of business of a railroad, state and interstate, is equally repugnant to the Constitution of the United States.

Whether in the enactment of the statute it was intended to discriminate is not the question, for, whatever may have been the intention of the lawmaker, if the necessary effect of the criterion established by the law is to cause its enforcement to produce an unlawful discrimination against interstate commerce by imposing a greater burden on the roads engaged in such commerce than upon other roads which do a purely local business, the statute is, I think, repugnant to the Constitution of the United States, and should not be upheld.

For these reasons, without meaning to imply that I do not assent to the conclusions stated by my brethren who have also, *on [338]
other grounds, dissented, I prefer to place my dissent on what seems to me the discrimination which the statute inevitably creates.

M. J. NUGENT, Superintendent of the Territorial Prison of the Territory of Arizona, *Appt.*,

v.

STATE OF ARIZONA IMPROVEMENT COMPANY.

(See S. C. Reporter's ed. 338-347.)

Evidence of execution of a bond—mandamus against public officer.

1. Where a case was heard upon the pleadings without any evidence except a written contract between the parties, a recital in the contract that a certain bond was executed is not evidence of its execution sufficient to overcome an averment in the answer that the bond was not executed.

2. Where the statute requires a bond to be executed before a contract with a public officer shall be enforceable, such officer cannot be compelled by mandamus to perform the contract, until the bond required by the statute has been given.

[No. 119.]

Argued and Submitted January 10, 11, 1899. Decided February 20, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Third Judicial District of the Territory in and for the County of Yuma overruling a demurrer and giving judgment for the plaintiff, the Arizona Improvement Company, and ordering a peremptory writ of mandamus to issue against M. J. Nugent, Superintendent of the Territorial Prison, commanding him to furnish to the plaintiff certain convicts out of said prison as laborers. *Reversed,* with directions to remand to the District Court for further proceedings.

The facts are stated in the opinion.

Messrs. **L. E. Payson** and *Charles F. Ainsworth,* Attorney General for Arizona, for appellant.

Messrs. **Eugene S. Ives** and *L. H. Chalmers* for appellee.

[338] *Mr. Justice **Harlan** delivered the opinion of the court:

By an act of the legislative assembly of the territory of Arizona, approved March 8th, 1895, the governor and auditor of the territory, together with one citizen to be appointed by the governor with the advice and consent of the council, were constituted a board of control, and given charge of all charitable, penal, and reformatory institutions then existing or which might thereafter be created in the territory.

It was provided by the ninth section of the [339] act that the *board of control, after qualifying and entering upon their duties, should have full control over the territorial insane asylum, the territorial reform school, and territorial prison, together with all property, buildings, and lands belonging thereto or that should thereafter be acquired. That section further provided: "Sixty days after the passage of this act they shall have the power and authority to enter into an agreement or agreements with a responsible person or persons, to lease on shares or for cash the property, buildings, and lands, or any part thereof, now belonging to the territory, wherever said buildings and lands may be located, or that may hereafter be acquired for the purpose of furnishing employment for the inmates of the said territorial prison and the said territorial reform school. The said board shall have the authority to contract with a responsible person or persons to furnish the labor of the inmates now within the said reform school or said prison, or that may hereafter be confined therein, or any number of them, for the best interests of the territory; provided, however, that at no time shall the labor of the inmates of the said territorial prison or territorial reform school be leased to any person or persons when the labor of the inmates of said institution is required upon any buildings or properties of the aforesaid institutions and no lease or contract shall be made that will obligate the territory to furnish tools, machinery or money, or make other expenditure other than the labor of the inmates, properly clothed and fed, and the proper guards for same, together with the use of the property, buildings, and lands heretofore mentioned; provided, that no contract or lease shall be made to extend for a term of more than ten years from the time of making said lease or contract. And the said board may contract to allow such labor to be performed at any place either inside or outside the prison walls or the confines of the reform school, but if a contract be made to allow labor to be performed outside of the prison walls or confines of the reform school it must be done under proper restrictions, having regard for the safety of the prisoners or inmates. A good and sufficient bond must be given by the person or persons leasing the labor of inmates of the *aforesaid [340] institutions for the faithful performance of such contract; said bond to be approved by the board of control." Ariz. Laws 1895, pp. 20, 22.

This statute being in force, a written agreement was made December 2d, 1896; between "the territory of Arizona, by L. C. Hughes, Governor, C. P. Leitch, Auditor, and M. H. McCord, constituting the Board of Control of the Territory of Arizona," of the first part, and the State of Arizona Improvement Company of the second part. That agreement contained, among other provisions, the following:

"The party of the second part having submitted its good and sufficient bond for the faithful performance of this contract, which said bond has been approved by the said board of control and each of its members, and is herewith delivered and accepted, the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, reserved and contained on their part, and on behalf of the said party of the second part to be done and kept and performed, hath granted, bargained, demised, leased, and to farm letten to said party of the second part, its successors and assigns, all that certain real estate; . . . also all the labor of the male convicts now in the territorial penitentiary, or who may hereafter be confined therein, to have and to hold the labor of said penitentiary convicts unto said party of the second part, and to its assigns, for the term of ten years from the date of these presents; and the lands and premises above described for and during and until the end of the full term of ten years to be fully completed and ended, and it is further stipulated and agreed by and between the parties hereto that in the event of the removal of the territorial prison from Yuma county, territory of Arizona, to any other portion of the territory, such removal will in no way, manner, shape, or form interfere with the conditions, stipulations, and covenants of this contract and lease.

"It is further understood, stipulated, and agreed by and between the parties hereto, that the party of the second part is to have the exclusive control of the labor of the convicts in the territorial prison from 8 o'clock
[341] A. M. to 5 o'clock P. M., *during the said term of ten years from the date of these presents, Sundays and legal holidays excepted.

"It is further agreed by and between the parties hereto that the party of the first part, or its agent or agents, will furnish the said convict labor to the party of the second part, at the place or places designated by the said party of the second part, or its agents, in Yuma county, Arizona territory, properly guarded, clothed, fed and ready to commence work at the hours and terms heretofore mentioned, and the party of the first part shall properly guard said convicts during the hours of labor. The party of the second part is to furnish all the tools and machinery necessary for the use of the convicts while at work under the conditions of this contract and lease, but the said party of the first part shall not be compelled to take outside of the prison, under guard, parties of less than five convicts. . . .

"The superintendent of the prison or agent of the territory having the convicts in charge shall be required to furnish the convicts in such numbers as may be required from time to time up to the amount of all the able-bodied male convicts; to deliver them at such points or places in Yuma county as may be demanded of him by the party of the second part, its agent or agents. The party of the second part further agrees to keep a current and accurate account of the number of days worked by convicts, and on the first Monday of each calendar month to make a statement of the total number of days done the previous month by all the convicts employed by the said party of the second part, and shall furnish a copy of the said statement to the superintendent of the territorial prison, properly verified by an agent of the company.

"The said party of the second part agrees to compensate the party of the first part for such convict labor as follows, to wit: The value of each convict's labor shall be placed at 70 cents per day, and as soon as the party of the first part has furnished convict labor at the rate of 70 cents per day, aggregating the sum of sixteen hundred dollars, the party of the second part shall issue its perpetual
[342] water-right deed for eighty *acres of land, of the water in its canal, when such canal is completed. . . .

"It is further covenanted and agreed, by and between the parties hereto, that after the water rights hereinbefore provided for are earned by said party of the first part, then as soon as the labor of convicts at the rate of 70 cents per day for each day's labor amounts to sixteen hundred dollars, the party of the second part shall issue water-right certificates for one eighty-acre water right. . . .

"It is further stipulated by and between the parties hereto in consideration of the covenants herein contained, that the said party of the second part is to use such of said convicts' labor ——— this contract and lease as it may from time to time require, and such party of the second party need not commence to use any of said labor sooner than five months from the date hereof.

"It is further stipulated and agreed by and between the parties hereto, in consideration of the covenants herein contained, to be performed by each of the parties hereto, and in consideration of the convict labor herein mentioned, that the lease of the lands herein described shall commence on and from the day when the water shall be conducted in the canal of the party of the second part to the lands convenient for the said water to be conducted upon the said lands hereinbefore described, and shall terminate ten years thereafter; and that the party of the second part shall pay to the party of the first part, as rent therefor, an annual sum, to be hereafter determined upon, in cash, or, at the option of the party of the second part, one half of the net products of the said lands; provided, however, that the said lease shall commence to run within four years from date.

"It is further agreed, covenanted, and declared that these presents are made, executed, and delivered for the best interest of the territory of Arizona, and for the purpose of furnishing employment for the inmates of the said territorial prison,—the labor of said inmates being not required upon any buildings or properties of any institution of said territory."

On the 22d day of April, 1896, it was agreed in writing *between the parties as [343]
follows: "The time for commencing work under this contract is hereby extended to the 10th day of June, 1896, and it is fully understood and agreed by the parties hereto that this extension is in no way to affect the legal status of said contract. It is understood and agreed that the rights of the parties thereto are to remain *in statu quo*, and the extension herein made is not intended to ratify, alter, or impair said contract, or to give it any validity whatsoever that it does not, before the signing of this instrument, possess."

Later, a supplemental agreement in writing was made between the same parties, but in the view which the court takes of this case it need not be set out in this opinion.

On the 26th day of May, 1896, the State of Arizona Improvement Company filed its complaint in the district court of the third judicial district of the territory in and for the county of Yuma, in which reference was made to the above agreements with the board of control, and in which it was alleged that it was a corporation organized under the laws of the territory; that M. J. Nugent, a resident of Yuma county, was the superintendent of the territorial prison at Yuma, and as such had full control of the prisoners confined in that prison, subject only to the direction of the board of control of the territory; that on the 25th day of May, 1896, the plaintiff company demanded in writing of said Nugent, superintendent aforesaid, that in pursuance of the contract between it and said board of control, he

furnish to plaintiff on the 2d day of June, 1896, at 8 A. M., ten able-bodied male convicts out of the territorial prison at Yuma, properly guarded, on the outside of the gate of the territorial prison; that on the next day Nugent served a written notice on the plaintiff, whereby he peremptorily declined to furnish the convict labor at such time and place, or at any time and place; and that the plaintiff had not a plain, speedy, or adequate remedy in the ordinary course of law.

The complaint was supported by the affidavit of the president of the plaintiff company.

The relief asked was that a writ of mandamus issue, directed *to Nugent, superintendent of the territorial prison, directing and commanding him to furnish to the plaintiff ten able-bodied male convicts out of the territorial prison at Yuma, on the 2d day of June, 1896, on the outside of the prison gate at Yuma, properly guarded; and that plaintiff have such other and further relief as to the court seemed meet and just. [344]

An alternative writ of mandamus was issued, and Nugent, as superintendent of the prison, excepted to the sufficiency of the complaint and demurred thereto upon these grounds: 1. That the complaint did not state facts sufficient to authorize a writ of mandamus. 2. That the plaintiff sought to compel the performance of an act by the respondent as superintendent of the territorial prison, which the law did not specially enjoin upon him as a duty resulting from his office. 3. That the petition sought to compel the performance of a contract made by others and not by respondent. 4. That the alleged contract was void because authorized only by a pretended law which was void.

Nugent also filed an answer alleging, among other things, that there was a want of proper parties defendant; that the territory had no power to hire out the convicts confined in the territorial prison who had not been sentenced to punishment with hard labor, nor to authorize the convicts to be taken out and away from the territorial prison, where punishment and sentence was by confinement in such prison; that the board of control had no power to make the contract sought to be enforced; that the contract was itself without consideration and in violation of the act of March 8th, 1895, in that it was for a period of over ten years; that the contract took the entire convict labor for the period just named in violation of the provisions of the act providing that said labor should not be leased out when it was needed to work on the buildings and premises of the territory; and that the contract was against public policy in authorizing all the prisoners to be taken from the prison and to remain away from it in many cases for the entire period of their sentence.

The answer also averred "that as the duly appointed, qualified, and acting superintendent of the territorial prison at *Yuma, Arizona, previous to the service of the alternative writ herein, this defendant was advised and informed by the Honorable B. J. Franklin, as governor of the territory of Arizona, that the said pretended contract mentioned in the application herein was and is of no valid force and effect, and further advised and informed in substance and to the effect that said contract was not of any legal force or binding effect upon said territory or said board of control, and, among other things concerning the same, the said Honorable B. J. Franklin, acting as such governor, authorized and directed this defendant in substance and to the effect that in the event that the said State of Arizona Improvement Company should, by its officers or agents, make a demand upon this defendant to do or perform anything under the provisions of said contract, and especially if such demand should be made for the delivery of any prisoners confined in or inmates of said penitentiary to the said company, its officers or agents, at the gate of said prison or elsewhere, that this defendant, acting as such superintendent, should politely, but firmly, refuse such request or any request made or to be made under the provisions of said pretended contract; that acting under the advice and information given by the Honorable B. J. Franklin, governor of this territory, and of the direction of the head of the executive department of this territory, this defendant alleges that he made the refusal complained of in the application herein, and not otherwise. . . . Respondent further avers and gives the court to know that the State of Arizona Improvement Company has not, before the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any of the courts of this territory for the faithful performance of said contract, as required by said pretended board of control act." [345]

The case was heard in the district court on the complaint and the demurrer and answer. The demurrer of the defendant was overruled, and the contracts set forth in the complaint were the only evidence adduced at the trial. The defendant having declined to amend the pleadings or to offer further evidence, and having elected to stand upon the pleadings, the *court found for the plaintiff, [346]
and ordered a peremptory writ of mandamus to issue.

A new trial having been refused, the case was carried to the supreme court of the territory, where the judgment of the district court was affirmed.

We are of opinion that the supreme court of the territory erred in affirming the judgment of the district court awarding a writ of mandamus against the defendant Nugent.

The statute under the authority of which the board of control made the contract referred to in the complaint expressly required a good and sufficient bond to be given by the person or persons leasing the labor of inmates of the territorial prison for the faithful performance of such contract, which bond was to be approved by the board. The complaint asking for a mandamus against the superintendent of the prison did not distinctly allege the execution of such bond.

But the answer of Nugent alleged that the defendant in error had not, prior to the institution of these proceedings, executed and filed a good and sufficient bond enforceable in a court of law in any court of the territory for the faithful performance of its contract, as required by the act of March 8th, 1895. That act, it is true, did not in terms require the execution and delivery of a bond prior to or contemporaneously with the making of a contract with the board of control. But it is clear that the board could not dispense with the bond, and that no contract made by them leasing the labor of the convicts could become binding upon the territory until a bond such as the statute requires was executed by the lessee and approved by the board. The recital in the agreement of December 2d, 1896, that the lessee had submitted, and that the board had approved, a good and sufficient bond for the faithful performance of that agreement, may have been made in the expectation that such a bond would be executed before the agreement became effective as between the parties. But as the case was heard upon the pleadings, without any evidence except the written agreements between the board of control and the improvement company, the mere recital referred to cannot be taken as sufficient to disprove the averment
[347] in answer as to the nonexecution *of the required bond. If the plaintiff was entitled to the relief asked by a proceeding against the superintendent, without bringing the members of the hoard of control before the court, it should have shown by allegation and proof that the required bond had been executed. If no bond was executed as required by the statute, the plaintiff was not in a position to ask relief by mandamus. The superintendent of the prison may not have been charged by law with knowledge of the provisions of the statute, but he was aware of its provisions, and was bound not to allow the convicts to go beyond his control under an agreement that did not conform to the statute. An agreement unaccompanied by the required bond would not justify him in surrendering custody and control of the convicts or any of them. As it must be taken upon the present record that the improvement company never executed the bond required by the statute, the district court erred in giving any relief.

Under the circumstances, it may not be inappropriate to say that in the printed brief of the attorney general of Arizona it is distinctly stated that no bond had ever been executed, and that statement is not disputed in the printed brief subsequently filed for appellee, nor was it disputed by counsel for appellee in oral argument.

Without expressing any opinion in reference to other questions discussed by counsel, some of which are important, *the judgment of the Supreme Court of the Territory is for the reasons stated reversed,* with directions to remand the case to the district court for such further proceedings as may be consistent with this opinion and with law.

It is so ordered.

TEXAS & PACIFIC RAILWAY COMPANY, [348]
Plff. in Err.,
v.
JOHN HENRY CLAYTON, Nicholas Roberts, and Charles Anderson Earle.

(See S. C. Reporter's ed. 348-363.)

Railroad company, when liable for goods destroyed by fire—when liable as carrier and not as warehouseman.

1. When goods were delivered in Texas to a railroad company to be carried to Liverpool, England, and the bill of lading provided that the carrier alone in whose actual custody the goods should be at the time of their loss should be liable therefor, such railroad company is liable for the destruction of the goods by fire before they had been actually delivered to the next connecting carrier, although they were placed by said company on the wharf, where the steamship line, the next connecting carrier, usually received goods, and notice given to it, but it had not taken actual custody thereof.
2. Under such circumstances the railroad company did not cease to be a carrier and become a warehouseman, although it requested the steamship line to remove the goods, but had not specified any particular time within which compliance was insisted on, or given notice that the goods would be kept or stored at the risk of the steamship line upon failure to comply with the request.

[No. 222.]

Argued January 27, 1899. Decided February 20, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming a judgment of the United States Circuit Court, for the Southern District of New York in favor of John Henry Clayton *et al.*, plaintiffs, against the Texas & Pacific Railway Company for the value of certain bales of cotton destroyed by fire while in the custody of defendant as common carrier. *Affirmed.*

See same case below, 51 U. S. App. 676.

The facts are stated in the opinion.

Messrs. **Rush Taggart** and **Arthur H. Masten**, for plaintiff in error:

Defendant had fully performed its duty as initial carrier.

Pratt v. *Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336; *Merriam* v. *Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344; *Converse* v. *Norwich & N. Y. Transp. Co.* 33 Conn. 166; *Illinois C. R. Co* v *Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *St. Louis, I. M. & S. R. Co.* v. *Murphy*, 60 Ark. 333; *Meyer* v. *Vicksburg, S. & P. R. Co.* 41 La. Ann. 639; *Montgomery & E. R. Co.* v. *Kolb*, 73 Ala. 396.

49 Am. Rep. 54; *Green* v. *Milwaukee & St. P. R. Co.* 38 Iowa, 100; *Coyle* v. *Western R. Corp.* 47 Barb. 152; *London & L. F. Ins. Co.* v. *Rome, W. & O. R. Co.* 144 N. Y. 200.

The rule as to delivery between connecting carriers is the same as between shipper and carrier.

Shelbyville R. Co. v. *Louisville, C. & L. R. Co.* 82 Ky. 541; *Ætna Ins. Co.* v. *Wheeler,* 49 N. Y. 616; *Conkey* v. *Milwaukee & St. P. R. Co.* 31 Wis. 619, 11 Am. Rep. 630; *Goold* v. *Chapin,* 20 N. Y. 259, 75 Am. Dec. 398.

The defendant held the goods in question, if at all, only as a warehouseman.

Condon v. *Marquette, H. & O. R. Co.* 55 Mich. 218, 54 Am. Rep. 367; *Whitworth* v. *Erie R. Co.* 87 N. Y. 413; *Michigan C. R. Co.* v. *Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *McHenry* v. *Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 448; *Garside, W. & sey & Trent Nav. Proprs.* 4 T. R. 581; *Regan* v. *Grand Trunk R. Co.* 61 N. H. 579; *Ayres* v. *Western R. Co.* 14 Blatchf. 9; *Wood* v. *Milwaukee & St. P. R. Co.* 27 Wis. 541, 9 Am. Rep. 465; *Deming* v. *Norfolk & W. R. Co.* 21 Fed. Rep. 25.

Mr. **Treadwell Cleveland,** for defendants in error:

The circuit court properly denied the motion for a direction for a verdict in its favor, made by the railroad company, when the plaintiff rested.

Dunn v. *Durant,* 9 Daly, 389; *Catlin* v. *Gunter,* 11 N. Y. 373, 62 Am. Dec. 113; *Place* v. *Minster,* 65 N. Y. 89; *Richards* v. *Westcott,* 2 Bosw. 589; *Bonsteel* v. *Vanderbilt,* 21 Barb. 26.

There was no constructive delivery of the cotton by the railway company. The relation of that company to the shippers was not that of warehouseman, but that of common carrier.

Michigan C. R. Co. v. *Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Goold* v. *Chapin,* 20 N. Y. 259, 75 Am. Dec. 398; *Mills* v. *Michigan C. R. Co.* 45 N. Y. 622, 6 Am. Rep. 152; *Ladue* v. *Griffith,* 25 N. Y. 364, 82 Am. Dec. 360; *Illinois C. R. Co.* v. *Mitchell,* 68 Ill. 471, 18 Am. Rep. 564; *Condon* v. *Marquette, H. & O. R. Co.* 55 Mich. 218, 54 Am. Rep. 367; *McDonald* v. *Western R. Corp.* 34 N. Y. 497.

[349] *Mr. Justice **Harlan,** delivered the opinion of the court:

This action was brought by the defendants in error, subjects of the Queen of Great Britain and Ireland, against the Texas & Pacific Railway Company, a corporation existing under an act of Congress approved March 3d, 1871 (chap. 122, 16 Stat. at L. 573), and engaged in the business of a common carrier of merchandise for hire. Its object was to recover the value of four hundred and sixty-seven bales of cotton destroyed by fire.

The complaint alleged that in the month of October, 1894, at Bonham, Texas, the plaintiffs delivered to the defendant railway company 500 bales of cotton, which it agreed to carry safely and securely at a through price or rate from the place of shipment to Liverpool, England, by way of New Orleans and there deliver the same on the payment of the freight; that the defendant failed to keep its agreement and to carry safely 467 of the bales of cotton to Liverpool, and there to deliver the same, although the plaintiffs had duly demanded delivery thereof and had been at all times ready and willing to pay the freight for the carriage; that through its negligence and carelessness and without the fault of the plaintiffs those 467 bales, worth $17,314.43, were on or about November 12th, 1894, wholly destroyed by fire at Westwego, Louisiana, "at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier;" and that the defendant has refused upon plaintiffs' demand to pay the value of the cotton so destroyed.

The defendant admitted the destruction of the cotton by fire at the time and place named, but made such denial of the material allegations of the complaint as put the plaintiffs on proof of their case.

The plaintiffs, having read in evidence the bills of lading and made proof of the value of the cotton as shown by certain stipulations between the parties, rested their case. Thereupon the defendant moved the court to direct the jury to render a verdict in its behalf. That motion was denied with exceptions to the defendant. At the close of all the evidence the jury by direction of the court returned a verdict in favor *of the [350]
plaintiffs for the sum of $14,063, and judgment for that sum with costs was entered against the defendant company. Upon writ of error to the circuit court of appeals that judgment was affirmed. 51 U. S. App. 676.

The action was based upon four bills of lading issued by the railway company. Two of them were dated October 10th, and the others October 15th and October 23d respectively. They are alike in form, and identical in respect of the terms and conditions of the contract. Each one showed a receipt by the railway company of a given number of bales, "in apparent good order and well conditioned, of Castner & Co., for delivery to shippers' order or their assigns, at Liverpool, England, he or they paying freight and charges as per margin;" also, that the cotton received was to be carried "from Bonham, Texas, to Liverpool, England, route: *via* New Orleans and Elder, Dempster, & Co. steamship line."

Each bill of lading contained also the following clauses:

"The terms and conditions hereof are understood and accepted by the owner.

"Upon the following terms and conditions, which are fully assented to and accepted by the owner, *viz.:*

"1. That the liability of the Texas & Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; *and* in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival and delivery *at its final destination,* whereby any legal

liability is incurred by *any* carrier, that carrier *alone* shall be held liable therefor in whose *actual custody* the cotton shall be at the time of such damage, detriment, or loss.

"2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or
[351] evidence to extend this *contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate. . . .

"5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton or claimant to establish that such injury resulted from the fault of the carrier.

"6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster, & Co. steamship line, with liberty to ship by any other steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination, the responsibility of the carriers shall cease."

The facts out of which the case arises are these: The railway company had warehouses and yards in New Orleans where its road terminated. Westwego is a branch station or terminal opposite that city. The company had a wharf with tracks and an office and sheds on it—the wharf having been constructed over the Mississippi river so that cars could be run upon the railroad tracks in its rear and unloaded, and so that vessels could come to its front to receive freight placed on it. The cotton in question was unloaded at the wharf at various dates from October 22d to November 4th, 1894, and was burned while on the wharf in the evening of November 12th, 1894.

On each of the bills of lading are the following words: "T. & P. contract No. 44." It does not appear that the shippers were informed what were the terms of that contract.
[352] *It was in proof, however, that it was in substance a contract with the Elder, Dempster, & Co. steamship line to connect with the Texas & Pacific Railway Company and receive from the latter 20,000 bales of cotton during the months of October, November, and December, 1894, on the conditions specified on the reverse side of the contract. Those conditions do not affect the questions here presented, but it was proved that the railway and the steamship companies agreed that the place of delivery of the cotton under the contract between them should be the wharf at Westwego.

The mode in which the railway company and the steamship company transacted business was as follows: Upon the shipment of cotton, bills of lading would be issued in Texas to the shipper. Thereupon the cotton would be loaded in the cars of the railway company and a way bill indicating the number and initial of the car, the number of the bill of lading, the date of shipment, the number of bales of cotton, the consignor, the consignee, the date of the bill of lading, the number of bales forwarded on that particular way bill, the marks of the cotton, the weight, rate, freights, amount prepaid, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the way bill and car at Westwego, a "skeleton" would be made out by the clerks at that place for the purpose of unloading the car properly. It contained the essential items of information covered by the way bill, and had also the date of the making of the skeleton. When this skeleton had thus been made out and the car had been pushed in on the side track in the rear of the wharf, it would be taken by a clerk known as a "check clerk," and with a gang of laborers, who actually handled the cotton and were employed by the railway company, the car would be opened; and as the cotton was taken from the car bale by bale the marks would be examined to see that they corresponded with the items on the skeleton, and the same were then checked. The cotton thus taken from the car was deposited at a place on the wharf designated by the check clerk, and it would remain there until the steamship company came and took it away. After the checking of the cotton in this *way to ascertain that [353]
the amounts, marks, and general information of the way bill were correct, the skeleton would be transmitted to the general office of the Texas & Pacific Railway Company in New Orleans, which thereupon would make out what was designated as a "transfer sheet" that contained substantially the information contained in the way bill, and which being at once transmitted to the steamship company or its agents was a notification understood by the steamship company's agents that cotton for their line was on the wharf at Westwego ready for them to come and take away. Upon the receipt of these transfer sheets the steamship company would collate the transfers relating to such cotton as was destined by them for a particular vessel, advise the railway company with the return of the transfers that this cotton would be taken by the vessel named, and would thereupon send the vessel with their stevedores to the wharf at Westwego. The clerk at Westwego would go around the wharf and by the aid of the transfers returned from the steamship agents point out to the master or mate of the ves-

sel, or the one in charge of the loading, the particular lots of cotton named in the transfers and designated for his vessel, and the stevedores and their helpers would thereupon take the cotton and put it on board the ship. In connection with the loading upon the vessel or after the cotton was pointed out in lots, the master or mate would sign a mate's receipt for this cotton. The stevedores and all men employed in loading the vessel were wholly in the employ of the steamship company. The time of coming to take cotton from the wharf was entirely in the control of the steamship company. They sent for it as soon as they were ready.

This was conceded to have been substantially the method of business between the railway company and the steamship company.

Counsel for the railway company correctly states that on the morning of the fire, and on other occasions prior thereto both in October and November, the officers of the railway company gave verbal notice to the steamship company that the cotton was upon the wharf
[354] ready for the steamship company to *take away and made request that the same should be removed; that the attention of the officers of the steamship company was called to the amount of cotton on the wharf which they had contracted to carry, and they were requested to move it at the earliest possible moment and to comply with their contract; and that in reply they said, in substance, that their ships had been delayed, the principal cause being certain labor troubles then existing in New Orleans with employees of the steamship companies, and another cause being the bad weather.

It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company.

So far as the management of the wharf and the protection of the cotton against fire were concerned, the evidence failed to show any negligence on the part of the railway company.

The defendant moved for a verdict in its behalf upon two grounds: 1. The evidence showed a delivery of the cotton to the connecting carrier before the fire occurred. 2. If no delivery took place before the fire, there had been a sufficient tender of the cotton to the steamship carrier, and thereafter, in view of the facts, the railway company should be deemed to have held it as a warehouseman, and as there was no proof of negligence it was not liable for the value of the cotton.

The principal question arises out of that clause in the bill of lading providing that in case of any loss, detriment, or damage done to or sustained by the cotton before its arrival and delivery at its final destination, whereby liability was incurred by any carrier, that carrier *alone* should be held liable therefor in whose *actual* custody the cotton should be at the time of such damage, detriment, or loss. The circuit court of appeals and the circuit court concurred in the view that the cotton when burned was, within the meaning of the contract, in the actual custody of the railway company. It will not be disputed that in determining this question regard must be had to all the provisions of the contract. The clause declaring that the railway company should be deemed to have fully performed its part of the contract "upon delivery of said cotton *to its next [355]
connecting carrier" must be taken with the clause immediately following, which makes that carrier alone liable who had actual custody of it at the time of the loss. The first thought suggested by these clauses, taken together, is that the parties recognized the possibility that it might be often difficult to determine what, as between carriers, in view of their relations to each other, would constitute a sufficient delivery to the connecting carrier. And in order to meet that difficulty the clause relating to actual custody was added, so as to indicate that the delivery intended, so far as liability to the shipper for loss was concerned, was not a constructive one, but such a delivery as involved actual custody of the cotton by the connecting carrier. We do not understand that counsel for the railway company dispute this general view. But they insist that within the meaning of the contract, and under the facts disclosed by the evidence, the steamship company had actual custody of the cotton at the time it was burned. In support of their contention they rely principally upon *Pratt* v. *Grand Trunk Railway Company*, 95 U. S. 43, 46 [24: 336, 339], and the cases upon which that case largely rests—*Merriam* v. *Hartford & N. H. Railroad Co.* 20 Conn. 354, and *Converse* v. *Norwich & New York Transportation Co.* 33 Conn. 166.

It is important to understand what were the facts upon which the judgment in *Pratt* v. *Grand Trunk Railway Company* was based. According to the report of that case they were these:

The Grand Trunk Railway Company, engaged as a carrier in the transportation of property, had received at Montreal to be carried to Detroit certain goods shipped at Liverpool for St. Louis. The goods reached Detroit in the cars of that company on the 17th day of October, 1865, and were destroyed by fire in the night of the succeeding day.

The company had no freight room or depot at Detroit, but it used there a single section or apartment in the frieght depot of the Michigan Central Railroad Company, a building several hundred feet long, three or four hundred feet wide, and all under one roof. Its different sections were without partition walls between them. In the center of the building there was a railroad track for cars to be loaded with freight. The section *in that building used by the Grand [356]
Trunk Company was used only as a place for depositing goods and property that came over its road or that were delivered for shipment over it. In common with the rest of the building, that section was under the control and supervision of the Michigan Central Company.

The Grand Trunk Company employed in its section two men, who checked freight coming into it. But all freight that came

into that section was handled exclusively by the employees of the Michigan Central Company, and the Grand Trunk Company paid that company a fixed compensation per hundred weight for such work as well as for the use of its section.

Goods coming into that section from the Grand Trunk Railroad to be carried over the road of the Michigan Central Company, after being unloaded were deposited by the employees of the latter company in a certain place in the Grand Trunk section, from which they were loaded into the cars of the Michigan Central Company by its own employees, whenever that company was ready to receive them; and after being so placed the employees of the Grand Trunk Company did not further handle such goods.

Whenever the agent of the Michigan Central Company saw any goods deposited in the section of the freight building used by the Grand Trunk Company and which were to be carried over the line of the former company, he would call on the agent of the latter company in the building, and from the way bill exhibited by the agent of the Grand Trunk Company take a list of such goods, and would then for the first time learn their place of destination, together with the amount of freight charges due thereon. From the information thus obtained a way bill would be made out by the Michigan Central Company for the transportation of the goods over its line of railway, and not before.

The goods referred to in the *Pratt Case* were taken from the Grand Trunk cars on the 17th day of October, 1865, and deposited in the apartment of the freight building used by the Grand Trunk Company in the place assigned for goods so destined.

[357] *At the time the goods were forwarded from Montreal the way bill in accordance with usage in such cases was made out in duplicate, on which were entered a list of the goods, the names of the consignees, the places to which they were consigned, and the charges against them from Liverpool to Detroit. The conductor having charge of the train containing the goods would take one of these way bills, and on arriving at Detroit would deliver it to the checking clerk of the Grand Trunk Company, "from which said clerk checked said goods from the cars into said section." The other copy would be forwarded to the agent of the Grand Trunk Company at Detroit. "It was the practice of the Michigan Central Railroad Company, before forwarding such goods, to take from said way bill in the custody of said checking clerk, in the manner aforesaid, the place of destination and a list of said goods, and the amount of accumulated charges, and to collect the same, together with its own charges, of the connecting carrier."

This court, in view of these facts, said: "We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company, by which the liability of the Grand Trunk Company was terminated. 1. They were placed within the control of the agents of the Michigan Company. 2. They were deposited by one party and received by the other for transportation, the deposit being accessory merely to such transportation. 3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company. 4. Under the arrangement between the parties, the presence of the goods in the precise locality agreed upon, and the marks upon them, 'P. & F., St. Louis,' were sufficient notice that they were there for transportation over the Michigan road towards the city of St. Louis; and such was the understanding of both parties." Referring to the section of the freight building specially used by the Grand Trunk Company, the court said: "It was a portion *of the [358]
freight house of the Michigan Company, in which a precise spot was selected or set apart, where the defendant might deposit goods brought on its road and intended for transportation over the Michigan road, and which, by usage and practice and the expectation of the parties, were then under the control of the Michigan Company, and to be loaded on to its cars at its convenience, without further orders from the defendant."

We do not think that the judgment in *Pratt* v. *Railway Company* controls the determination of the present case. In many important particulars the two cases are materially different. In the *Pratt Case* the court proceeded upon the ground that the goods were deposited in a section of a freight building set apart by the connecting carrier, the owner of the building, for goods coming over the line of the first carrier to be transported in the cars of the connecting carrier to the place to which they were consigned, the goods having been unloaded by the employees of the connecting carrier and by them deposited in that section, to be put by such employees into the cars of that carrier at its convenience. It was a case in which the goods passed under the complete control and supervision and into the actual custody of the connecting carrier from the moment they were deposited in the section set apart for them.

In the case at bar, the facts plainly indicate that although the goods had been placed by the first carrier upon the wharf, and although that was the place at which the steamship company was to receive or usually received goods from the railway company for further transportation, they were not in the actual possession or under the actual control of the connecting carrier at the time of the fire. The connecting carrier had not given a mate's receipt for the cotton or assumed control of it. True, it had received notice that the goods were on the wharf and could be taken into possession, but such notice did not put the cotton into the actual custody of the connecting carrier. The opportunity given it to take possession or its mere readiness to take possession was not under the contract equivalent to placing the cotton in the actual *custody of the steam- [359]
ship line. The undertaking of the railway

company was to transport safely and deliver to the next connecting carrier. But its further express agreement was, in substance, that if any carrier incurred liability to the shipper in respect of the goods, that carrier alone was to be liable who, at the time the cotton was damaged or lost, had it in actual custody. In other words, the delivery to the connecting carrier which would, as between the first carrier and the shipper, terminate the liability of such carrier, must have been a delivery that put the cotton into the actual, not constructive, custody of the connecting carrier. To hold otherwise is to eliminate from the contract the clause relating to actual custody. The entire argument of the learned counsel for the railway company in effect assumes that the contract means no more than it would mean if that clause were omitted. But the court cannot hold that that clause is meaningless, or that it was inserted in the contract in ignorance of the meaning of the words "actual custody." Nor can it be supposed that the parties understood the contract to mean that the connecting carrier was to be deemed to have actual custody from the moment it could have taken actual custody if it had seen proper to do so. So far as the shipper was concerned, the actual custody of the first carrier could not cease until it was in fact displaced by the actual custody of the connecting carrier. It may be that the railway company has good ground for saying that, as between it and the connecting carrier, the latter was bound to take actual custody whenever the railway company was ready to surrender possession, and thereby relieve the latter from possible liability to the shipper in the event of the loss of the cotton while in its custody. That is a matter between the two carriers, touching which we express no opinion. But we adjudge that the shipper cannot be compelled, when seeking damages for the value of his cotton destroyed by fire in the course of its transportation, to look to any carrier except the one who had actual custody of it at the time of the fire. One of the conditions imposed upon him by the contract was that if any carrier became liable to him he should have no remedy except against
[360]the one having such *actual custody. That remedy should not be taken from him by a construction of the contract inconsistent with the ordinary meaning of the words used.

The two cases in the supreme court of Connecticut which were cited in *Pratt* v. *Grand Trunk Railway Co.* undoubtedly sustain the principles announced in that case, but they do not militate against the views we have expressed in this case.

Merriam v. *Hartford & New Haven Railroad Co.* 20 Conn. 354, 360, was an action on the case for negligence on the part of a railroad company in the transportation and delivery of certain goods, and in which it was a question whether the goods had been delivered to the company before their destruction. After stating the general rule to be that, in order to charge a common carrier for the loss of property delivered to it for transportation, the property must be delivered into the hands of the carrier itself or its servant or some person authorized by the carrier to receive it, and that if it was merely deposited in the yard of an inn, or upon a wharf to which the carrier resorts, or in the carrier's cart, vessel, or carriage, without the knowledge and acceptance of the carrier, its servants or agents, there would be no sufficient delivery to charge the carrier, the court said: "But this rule is subject to any conventional arrangement between the parties in regard to the mode of delivery, and prevails only where there is no such arrangement. It is competent for them to make such stipulations on the subject as they see fit; and when made they, and not the general law, are to govern. If, therefore, they agree that the property may be deposited for transportation at any particular place without any express notice to the carrier, such deposit merely would be a sufficient delivery. So if in this case the defendants had not agreed to dispense with the express notice of the delivery of the property on their dock, actual notice thereof to them would have been necessary; but if there was such an agreement, the deposit of it there merely would amount to constructive notice to the defendants, and constitute an acceptance of it by them. And we have no doubt that the proof by the plaintiff of a constant and habitual practice and usage of the *defendants to receive property [361]
at their dock for transportation in the manner in which it was deposited by the plaintiff, and without any special notice of such deposit, was competent, and in this case sufficient, to show a public offer by the defendants to receive property for that purpose and in that mode; and that the delivery of it there accordingly by the plaintiff in pursuance of such offer should be deemed a compliance with it on his part, and so to constitute an agreement between the parties by the terms of which the property, if so deposited, should be considered as delivered to the defendants without any other notice. Such practice and usage were tantamount to an open declaration, a public advertisement by the defendants, that such a delivery should of itself be deemed an acceptance of it by them for the purpose of transportation; and to permit them to set up against those who had been thereby induced to omit it, the formality of an express notice, which had thus been waived, would be sanctioning the greatest injustice and the most palpable fraud."

Converse v. *Norwich & New York Transportation Co.* 3 Conn. 166, 181, involved the question whether certain goods had been delivered to the connecting carrier prior to their destruction by fire. The wharf and depot building in which the goods were deposited by the first carrier were owned by the connecting carrier, and the first carrier paid an annual rental for its use in its business. The court, among other things, said: "We have no difficulty in determining, indeed we must hold, that there was a mutual agreement, or tacit understanding equivalent to such an agreement, that the transportation company should place the through freight at that precise spot, and that the

Northern road should take it from thence at a time convenient to them. The construction of the depot and the uniform usage are conclusive of it. The depot was constructed with a platform by the side of the track for the reception of goods to be taken from or put into the cars; and on that platform the railroad company in the first and every instance of delivery by them placed their freight, and the transportation company at their convenience took it away and carried it on board their boat. And so the transpor-
[362]tation *company in like manner in the first and every instance placed there the freight for the Northern road; and they at their convenience put it in their cars and took it away. And the usage was precisely the same with the Worcester road. . . . Upon this wharf and into the inclosure the Northern road laid their track for the delivery and reception of freight to and from the transportation company. Both parties then contemplated a delivery and reception on this wharf and in this inclosure, and obviously in the precise manner actually pursued. . . . It is clear, then, that both the transportation company and the Northern road contemplated that a placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other."

It is to be observed that neither in the *Pratt Case* nor in the *Converse* and *Merriam Cases* was there any clause in the contract between the parties to the effect that the shipper, in enforcing his claim for liability, should look alone to the carrier who had the actual custody of the goods at the time they were lost or destroyed. It is the clause of that character in the bill of lading now in suit which makes the judgments in the *Pratt*, *Converse* and *Merriam Cases* inapplicable to the present case.

A further contention of the defendant is that at the time of the fire it held the goods, if at all, only as a warehouseman and not as a common carrier, and that the circuit court erred in not so instructing the jury. We cannot assent to this view. As the goods had not at the time of the fire passed into the actual custody of the steamship company, and as the contract expressly declared that if any carrier was liable for their destruction that one alone should be liable in whose actual custody the goods were when destroyed, the defendant could not escape responsibility by showing that the connecting carrier could by reasonable diligence have taken actual custody prior to the fire. In other words, it could not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although
[363]without reasonable excuse, to take them *into its actual custody. Even if this were not so, the suggestion that the railway company had become a warehouseman before the fire occurred can be disposed of on the grounds stated by the circuit court of appeals. Speaking by Judge Wallace, that court said: "There is no room for the contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it 'as soon as practicable' was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire." 51 U. S. App. 676, 686.

Under the views expressed in this opinion, it is unnecessary to enter upon a review of the numerous cases cited by counsel for the railway company in their able and elaborate brief to support the different propositions discussed by them.

We are of opinion that the circuit court did not err in directing a verdict for the plaintiff, and the judgment is *affirmed.*

UNITED STATES, *Plff. in Err.*,
v.
JESSE JOHNSON.

(See S. C. Reporter's ed. 363-381.)

Special compensation of district attorney.

Services of a United States district attorney in instituting and conducting proceedings on behalf of the government for the condemnation of land for public purposes, within his district. are such as the law requires the district attorney to render, and consequently he can receive no special compensation therefor, as such proceedings constitute a civil action within U. S. Rev. Stat. § 771, and are the business of the United States within § 824.

[No. 59.]

Submitted November 10, 1898. Decided February 27, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying to this court certain questions of law upon which the Circuit Court of Appeals desired instructions in an action brought by Jesse Johnson, plaintiff, in the Circuit Court of the United States for the Eastern District of New York, against the United States for compensation for services rendered by the plaintiff as United States district attorney, for which he claimed compensation beyond the salary and emoluments attached to the said office in which suit a judgment was rendered in his favor against the government for the sum of $6,513.95. Question as to plaintiff's right to extra compensation *answered in the negative.*

The facts are stated in the opinion.

Mr. **James E. Boyd**, Assistant Attorney General, for the plaintiff in error.

Mr. **Jesse Johnson,** defendant in error, in proper person.

[364] *Mr. Justice **Harlan** delivered the opinion of the court:

In the circuit court of the United States for the eastern district of New York a judgment was rendered against the government and in favor of the defendant in error, Johnson, for the sum of $6,513.95. Of that amount $6,500 represented the value of legal services rendered for the United States by Johnson while he held the office of district attorney for that district, in proceedings in that court for the condemnation of certain lands for public purposes.

The case having been carried by writ of error to the circuit court of appeals, certain questions of law arose as to which instructions are desired from this court,—the controlling question being whether Johnson was entitled, for the services rendered, to any compensation beyond the salary and emoluments attached to his office.

The sections of the Revised Statutes (Title 13, chap. 16) upon the construction of which the answers to the questions propounded more or less depend are the following:

"§ 355. No public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the state in which the land or site may be, to such purchase, has been given. The district attorneys of the United
[365] States, upon the application *of the Attorney General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney General, shall procure any additional evidence of title which may be deemed necessary and which may not be in possession of the officers of the government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

"§ 767. There shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina, a person learned in the law, to act as attorney for the United States in such district."

"§ 770. The district attorney for the southern district of New York is entitled to receive quarterly for all his services a salary at the rate of $6,000 a year. For extra services the district attorney for the district of California is entitled to receive a salary at the rate of $500 a year, and the district attorneys *for all other districts* at the rate of $200 a year.

"§ 771. It shall be the *duty of every district attorney* to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and *all civil actions in which the United States are concerned*, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury."

"§ 823. The following *and no other compensation* shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to *district attorneys*, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several states and territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, *and [366]
proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

"§ 824. . . . For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed. *For each day of his necessary attendance in a court of the United States on the business of the United States,* when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

"§ 825. There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

"§ 827. When a district attorney appears by deriction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury."

"§ 833. Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments *re- [367]

ceived or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them.

"§ 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees, charges, and emoluments to which a district attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.

"§ 835. No district attorney shall be allowed by the Attorney General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, *a sum exceeding six thousand dollars a year*, or exceeding that rate for any time less than a year."

"§ 844. Every district attorney, clerk, and marshal, shall at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

"§ 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; *and no allowance or compensation shall be made for any extra services whatever, which any officer* or clerk *may be required to perform, unless expressly authorized by law.*

[368] *"§ 1765. *No officer in any branch of the public service,* or any other person whose salary, pay, or emoluments are fixed by law or regulations shall receive *any additional pay, extra allowance, or compensation,* in any form whatever, for the disbursement of public money, *or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor expressly states that it is for such additional pay, extra allowance, or compensation.*"

By section 3 of the act of June 20th, 1874 (18 Stat. at L. 85, 109, chap. 328), it was provided that "*no civil officer of the government* shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States *beyond his salary or compensation allowed by law: Provided,* That this shall not be construed to prevent the employment and payment, by the Department of Justice, of district attorneys as now allowed by law for the performance of services *not covered by their salary or fees.*"

The facts to be considered in connection with these statutory provisions are set forth in a statement accompanying the certificate of questions. They may be thus summarized:

By the fortification act of August 18th, 1890 (26 Stat. at L. 315, 316, chap. 797), appropriations were made for gun and mortar batteries, as follows: "For construction of gun and mortar batteries for defense of Boston harbor, two hundred and thirty-five thousand dollars; New York, seven hundred and twenty-six thousand dollars; San Francisco, two hundred and sixty thousand dollars."

The same act contained the following provision: "For the procurement of land or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, five hundred thousand dollars, or so much thereof as may be necessary, and hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted in accordance *with the [369]
laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted: *Provided,* That when the owner of such land or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: *Provided further,* That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land or rights pertaining thereto required for the abovementioned purposes: *And provided further,* That nothing herein contained shall be construed to authorize an expenditure, or to involve the government in any contracts for the future payment of money, in excess of the sums appropriated therefor."

By the subsequent act of July 23d, 1892 (27 Stat. at L. 257, 258, chap. 233), five hundred thousand dollars, or so much thereof as was necessary, was appropriated "for the procurement of land or right pertaining thereto, needed for the site, location, construction, or prosecution of work for fortifications and coast defenses."

In the year 1891, at the special written request of the Secretary of War, Johnson, being then United States district attorney for the eastern district of New York, was instructed by the Attorney General of the United States to institute proceedings on behalf of the government of the United States for the condemnation for a mortar battery of certain lands on Staten Island, New York, adjacent to Fort Wadsworth in that district. With such instructions the Attorney Gen-

eral inclosed a copy of the Secretary's request, and stated that he acted agreeably thereto.

Proceeding under the above employment in the name of the government of the United States, Johnson took steps to acquire such lands by proceedings for their condemnation, and obtained decrees against the persons interested in them. In order to carry on such proceedings it was necessary that he should search and ascertain, and he did search and ascertain, the titles to the lands sought to be condemned. After rendering these services, he presented two bills against the government, which were approved and allowed
[370] by the Attorney *General, one being for $4,000, and the other for $2,500. These services were rendered by him in 1892, and were worth those sums respectively.

In the statement that accompanies the questions certified it is said that for many years before 1892, and for many years prior to Johnson's employment, it was the custom and usage of the government to pay to district attorneys, under like employment and for like services, compensation outside of their annual salaries as fixed by statute at the sum of two hundred dollars.

Johnson had received from the United States for services (other than those above mentioned) rendered for the government in the year 1892, either as district atttorney or under employment or directions of the Attorney General, the sum of $2,250.

In 1891 he rendered services to the government in and about the acquisition of other lands in his district by condemnation proceedings. These services were rendered under employment similar to that above stated, in acquiring lands for like purposes. For the services thus rendered in 1891 he was paid by the government a sum exceeding six thousand dollars. He had also been paid for other services rendered to the government in 1891 further and additional sums. The aggregate so paid for services in 1891 exceeded six thousand dollars by a sum which, together with the amounts paid to him as above stated for services rendered in 1892, equaled the sum of six thousand dollars. Such excess over six thousand dollars existed and appeared after crediting and allowing on the sums so received by him the necessary expenses of his office, including the necessary clerk hire, as audited and allowed to him in the years 1891 and 1892.

After the services rendered in 1892, and after the above sum of six thousand five hundred dollars had been allowed by the Attorney General as stated, the accounting officers of the United States caused a warrant on funds appropriated for the War Department to be drawn for the sum of six thousand five hundred dollars, and "conveyed into the Treasury of the United States." That warrant
[371] "was drawn and conveyed" *against and in payment of the amount which Johnson, for services rendered in 1891, had been paid in excess of the maximum fixed by section 835 of the Revised Statutes. Such conveyance and application were made by the government without his consent, and except as above stated his claim for six thousand five hundred dollars has not been allowed or paid.

After the above services were rendered in 1892 Johnson requested that the amounts so allowed be paid by the officers of the Treasury, but those officers refused to audit or allow his bills or any part of the same, except as above stated, and refused to allow or pay to him any part of the same.

Upon the trial in the circuit court it was admitted that the expense account of Johnson was $1,018.23, which was allowed by the Attorney General; that if the amounts he received for services in obtaining lands in said district (which services were similar in nature, employment, etc., to those here claimed for) are to be computed as part of the amount limited by section 835 of the Revised Statutes, then he had received in excess of the amount so limited for the year 1891 a sum, which, added to the amounts received by him for the year 1892 (and which are fees and emoluments referred to by section 835 of the Revised Statutes), equaled the sum of six thousand dollars and the legitimate office expenses of his office; and that if the services involved in this action and the other similar services stated above are to be accounted as a part of the maximum fixed by section 835 of the Revised Statutes, and if the government, having paid him for one year in excess of such maximum, has the right to recoup, set off, or counterclaim such overpayment against an amount otherwise due, then Johnson had no cause of action as set forth in his present suit.

The circuit court of appeals desires information upon the following questions of law arising out of the above facts:

1. Whether Johnson is entitled to be paid the said sum of six thousand five hundred dollars for the services rendered by him in the year 1892. This question is submitted without reference to the provisions of section 835 of the Revised Statutes.

*2. Whether, if the first question be answered in the affirmative, such compensation should be included in the fees and emoluments of claimant's office within the meaning of sections 834, 835, and 844 of the Revised Statutes. [372]

3. Whether, if both of the above questions are answered in the affirmative, the government of the United States can, under the circumstances stated, apply the six thousand five hundred dollars as such sum was applied, on account of the payments made by the United States for services rendered by Johnson in the year 1891.

The government contends that the services in question were such as the law required the district attorney to render, and consequently that he could receive no special compensation therefor.

In support of this proposition the Assistant Attorney General refers to *Gibson v. Peters*, 150 U. S. 342, 347 [37: 1104, 1106]. That was an action against the receiver of a national bank to recover the value of legal services alleged to have been rendered or offered to be rendered by a district attorney of the United States in a suit brought in the name of the receiver against one McDonald.

In its opinion in that case this court referred to section 380 of the Revised Statutes, providing that "all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury," and observed that the suit against McDonald was one embraced by that section, and that the receiver was, within its meaning, an officer and agent of the United States.

After referring also to sections 770, 823 to 827 inclusive, 1764, and 1765, the court said: "It ought not to be difficult under any reasonable construction of these statutory provisions to ascertain the intention of Congress. A distinct provision is made for the salary of a district attorney, and he cannot receive, on that account, any more than the statute prescribes. But the statute is equally explicit in declaring, in respect to compensation that may be 'taxed and allowed,' that
[373] he shall *receive no other than that specified in sections 823 to 827 inclusive, 'except in cases otherwise expressly provided by law.' It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance, or compensation, in any form whatever, for any service or duty, unless the same is expressly authorized by law, or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. No room is left here for construction. It is not expressly provided by law that a district attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties. Without such express provision, compensation for services of that character cannot be taxed, allowed, or paid. Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named. Nothing in the last clause of section 823 militates against this view. On the contrary, the proper interpretation of that clause supports the conclusion we have reached. Its principal object was to make it clear that Congress did not intend to prohibit attorneys, solicitors, and proctors, representing individuals in the courts of the United States, from charging and receiving, in addition to taxable fees and allowances, such compensation as was reasonable under local usage, or such as was agreed upon between them and their clients. But to prevent the application of that rule to the United States, the words 'other than the government' were inserted. The introduction of those words in that clause emphasizes the purpose not to subject the United States to any system for compensating *district attorneys except that expressly [374]
established by Congress, and therefore to withhold from them any compensation for extra or special services rendered in their official capacity, which is not expressly authorized by statute. Whatever legal services were rendered or offered to be rendered by the plaintiff in the McDonald suit were rendered or offered to be rendered by him as United States district attorney, and in that capacity alone. As such officer he is not entitled to demand compensation for the services so rendered or offered to be rendered."

The full scope of the decision in *Gibson* v. *Peters* is shown by this extract from the opinion in that case. The point in judgment was that the services rendered by Gibson were in discharge of duties imposed upon him by law in relation to suits of a particular kind, and as no statute made provision for additional or special compensation for such services, his claim against the United States for extra pay could not be allowed.

In *United States* v. *Winston*, 170 U. S. 522, 525 [42: 1130, 1132], which involved the question whether the district attorney of the United States for the district of Washington could be allowed special compensation for services rendered by direction or at the instance of the Attorney General in a case in the circuit court of appeals for the ninth circuit sitting at San Francisco, it was held that the duties of the claimant as district attorney of the United States were limited by the boundaries of his district; and that, while he was required to discharge all his official duties within those boundaries, he was not required to go beyond them. The court said: "Whenever the Attorney General calls upon a district attorney to appear for the government in a case pending in the court of appeals, he is not directing him in the discharge of his official duties as district attorney, but is employing him as special counsel. The duties so performed are not performed by him as district attorney, but by virtue of the special designation and employment by the Attorney General, and the compensation which he may receive is not a part of his compensation as district attorney, or limited by the maximum prescribed *therefor. It seems to us that this is the [375]
clear import of the statutes, and we have no difficulty in agreeing with the court of appeals in its opinion upon this question."

In *Ruhm* v. *United States*, 66 Fed. Rep. 531, 532, it was held that, as it is the duty of a district attorney to prosecute in his district all civil actions in which the United States are concerned, he is not entitled to extra compensation for conducting a suit to recover pension money fraudulently secured.

The controlling question, therefore, in the present case is whether Johnson was under a duty imposed upon him as district attorney to perform the services for which he here claims special compensation. If such was his duty as defined by law, then he is for-

bidden by statute from receiving any special compensation on account of such services,—this, for the reason that no appropriation for such compensation has been made by any statute explicitly stating that it was for such additional pay, extra allowance, or compensation. §§ 1764, 1765. On the other hand, if his duties as district attorney did not embrace such services as he rendered and for which he here claims special compensation, then he is entitled to be paid therefor without reference to the regular salary, pay, or emoluments attached to his office.

What relations did the district attorney have, by virtue of his office, with the proceedings instituted in his district for the condemnation of land under the act of 1890 relating to gun and mortar batteries for the defense of New York? That act authorized the Secretary to cause condemnation proceedings to be instituted, in the name of the United States,—such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property in the states wherein the proceedings were instituted. The application of the Secretary to the Attorney General was doubtless made under the provisions of the act of August 1st, 1888 (25 Stat. at L. 357, chap. 728), providing that in every case in which the Secretary of the Treasury, "or any other officer of the government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, au-
[376] thorized to acquire the same for *the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so, and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." By the same act it was provided that "the practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding." 25 Stat. at L. 357, chap. 728.

This statute being in force, the Attorney General directed the defendant in error as district attorney to institute on behalf of the government the condemnation proceedings desired by the Secretary of War. It was of course not contemplated by Congress that the Attorney General should be away from the national capital in order to give his personal attention to the conduct of such proceedings. He therefore directed the district attorney of the district in which the lands were situated to institute and prosecute the required proceedings. Could the district attorney have declined to represent the United States in such proceedings upon the ground that he was not required by law to do so in his official capacity? The answer to that question depends upon the construction to be given to section 771 of the Revised Statutes, which defines generally the duties of district attorneys. That section, as we have seen, makes it the duty of every district attorney to prosecute in his district, not only all crimes and offenses cognizable under the authority of the United States, but "all civil actions in which the United States are concerned." We are of opinion that within the reasonable meaning of that section the proceedings instituted in the Federal court by District *Attorney Johnson to condemn the [377]
lands in question for the benefit of the United States constituted a civil action in which the government was concerned; and that in following the directions of the Attorney General to institute such proceedings and have the lands referred to condemned for the United States he was only discharging an official duty imposed upon him by statute. It would involve a very narrow construction of section 771 to hold that judicial proceedings in a court of the United States to condemn lands for the use of the government were not civil actions in which the United States was concerned. We think that when he attended court in the prosecution of those proceedings he was, within the meaning of section 824, "on the business of the United States."

Under the interpretation placed by us upon sections 771 and 824, it results that, according to the principle announced in *Gibson* v. *Peters*, the defendant in error having been under a duty to represent the United States in the condemnation proceedings referred to, and there being no statute explicitly allowing him extra compensation for the services rendered by him in and about those proceedings, his present claim must be disallowed.

This conclusion, it is contended, is not consistent with the usage and custom which has obtained in the executive departments of the government for many years prior to the year 1892. How long such usage or custom prevailed, upon what specific grounds it rested, and in what way it is evidenced, does not appear from the statement of facts accompanying the certificate of questions. The opinions of Attorneys General to which our attention has been called by counsel certainly do not cover the precise question now before us. Some of them hold that a district attorney is entitled to special compensation for representing the interests of the United States in suits in state courts,—services in such courts not being required by the statutes regulating his official duties. That is a question not involved in the present case. We perceive no reason for holding that there has been any such long-continued practical interpretation by the executive departments *of the gov- [378]
ernment of sections 1764 and 1765 of the Revised Statutes (brought forward from the acts of March 3d, 1839, chap. 82, 5 Stat. at L. 339, 349, § 3; August 23d, 1842, chap. 183, 5 Stat. at L. 510, § 2; and August 26th, 1842,

chap. 202, 5 Stat. at L. 525, § 12) as to justify this court in departing in any degree from such an interpretation of those sections as is required by the obvious import of the words found in them. Such a practice may be resorted to in aid of interpretation, but it cannot be recognized as controlling when the statute to be interpreted is clear and explicit in its language and its meaning not doubtful. *United States* v. *Graham*, 110 U. S. 219, 221 [28: 126, 127]; *United States* v. *Healey*, 160 U. S. 136, 141 [40: 369, 371].

It may, however, be observed that some of the opinions of Attorneys General rest upon rules of construction that forbid the allowance of the claim of the defendant in error. In 1855 special or extra compensation was claimed by a district attorney for services rendered under employment by the Navy Department, in a certain case in a circuit court of the United States in which the government was a party. Attorney General Cushing referred to the act of February 26th, 1853, regulating "the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes." 10 Stat. at L. 161, chap. 80. That act declared, among other things, that in lieu of the compensation then allowed to the officers named no other compensation should be taxed and allowed. It also established for district attorneys a fee for each day "of his necessary attendance in a court of the United States on the business of the United States." The provisions of the act of 1853 have been preserved in chapter sixteen of title 13 of the Revised Statutes. After referring to some former opinions given by him, Mr. Cushing said: "But in a matter like that now before me, which is of the direct official business of a district attorney in the court of the United States for his district, which is of the very class of business for which the act of 1853 expressly and in plain terms provides, and as to which any other compensation is emphatically excluded by the strong terms of that
[379] act, it does not appear to me that *any extra or special compensation can be lawfully paid to the district attorney. Nor, in my judgment, is the case taken out of the general rule by the fact that the suit concerns immediately the business of the Navy Department, and has been the subject of instructions from the Secretary of the Navy. All the civil business of the government concerns some one of its departments, and may require the attention of its head. It cannot be that a suit in the name of the United States, pending in the district or circuit court, is out of the scope of the regular duty of a district attorney because of its arising in the business of the Navy Department rather than the Treasury or any other department; nor that in such a case the service of the district attorney becomes that of counsel specially retained by the Department. This latter enactment must have been designed, it seems to me, for contingencies where a head of department needs professional services in a case not provided for by the particular terms of the law, and the special compensation to a district attorney for the performance of such a service must depend on that fact, not on the fact that he has been instructed by the head of department. A contrary construction would lay the foundation for extra compensation to district attorneys in almost every case in which they appear in civil actions in which the United States are concerned." 7 Ops. Atty. Gen. 84, 86.

At a later date, May 25th, 1858, Attorney General Black had before him an application for special allowance to a district attorney for services rendered by him. The claim, he said, involved three questions, the first of which was, Can the district attorney, in any case, charge more for his services than the fee-bill expressly allows? He said: "The first question does not, for a moment, admit of any other reply than a direct negative: the district attorney can receive such compensation, and such only, as the fee-bill gives. This is not only the general policy of the government, but it is expressly declared to be the will of Congress by the act of 1853. When, therefore, a district attorney makes a charge against the Treasury for services, he must support it by showing some clause in the fee-bill which authorizes him to recive what he *claims. When a duty [380]
is enjoined upon him by the law of his office, and not merely by the request of a department, he is bound to perform it and take as compensation what the law gives him. That is his contract; and if it be a bad one for him he has no remedy but resignation. The subject is not open to a new bargain between him and any other officer of the government. All criminal prosecutions and all civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can be legally allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee-bill is altogether inadequate. I cannot make out, in any way satisfactory to my own mind, the ingenious distinction which would pay the officer as attorney what the fee-bill gives, and then pay him besides a *quantum meruit* for managing the same case as counsel." 9 Ops. Atty. Gen. 146, 147.

In an opinion rendered March 13th, 1888, Attorney General Garland, upon an extended review of the adjudged cases, said: "From these authorities it may be derived that the elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation whose amount is fixed by law or regulation shall be provided for their payment." 19 Ops. Atty. Gen. 121, 125, 126.

The same views were expressed by the Second Comptroller of the Treasury in an opinion delivered by him as late as 1893, in *Earhart's Case*. Cousar's Dig. 12.

We are of opinion that Congress intended by sections 1764 and 1765 to uproot the practice under which, in the absence of any stat-

ute expressly authorizing it, extra allowances or special compensation were made to public officers for services which they were required to render in consideration only of the fixed salary and emoluments established for them by law. Our duty is to give effect to the legislation of Congress, and not to defeat it by an interpretation plainly inconsistent with the words used.

[381] *The conclusion is that as the defendant in error was under a duty as district attorney to represent the United States in the condemnation proceedings referred to (§ 771); as his attendance in court on those proceedings was on the business of the United States (§ 824); as no statute provides for extra or special compensation for services of that character; and as the existing statutes declare that no officer in any branch of the public service shall, directly or indirectly, or in any form whatever, receive from the Treasury of the United States any additional pay, extra allowance, or compensation, unless the same be authorized by law and the appropriation therefor expressly states that it is for such additional pay, extra allowance, or compensation (§§ 1764, 1765, Act of June 20th, 1874, chap. 328), the claim of the defendant in error must be rejected, and judgment rendered for the United States.

For the reasons stated *the first question is answered in the negative;* and under the certificate the answer to the other questions becomes both unnecessary and immaterial.

It will be so certified.

Dissenting: Mr. Justice **Shiras** and Mr. Justice **Peckham.**

UNITED STATES, *Appt.*,
v.
ANDREW J. MATTHEWS and Thomas Gunn.

(See S. C. Reporter's ed. 381-389.)

Reward for arrest of criminal—deputy marshals may receive the reward—statute as to compensation.

1. A reward expressly offered by competent legislative and executive authority for the arrest of a criminal by a public officer, is not contrary to public policy.
2. When the statute gives the attorney general discretion to whom to offer the reward, a general offer of a reward for an arrest includes deputy marshals, who may take the offered reward for the arrest.
3. When the reward is sanctioned by an appropriation act and is within the offer of the attorney general it is removed from the provisions of other statutes denying extra compensation to officers.

[No. 79.]

Argued December 8, 1898. Decided March 6, 1899.

APPEAL from a judgment of the Court of Claims in favor of Andrew J. Matthews and Thomas Gunn, plaintiffs, against the United States for the recovery of the amount of a reward offered for the arrest of a criminal. *Affirmed.*

See same case below, 32 Ct. Cl. 123.

The facts are stated in the opinion.

Messrs. **Louis A. Pradt,** Assistant Attorney General, and *John G. Capers* for appellant.

Messrs. **Richard R. McMahon** and **George A. King** for appellees.

*Mr. Justice **White** delivered the opinion [382] of the court:

The court below held that the plaintiffs were entitled to recover the sum by them claimed (32 Ct. Cl. 123), and the United States prosecutes this appeal. The origin of the controversy and the facts upon which the legal conclusion of the court was rested are these: The two plaintiffs were, one a regular and the other a specially appointed deputy marshal. They claimed five hundred dollars, the sum of a reward offered by the Attorney General for the arrest and conviction of one Asa NcNeil, who was accused of having been concerned in the killing of one or more revenue officers at a village in Holmes county, Florida. McNeil was arrested by the officers in question, tried, and convicted. This suit was brought in consequence of a refusal to pay the reward. The act of March 3, 1891, "making appropriations for sundry civil expenses of the government for the fiscal year ending June the thirtieth, eighteen hundred and ninety-two, and for other purposes," under the heading "Miscellaneous," contained the following appropriation: "Prosecution of crimes; for the detection and prosecution of crimes against the United States, preliminary to indictment . . . under the direction of the Attorney General, . . . thirty-five thousand dollars." Under the authority thus conferred the Attorney General, on July 31, 1891, addressed a letter to the marshal of the northern district of Florida, saying: "Your letter of July 24th is received. You are authorized to offer a reward of five hundred dollars (500) for the arrest and delivery to you, at Jacksonville, of Asa McNeil, chief of conspirators, who fired upon revenue deputies at Bonifay, Holmes county, last fall, this reward *to be paid upon conviction of [383] said McNeil." A capias for the arrest of McNeil was executed by the deputies in question on the 11th day of July, 1892, the court below finding that the arrest was due to their exertions.

Beyond doubt the appropriation empowered the Attorney General to make the offer of reward, and hence in doing so he exercised a lawful discretion vested in him by Congress. It is also clear that the offer of the reward made by the Attorney General was broad enough to embrace an arrest made by the deputies in question. If, then, the right to recover is to be tested by the provisions of the statute and by the language of the offer of reward, the judgment below was correctly rendered. The United States, however, relies for reversal solely on two propositions, which it is argued are both well founded. First. That as at common law it was against

public policy to allow an officer to receive a reward for the performance of a duty which he was required by law to perform, therefore the statute conferring power on the Attorney General and the offer made by him in virtue of the discretion in him vested, should be so construed as to exclude the right of the deputies in question to recover, since as deputy marshals an obligation was upon them to make the arrest without regard to the reward offered. Second. That even although it be conceded that the officers in question were otherwise entitled to recover the reward, they were without capacity to do so because of the general statutory provision forbidding "officers in any branch of the public service or any other person whose salary, pay, or emoluments are fixed by law or regulations," from receiving "any additional pay, extra allowance or compensation in any form whatever" (Rev. Stat. 1765), and because of the further provision "that no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law . . ." (18 Stat. at L. 109, chap. 328, § 3). The first of these contentions amounts simply to saying that though the act of Congress vested the amplest discre-
[384]tion on the subject *in the Attorney General, and although that discretion was by him exercised without qualification or restriction, it becomes a matter of judicial duty in construing the statute and in interpreting the authority exercised under it to disregard both the obvious meaning of the statute and the general language of the authority exercised under it by reading into the statute a qualification which it does not contain and by inserting in the offer of reward a restriction not mentioned in it, the argument being that this should be done under the assumption that it is within the province of a court to disregard a statute upon the theory that the power which it confers is contrary to public policy. It cannot be doubted that in exercising the powers conferred on him by the statute, the Attorney General could at his discretion have confined the reward offered by him to particular classes of persons. To invoke, however, judicial authority to insert such restriction in the offer of reward when it is not there found, is to ask the judicial power to exert a discretion not vested in it, but which has been lodged by the lawmaking power in a different branch of the government. Aside from these considerations the contention as to the existence of a supposed public policy, as applied to the question in hand, is without foundation in reason and wanting in support of authority.

It is undoubted that both in England and in this country it has been held that it is contrary to public policy to enforce in a court of law, in favor of a public officer, whose duty by virtue of his employment required the doing of a particular act, any agreement or contract made by the officer with a *private individual*, stipulating that the officer should receive an extra compensation or reward for the doing of such act. An agreement of this character was considered at common law to be a species of quasi extortion, and partaking of the character of a bribe. *Bridge* v. *Cage*, Cro. Jac. 103; *Badow* v. *Salter*, Wm. Jones, 65; *Stotesbury* v. *Smith*, 2 Burr. 924; *Hatch* v. *Mann*, 15 Wend. 44; *Gillmore* v. *Lewis*, 12 Ohio, 281; *Stacy* v. *State Bank of Illinois*, 5 Ill. 91; *Davies* v. *Burns*, 5 Allen, 349; *Brown* v. *Godfrey*, 33 Vt. 120; *Morrell* v. *Quarles*, 35 Ala. 544; *Day* v. *Punam Ins. Co.* 16 *Minn. 408,[385]
414; *Hayden* v. *Souger*, 56 Ind. 42 [26 Am. Rep. 1]; *Matter of Russell's Application*, 51 Conn. 577 [50 Am. Rep. 55]; *Ring* v. *Devlin*, 68 Wis. 384; *St. Louis, I. M. & S. Ry. Co.* v. *Grafton*, 51 Ark. 504. The broad difference between the right of an officer to take from a private individual a reward or compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority and sanctioned by the executive officer to whom the legislative power has delegated ample discretion to offer the reward, is too obvious to require anything but statement.

Nor is there anything in the case of *Pool* v. *Boston*, 5 Cush. 219, tending to obscure the difference which exists between the offer of a reward by competent legislative and executive authority and an offer by one not having the legal capacity to do so. In that case, the plaintiff, a watchman in the employ of the city of Boston, while patrolling the streets, in the ordinary performance of his duty, discovered and apprehended an incendiary, who was subsequently convicted. The action was brought to recover the amount of a reward which the city government had offered "for the detection and conviction of any incendiaries" who had set fire to any building in the city, or might do so, within a given period. Solely upon the authority of decisions denying the right of a public officer to recover from a private individual a reward or extra compensation for the performance of a duty owing to the party sought to be charged, it was held that there could be no recovery. The city government of Boston, acting in its official capacity, and in the exercise of the general powers vested in cities and towns by the law of Massachusetts, doubtless had authority to offer rewards for the detection and conviction of criminals. *Freeman* v. *Boston*, 5 Met. 56; *Crawshaw* v. *Roxbury*, 7 Gray, 374. But no act of the legislature, expressly or by implication, had intrusted municipal authorities with the discretion of including in an offer of reward public officers whose official duty it was to aid in the detection and conviction of criminals. There is not the slightest intimation contained in the opinion in that case that if the reward in *question had[386]
been offered within the limits of a discretion duly vested by the supreme legislative authority of the commonwealth that the court would have considered that it was its duty to deny the power of the commonwealth, or by indirection to frustrate the calling of such power into play, by reading into the legislative authority by construction a limitation which it did not contain.

Looking at the question of public policy by the light of the legislation of Congress, on other subjects, it becomes clear that the expediency of offering to public officers a reward as an incentive or stimulus for the energetic performance of public duty has often been resorted to. As early as July 31, 1789, in chapter 5 of the statutes of that year, a portion of the penalties, fines, and forfeitures which might be recovered under the act, and which were not otherwise appropriated were directed to be paid to one or more of certain officers of the customs. Like provisions were embodied in section 69 of chapter 35 of the act of August 4, 1790; section 2 of chapter 22 of the act of May 6, 1796; and section 91 of chapter 22 of the act of March 2, 1799. Similar provisions are also contained in the one hundred and seventy-ninth section of chapter 173, act of June 30, 1864, and the amendatory section, No. 1, of chapter 78 of the act of March 3, 1865. So also by section 3 of the anti-moiety act, chapter 391, June 22, 1874, a discretion was vested in the Secretary of the Treasury to award to officers of the customs as well as other parties, not exceeding one half of the net proceeds of forfeitures incurred in violation of the laws against smuggling. As said by Mr. Justice Grier, delivering the opinion of the court in *Dorsheimer* v. *United States*, 7 Wall. 173 [19: 187]: "The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes."

The fact that the statute vested a discretion in the Attorney General to include or not to include, when he exercised the power to offer a reward, particular persons within the offer by him made, and that in the instant case the discretion was so availed of as not to exclude deputy marshals from
[387] taking *the offered reward, renders it unnecessary to determine whether a deputy marshal is an officer of the United States within the meaning of section 1765 of the Revised Statutes and section 3 of the Act of June 20, 1874, to which reference has already been made. As the reward was sanctioned by the statute making the appropriation, and was embraced within the offer of the Attorney General, it clearly, under any view of the case, was removed from the provisions of the statutes in question. The appropriation act being a special and later enactment operated necessarily to engraft upon the prior and general statute an exception to the extent of the power conferred on the Attorney General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the provisions of the later and special act. *Judgment affirmed.*

Mr. Justice **Harlan** and Mr. Justice **Peckham** dissented, upon the ground that the offering or payment of a reward to a public officer, for the performance of what was at all events nothing more than his official duty, was against public policy, and the act of Congress authorizing the Attorney General to offer and pay rewards, did not include or authorize the offer or payment of any reward to a public officer under such circumstances.

Mr. Justice **Brown** concurring in the result only:

Did the opinion of the court rest solely upon the ground stated in the opinion of the court of claims, that a deputy marshal is not an "officer," or "other person whose salary, pay, or emoluments are fixed by law or regulations," as specified in Revised Statutes, section 1765; nor a civil officer receiving from the United States a salary or compensation allowed by law, and therefore not within the act of June 20, 1874 (18 Stat. at L. 109),—I should have been disposed, though with some doubt, to acquiesce in the opinion. While I think a deputy marshal is beyond all peradventure an officer of the United States, yet as his compensation is by fees not paid directly by the government, but by agreement with the marshal, subject only to the limitation that such fees "shall not exceed three fourths of the fees and emoluments received or payable" to the marshall "for services rendered by him" (such deputy), I think it a grave question whether he is within the spirit of either of the sections above quoted. I consider it a reasonable construction to hold that these sections are limited to those who receive a salary or other compensation directly from the government, or one of its departments, and doubt their application *to one who, although [388]
holding a permanent appointment as an officer, receives no pay directly from the government, but only such compensation as his superior may choose to allow him. (*Douglas* v. *Wallace*, 161 U. S. 346 [40: 727]).

But I cannot concur in so much of the opinion as intimates that, under an act of Congress making an appropriation for the prosecution of crime, under the direction of the Attorney General, the Attorney General has a discretion to direct any portion of it to be paid to one of a class of persons who are forbidden by a previous act from receiving any additional pay or compensation beyond such as is allowed to them by law. This could only be done upon the theory stated in the opinion that the appropriation act, being a special and later enactment, operated necessarily to ingraft upon the prior and general statute an exception to the extent of the power conferred upon the Attorney General. I do not think the two acts stand in the relation of a prior general statute and a subsequent special one, but rather the converse. The prior acts are general acts, applicable to all officers of government whose salaries or compensations are fixed by law; the latter act makes a particular appropriation for the detection of crime, and vests the Attorney General with power to direct to whom it shall be paid. But there can be no inference from it that he has a discretion to pay it to anyone who is forbidden by law to receive it. I had assumed it to be the law that a later act would not be held to qualify or repeal a prior one, unless there were a positive repugnancy between the provisions of the new law and

the old, and even then the prior law is only repealed to the extent of such repugnancy. This was the declared doctrine of this court in *Wood* v. *United States*, 16 Pet. 342 [10: 987]; in *McCool* v. *Smith*, 1 Black, 459 [17: 218]; in *Daviess* v. *Fairbairn*, 3 How. 636 [11: 760]; in *Cope* v. *Cope*, 137 U. S. 682 [34: 832]; in *Furman* v. *Nichol*, 8 Wall. 44 [19: 370]; in *Ex parte Yerger*, 8 Wall. 85 [19: 882]; *United States* v. *Sixty-Seven Packages of Dry Goods*, 17 How. 85 [15: 54]; and in *Red Rock* v. *Henry*, 106 U. S. 596 [27: 251].

In this case I see no intent whatever on the part of Congress to vary or qualify the prior law. Both enactments may properly stand together, and the prior ones be simply regarded as limiting the application of the later.

[389] *In justice to the Attorney General it ought to be said that his offer of $500 for the arrest and delivery of McNeil was a general one; and that he did not assume to say that any officer of the government, who was forbidden by law from receiving extra compensation, should receive any portion of the reward. There was no attempt on his part to disregard the previous limitation or to offer it to anyone who was forbidden by law from receiving it. The subsequent action of the Acting Attorney General in refusing to pay Matthews the reward upon the ground that the arrest of McNeil was performed in the line of his duty is a still clearer intimation that no such construction as is put by the court upon the offer of reward was intended by the Attorney General.

For these reasons, I cannot concur in the opinion, though I do not dissent from the result.

MRS. BETTIE ALLEN *et al.*, *Plffs. in Err.*,
v.
OGDEN SMITH.

OGDEN SMITH, *Plff. in Err.*,
v.
MRS. BETTIE ALLEN *et al.*

(See S. C. Reporter's ed. 389-404.)

Government bounties—bounty on sugar goes to the manufacturer.

1. Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized.
2. The manufacturer of the sugar, although not the producer of the cane, is entitled to the bounty given by the act of Congress of August 28, 1894, to producers and manufacturers who had complied with the provisions of the bounty law of 1890, which had been repealed.

[Nos. 168 & 176.]

Argued January 19, 1899. Decided March 6, 1899.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree of that Court varying and affirming the decree of the District Court of that State, and decreeing that the government bounty upon sugar earned upon the estate left by Richard H. Allen, deceased, be divided equally, and one half be distributed among his heirs as an unwilled portion, and that the other half be delivered to his widow and legatee, Mrs. Bettie Allen. *Reversed* and case remanded for further proceeding.

See same case below, 48 La. Ann. 1036, 49 La. Ann. 1096, 1112.

Statement by Mr. Justice **Brown:**

*This was a controversy arising over the [390] distribution of the estate of Richard H. Allen, a large sugar planter of La Fourche parish, Louisiana, who died September 14, 1894, leaving a will of which the following clauses only are material to the disposition of this case:

"I give to my wife, Bettie Allen, one half on my Rienzi plantation and one half of all tools, mules, etc. The names of my executors, etc., will be named hereafter. My executors shall have from one to five years to sell and close up the estate, as I fear property will be very low and dull. They can sell part cash, part on time, eight per cent interest with vendor's lien. I will that my wife do have one half of everything belonging to Rienzi, except the claim due me by the United States; that and other property I will speak of further on. I appoint as my executors, Ogden Smith and W. F. Collins, residing on Rienzi plantation. I also appoint Mrs. Bettie Allen, executrix. I give them full power to sell Rienzi plantation whenever they find a good offer for all of the property there belonging. When it is sold half of all the proceeds, cash, notes, etc., is to belong to my dear wife, Bettie Allen. The other half will be spoken of hereafter. As I fear property will be very low, I give my executors five years to work for a good price. In the meantime that they are waiting to sell, the place can be rented or worked so as to pay all taxes and other charges; any over that to go to Mrs. Bettie Allen's credit."

Letters testamentary were issued to William F. Collins, Ogden Smith, and M. Elizabeth Greene, the widow, better known as Bettie Allen, who were authorized by special order to carry on and work the plantation, etc.

The executors did not agree as to the disposition of the estate; Mrs. Allen and Collins filing a provisional account of their administration and praying for its approval, while Smith filed a separate account, prayed for its approval, and stated that he disagreed with his coexecutors in several particulars, and therefore filed an account in which his coexecutors did not concur. The principal dispute seems to have been over the cash left by the deceased, which Mrs. Allen claimed under the will, and Smith insisted belonged to the legal heirs who *were [391] not cut off by the will. Mrs. Allen also claimed the crop of the Rienzi plantation, while Smith insisted it belonged

to the legatees named in the will, to whom the realty was bequeathed. Oppositions to the approval of both accounts were also filed by various parties interested in the estate, and for various reasons not necessary to be here enumerated. Judgment was delivered by the district court, June 10, 1895, settling the questions in dispute between the parties interested, and an appeal was taken to the supreme court of Louisiana, which rendered an opinion March 9, 1896, varying the decree of the court below to the extent of holding Mrs. Allen entitled to the net proceeds of the crop for the year 1894, but affirming it in other respects. (48 La. Ann. 1036.) No reference, however, was made in the proceedings up to this time to the government bounty upon sugar, amounting to $11,569.35, which was collected by Mrs Allen, and which forms the subject of the present litigation.

This suit was initiated by a petition filed August 18, 1896, by Collins and Mrs. Allen for the approval of their final account, and of the proposed distribution of the undistributed assets, among which was the bounty granted by Congress for sugar produced on the Rienzi plantation for the year 1894, the portion received, $11,569.35, being all that the estate was entitled to out of the appropriation made by Congress for this purpose. "This amount the accountants proposed to turn over to Mrs. Bettie Allen as the owner of the net proceeds of the crop of 1894 on the Rienzi plantation, under the will of the testator and the decree of the supreme court."

Smith also filed a final account and an opposition to that of Mrs. Allen and Collins, particularly opposing giving any part of the bounty to Mrs. Allen, stating that "this money formed no part of the crop of 1894, is an unwilled asset, and must be distributed among the legal heirs who have not been cut off by the will, in accordance with the petitioner's final account filed herewith." These heirs, as stated by him in his account, were (1) the estate of Thomas H. Allen, Sen., a deceased brother of the testator, represented by J. Louis Aucoin, administrator; (2) two children of Mrs. Myra Turner, a de-
[392] ceased *sister; (3) five children of Mrs. Cynthia Smith, a deceased sister. Opposition was also filed by these several classes of heirs to the accounts of Mrs. Allen and Collins, and by certain other heirs who were not recognized by the executors, to that of Smith. Upon consideration of these various pleadings and the testimony introduced in connection therewith, the district court was of opinion that the bounty formed no part of the crop proper or the proceeds thereof. "Though based on the crop as a means of calculation, and conditioned on the production of the crop by the owner of the plantation under certain rules, it was a pure gratuity from the government;" that it did not therefore go to Mrs. Allen under the will, but to the heirs as an unwilled portion.

An appeal was taken to the supreme court by the Smith heirs, by Ogden Smith, executor, and by Mrs. Allen and Collins. That court first held that the bounty was a gratuity from the government, though based upon an estimate of the crop as a means of calculation; that its allowance was conditioned on the fulfilment by the deceased of certain prerequisites; that the equitable claim of the deceased to the bounty had been created during his lifetime, the license obtained and all conditions precedent complied with; that it formed no part of the crops of 1894 or 1895, nor of their proceeds; that the executors did nothing but make the necessary proofs preparatory to its collection and receive payment of the money. "It must consequently be classed as an unwilled asset of the deceased, and not as part of the net proceeds of the crop of 1894, passing, under the will, to Mrs. Betty Allen;" and that it must pass to the account of the legal heirs. (49 La. Ann. 1096.) Upon a rehearing, applied for by both parties, that court modified its views, and adjudged that the bounty money in controversy be divided equally; that one half be distributed among the heirs as an unwilled portion, and that the other half be delivered to Mrs. Allen as legatee. From this decree both parties sued out a writ of error from this court. 49 La. Ann. 1112.

Messrs. **James F. Pierson,** *Charlton R. Beattie,* and *Taylor Beattie* for Mrs. Bettie Allen, as executrix and individually, and *W. F. Collins,* executor, plaintiffs in error in No. 168, and defendants in error in No. 176.

Messrs. **Charles Payne Fenner,** *Charles E. Fenner,* and *Samuel Henderson, Jr.,* for J. L. Aucoin, administrator, plaintiff in error in No. 176 and defendant in error in No. 168.

Mr. **Henry Chiapella** and *L. F. Suthon* for Smith *et al.,* defendants in error in No. 168, and plaintiffs in error in No. 176.

*Mr. Justice **Brown** delivered the opinion [393]
of the court:

This case involves the question whether, under the act of Congress and the will of Richard H. Allen, the bounty of eight tenths of one per cent per pound, granted by Congress to the "producer" of sugar, was payable to his widow or to his heirs at law.

In the course of the litigation in the state courts a large number of questions were raised and decided which are not pertinent to this issue. So far as these questions depend upon the construction of state laws or of the will of Mr. Allen, they are beyond our cognizance. So far as the question of bounty depends upon the construction of that law, the decision of the supreme court is equally binding upon us; but so far as it depends upon the construction of the act of Congress awarding such bounty, it is subject to reexamination here.

The course of legislation upon the subject of the sugar bounty is set forth at length in the opinion of this court in *United States* v. *Realty Co.* 163 U. S. 427 [41: 215], and is briefly as follows:

By the tariff act of October 1, 1890 (26 Stat. at L. 567), it was provided in paragraph 231 that on and after July 1, 1891, and until July 1, 1905, there should be paid "to the producer of sugar" a variable bounty, dependent upon polariscope tests, "under

such rules and regulations as the Commissioner of Internal Revenue . . . shall prescribe." Then follow three paragraphs requiring the producer to give notice to the Commissioner of Internal Revenue of the place of production, the methods employed, and an estimate of the amount to be produced, together with an application for a license and an accompanying bond. The Com-
[394]missioner was required to issue *this license, and to certify to the Secretary of the Treasury the amount of the bounty for which the Secretary was authorized to draw warrants on the Treasury. This act was repealed August 28, 1894 (28 Stat. at L. 509), while the crop of 1894 was in progress of growth, and about a fortnight before the death of Mr. Allen. But by a subsequent act of March 2, 1895 (28 Stat. at L. 910, 933), it was enacted that there should be paid to those "producers and manufacturers of sugar" who had complied with the provisions of the previous law a similar bounty upon sugar manufactured and produced by them previous to August 28, 1894, upon which no bounty had been previously paid. As the sugar in question in this case was not manufactured and produced prior to August 28, 1894, this provision was not applicable; but there was a further clause (under which the bounty in this case was paid) to the effect that there should be paid to "those producers who complied with the provisions" of the previous bounty law of 1890, by filing an application for license and bond thereunder required, prior to July 1, 1894, and who would have been entitled to receive a license as provided for in said act, a bounty of eight tenths of a cent per pound on the sugars actually manufactured and produced during that part of the fiscal year ending June 30, 1895, comprised in the period commencing August 20, 1394, and ending June 30, 1895, both days inclusive. The constitutionality of this act was affirmed by this court in *United States* v. *Realty Co.* 163 U. S. 430 [41: 216].

At the time of Mr. Allen's death, September 19, 1894, and for many years prior thereto, he was the owner of a valuable sugar plantation, upon which he was engaged in the cultivation of cane and the manufacture of sugar. At this time there was standing in his fields a large crop of cane nearly ready for harvesting. In anticipation of this crop and of the manufacture of sugar therefrom, Mr. Allen had complied with all the provisions of the bounty law, and would, but for the repeal of the act of 1894, about one month prior to his death, have been entitled to collect the bounty. While, then, there was no bounty provision in force at
[395]the time of his death,*Congress, in March of the following year, enacted the bounty law above specified in fulfilment of its moral obligation to recompense those who had planted their cane upon the supposition that the bounty granted by the act of 1890 would be continued. The crop of cane upon his plantation at his death was harvested by his executors at the expense of the funds in their hands, which expense was deducted from the gross proceeds of the sugar.

The material provisions of his will are as follows:

1. "I give to my wife, Bettie Allen, one half on my Rienzi plantation and one half of all tools, mules, etc."

2. "My executors shall have from one to five years to sell and close up the estate."

3. "I will that my wife do have one half of everything belonging to Rienzi plantation, except the claim due me by the United States." (This was not the claim for bounty.)

4. "When it" (the plantation) "is sold, half of all the proceeds, cash, notes, etc., is to belong to my wife, Bettie Allen." "As I fear property will be very low, I give my executors five years to work for a good price."

5. "In the meantime, that they are waiting to sell, the place can be rented or worked to pay all taxes and other charges, any over that to go to Mrs. Bettie Allen's credit."

Under the last clause of the will the executors, while awaiting a favorable opportunity to sell the plantation, were authorized to work it so as to pay all taxes and other charges, and to place the net proceeds to Mrs. Allen's credit. In construing this clause the supreme court of Louisiana held, upon the first hearing (48 La. Ann. 1045), that Mistress Bettie was entitled to the net proceeds of the crop of the Rienzi plantation for the years 1894-1895. At the time of the filing of their first account by the executors, the crop of 1894 had not been sold by them, and the bounty granted by the act of March 2, 1895, had not been collected; consequently these two items were reserved to be afterwards accounted for by the executors. A further question, however, arose, and that was as to whether, in making up the net proceeds of the crop of 1894, the expenses incurred prior to the death of the testator *should be [396]
deducted, as well as those incurred by the executors after the death of the testator. Both the district court and the supreme court were of opinion that the will contemplated and dealt with the renting or cultivation of the plantation after the death of the testator, and during such a period of time as it might remain under the administration of the executors pending a sale; that the date at which the expenses were to begin was evidently that at which the administration of the executors commenced, and only those incurred during their administration should be deducted from the proceeds of the crop, in order to ascertain the net proceeds thereof, including the expenses of making the sale. 49 La. Ann. 1096.

The supreme court was further of the opinion that the bounty money which was collected from the government by the executors formed no part of the crops of 1894 and 1895, nor of their proceeds; that it was not *in esse* at the time those crops were grown and gathered; that the executors did nothing but make the necessary proofs preparatory to its collection and receive payment of the money, and that it should therefore be classed as an unwilled asset of the deceased, and not as part of the net proceeds of the crop of 1894, passing, under the will,

to Mrs. Allen. 49 La. Ann. 1096. But, upon a rehearing of this question (49 La. Ann. 1112), the supreme court modified its views to a certain extent, treated the case as one depending upon the question who was the producer of the crop within the meaning of the act of Congress, and held that the producer of the cane was to be the first to receive the benefit of the bounty on complying with certain formalities; that the act placed the manufacturer of the sugar, in the matter of the bounty laws, in a secondary position; but that both production and manufacture were essential in order to enable the producer to recover the bounty; that to determine who was the producer it was necessary to consider the questions of title and ownership; that the crop had been planted and cultivated by Allen, and all expenses to the date of his death were paid from his funds; that he had earned the value of the crop on [397]that date,*and had also earned a proportionate share of the bounty, not because the bounty was a part of the crop or its proceeds, but because it was granted to the producer of the crop; that in determining who was the producer, it could not exclude from consideration the labor applied under the direction of the owner of the plantation and the amount expended by him; that Mistress Bettie was not the exclusive producer, and was, therefore, not entitled to the whole bounty of the government granted to the producer who produced the entire thing—a crop.

In its opinion upon the rehearing the supreme court adjudged that under the will of Allen the proceeds of the manufacture of sugar carried on after his death were for the account of Mrs. Allen, and not for that of the estate, and that as a consequence of this construction Mrs. Allen was the manufacturer of the sugar made in the sugar house; that is to say, that whilst the executors may have manufactured the sugar they did so as the agents and for the account of Mrs. Allen, and she was therefore the producer of the sugar, in so far as the manufacture thereof was concerned. In delivering the opinion the court used the following language: "But there are other clauses of the will which, in our view, extend her right and show that she was the producer after the death of Mr. Allen. She paid all the expenses of the crop; she was to receive the proceeds under the terms of the will; indeed, she was the owner of the crop. She can well be considered, as we think, the producer. We desire it to be well understood that, in our opinion, the bounty money is no part of the crop or proceeds of the crop. The question was: Who was the owner and producer of the crop after the death of the testator?"

Having thus determined that under the will of Mr. Allen she, through the executors, was entitled to all the proceeds of the manufacture of sugar in the sugar house, the court proceeded to take away from Mrs. Allen a part of these proceeds upon the theory that, by the act of Congress, the bounty was given, not to the manufacturer of the sugar, but to the producer of the cane. In doing this [398]it necessarily took from Mrs. *Allen a part of the bounty belonging to her as manufacturer of sugar under the act of Congress, and gave it to the legal heirs of Allen, because they had produced the cane from which the sugar had been manufactured. This, therefore, necessarily raised a Federal question, since it involved a construction of the act of Congress. The theory upon which the court did this is thus stated in the opinion: "The end of the bounty was to encourage the production of cane. It devolved upon us to determine by whom the cane was produced. In our judgment, after carefully reading the act, it is evident that the producer was to be the first to receive the benefit of the bounty. . . . The act (although it includes the manufacture of cane into sugar as one of the essentials) places the manufacture of the sugar in matter of the bounty scheme in a secondary position. In other words, in our view production was a first and manufacture a secondary consideration. Each, however, was essential in order to enable the producer to recover the bounty." The conclusion of the court was that, as the cost of cultivation was about equal to the cost of manufacture, the heirs at law were entitled to one half of the bounty and Mrs. Allen the other half.

The correctness of this construction is the question presented for our consideration. In the final production of sugar there are two distinct processes involved: (1) The raising of the cane; (2) the manufacture of the sugar from the cane so raised. If the cane be raised and the sugar be manufactured by the same person. he is beyond peradventure the "producer" of the sugar within the meaning of the statute; but if the cane be raised by one person and the sugar manufactured by another, which is the producer within the intent of the act? Or, if, as in this case, the cane be raised by the testator and he die while the crop is growing, and his executors reap it and convert it into sugar, which is the producer and which is entitled to the net proceeds of the crop? Conceding the question of what are the net proceeds of the crop is one determinable by the state courts alone, it is so commingled with the Federal question, who, under the act of Congress, was the producer of this crop, that it is scarcely possible to give a construction to the *one[399] without also taking into consideration the bearing of the other. In this particular the case is not unlike that of *Briggs* v. *Walker*, 171 U.S. 466 [*ante*, 243], in which, where certain moneys had been collected of the United States by Briggs' executors, this court assumed to determine who were the "legal representatives" of Briggs, and for whose benefit under the act of Congress the money had been collected.

It is quite evident that Allen himself was not the producer of the sugar. He had planted the crop of cane upon his own plantation. He had given notice and a bond to the Commissioner of Internal Revenue, and had applied for a license; but he had done nothing toward the production of the sugar at the time of his death beyond raising the cane, which certainly would not have entitled him to be considered a producer of the sugar. The word "producer" does not differ essen-

tially in its legal aspects from the word "manufacturer," except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market. In the case of sugar a process of strict manufacture is also involved in converting the cane into its final product. In a number of cases arising in this court under the revenue laws, it is said that the word "manufacture" is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. That such product is often the result of several processes, each one of which is a separate and distinct manufacture, and usually receives a separate name; or, as stated in *Tide Water Oil Co.* v. *United States,* 171 U. S. 210, 216 [*ante* 139]; "Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, and several of which may be required to make the final product. Thus, logs are first manufactured into boards, planks, joists, scantling, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings, and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for
[400]*which the article so manufactured receives a different name." So the one who raises the cane is undoubtedly entitled to be considered the producer of the cane, but he is not the producer of the sugar. That appellation is reserved for him who turns out the finished product.

Neither can Mrs. Allen, nor the heirs of her husband, be said to be the direct producers of the sugar. Neither of them was the owner of the crop, which belonged to the plantation while growing, and would, as hereinafter stated, have passed to the purchaser, had a sale been made while the cane was still uncut. One half of the plantation passed under the will to Mistress Bettie, and the other half to the heirs of her husband.

There remain only the executors who, as between the estate of Allen and the government, must be deemed the producers of the sugar. By the will they were authorized to rent or work the plantation as they pleased, to pay all taxes and other charges, and to put the residue to the credit of Mrs. Allen. The inchoate right to the bounty obtained by Allen before his death was a personal asset, which undoubtedly passed to the executors, who subsequently perfected that right and received the money.

Of course this money did not belong to the executors personally. They held it for the benefit of the estate and as agents for all persons interested therein; and the question as between the different heirs and legatee who shall be deemed the producer of the sugar remains to be settled. We are all of opinion that this question must be answered in favor of Mistress Bettie. If the cane when cut had been sold, the proceeds, over and above all expenses incurred since her husband's death, would have belonged to her, but not the bounty *eo nomine,* since the sugar had not been produced nor the bounty earned. But if such sale had been made, the cane undoubtedly would have fetched a price largely increased by the fact that the purchaser would receive a bounty upon the manufacture of the sugar. It is impossible to suppose that the price of the cane would not be seriously affected by the promise of the bounty, though perhaps not to the full amount of such *bounty. In this way Mrs. [401]
Allen would have received indirectly the benefit of the bounty, although she did not produce the sugar. On the other hand, if the cane be converted into sugar, it is equally just that she should receive the bounty. To deny it to her would place her in a worse position than she would have been in if the executors had sold the cane when it was cut. Whether she received it directly or indirectly makes no difference in principle.

The difficulty with the position of the supreme court of Louisiana is this: That if A should raise the cane and sell it to B, who manufactured it into sugar, A and B would be entitled to share in the bounty, although A may have received a much larger price for his cane than he would have received if there had been no bounty. Under the terms of the will Mistress Bettie was entitled to receive the entire proceeds of the crop, over and above the expenses, taxes, and other charges; and whether these came from a price received from the cane increased by the offer of a bounty, or from the bounty actually received upon the production of the sugar, is wholly immaterial. To give to one who raises the cane and sells it to a manufacturer any part of the bounty, is in reality to give him a double bounty, since he must necessarily receive one in the enhanced price given for the cane. On the other hand, the manufacturer of the sugar is entitled to the proceeds of his sugar and to whatever the law has annexed thereto as an incident.

To return to the illustration of manufactures. Can it be possible that, if a bounty were offered for the manufacture of furniture, the manufacturer of the finished product would be obliged to share such bounty with the owner of the trees, or the manufacturer of the lumber cut from such trees, from which the furniture was made? Or, under similar circumstances, would the manufacturer of watches be compelled to share the bounty with the scores of prior manufacturers who contributed directly or indirectly to the production of the various articles of mechanism which go to make up the finished watch? To state this question is to answer it; and yet, if the producer of the cane be entitled to any portion of the *bounty, why are [402]
not the manufacturers of the constituent parts of a finished product?

The supreme court of Louisiana held that the widow was not chargeable with any part of the expense of the crop incurred prior to her husband's death, but that does not change her attitude to the sugar as its actual producer, nor deprive her of the benefit of the bounty; nor do we think that her

right to such bounty is affected by the fact that the bounty law in existence when Allen applied for his license was repealed before his death, and another law passed in the following spring renewing the bounty applicable to the crop of the previous year. Such act was passed, as was held by this court, in *United States* v. *Realty Co.* 163 U. S. 427 [41: 215], in recognition of a moral obligation to those who had put in their crop the previous year upon the faith of the bounty law then in existence. It was not so much a gift by the government as a reward paid in consideration of expenses incurred by the planters upon the faith of the government's promise to pay a bounty to the manufacturers and producers of sugar. As applied to this case, we think the act of 1895 should be construed as a continuation of a prior bounty. To say that it is an "unwilled asset" is practically to hold that it is a gift from the government "without anything in the nature of a consideration," and that the amount of sugar produced is only to be considered as the measure of the bounty. This dissociates the bounty altogether from the motive which actuated Congress in granting it, and turns it into a mere donation of so much money, which it cannot be presumed to have made, even if it had the power. Bounties granted by a government are never pure donations, but are allowed either in consideration of services rendered or to be rendered, objects of public interest to be obtained, production or manufacture to be stimulated, or moral obligations to be recognized. To grant a bounty irrespective altogether of these considerations would be an act of pure agrarianism; and to determine who is entitled to the benefit of the bounty is but little more than to determine who has rendered the consideration.

[403] *The act giving the supplementary bounty to replace that which should have been paid under the original act clearly did not contemplate giving a bounty to any other producer than the one designated by the original act. That act plainly gives the bounty only to the manufacturer, and not to the grower. It follows, therefore, that the court accepting its construction of the will as unquestionable, declared that although Mrs. Allen was a manufacturer of the sugar and the successor of Mr. Allen in that regard, was yet not entitled to the whole bounty, because, under its construction of the act of Congress, the grower of the cane was the primary person intended to be benefited by the act. As it is obvious that the person intended to be benefited by the act of Congress was the manufacturer, it follows that the supreme court of Louisiana, after finding that Mrs. Allen was the manufacturer, has taken from her a portion of the bounty to which she was entitled under the act of Congress, on the erroneous theory that that act gave the bounty to the grower of the cane instead of to the manufacturer.

We do not undertake to say that the crop of growing or maturing cane passed to Mrs. Allen at the date of her husband's death, since if the executors had chosen to sell the plantation the next day, this cane would have passed to the vendee. In this the common law and the civil law agree. 1 Washb. Real Prop. 5th ed. 11; Code Napoleon, art. 520. The same principle is incorporated in the Civil Code of Louisiana: "Art. 465. Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as part of the land to which they are attached. As soon as the crop is cut, and the fruits gathered, or the trees cut down, although not yet carried off, they are movables." But what she did own was the proceeds of the crop; the right in case the plantation was not sold to have this crop harvested for her benefit, and if manufactured into sugar, to have the proceeds of such sugar and all the incidents thereto placed to her credit.

For the reasons above given, we think she must be considered as the producer of the sugar, and that it is immaterial that she*was [404]
not the producer of the cane, since the two are distinct and separate articles of production. It results from this that the decree of the Supreme Court of Louisiana must be *reversed,* and the cases remanded to that court for further proceedings in consonance with this opinion.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, *Plff. in Err.,*

v.

CHARLES PAUL.

(See S. C. Reporter's ed. 404–410.)

Arkansas act as to railroad companies paying their employees—due process of law.

1. The Arkansas act of 1889 requiring railroad companies to pay their employees when discharged their unpaid wages then earned, without deduction, or that such wages should continue at the same rate until paid, not to exceed sixty days, does not deny to such companies the equal protection of the laws.
2. Such act was prospective in its operation, restricting future contracts only, and does not deprive railroad companies of their property without due process of law.

[No. 120.]

Submitted January 10, 1899. Decided March 6, 1899.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment of that court affirming a judgment of the Circuit Court of Saline County, Arkansas, in favor of Charles Paul, plaintiff, against the St. Louis, Iron Mountain, & Southern Railway Company for the amount of wages due plaintiff as a laborer for said company and the penalty of $1.25 per day for failure to pay him what was due him when he was discharged from his employment by the company, as provided by a law of that state approved March 21, 1889. *Affirmed.*

See same case below, 64 Ark. 83, 37 L. R. A. 504.

Statement by Mr. Chief Justice **Fuller:**

This action was commenced in a justice's court in Saline township, Saline county, Arkansas, by Charles Paul against the St. Louis, Iron Mountain, & Southern Railway Company, a corporation organized under the laws of the state of Arkansas, and owning and operating a railroad within that state, to recover $21.80 due him as a laborer, and a penalty of $1.25 per day for failure to pay him what was due him when he was discharged. The case was carried by appeal to the circuit court of Saline county and there tried *de novo*. Defendant demurred to so much of the complaint as sought to recover the penalty on the ground that the act of the general assembly of Arkansas entitled "An Act to Provide for the Protection of Servants and Employees of Railroads," approved March 25, 1889 (Acts Ark. 1889, 76), which provided therefor, was in violation of articles five and fourteen of the Amendments to the Constitution of the United States, and also in violation of the Constitution of the state of Arkansas. The demurrer was overruled, and defendant answered, setting up certain matters not material here, and reit-
[405] erating in its third paragraph the *objection that the act was unconstitutional and void. To this paragraph plaintiff demurred, and the demurrer was sustained. The case was then heard by the court, the parties having waived a trial by jury, and the court found that the plaintiff was entitled to recover the sum claimed and the penalty at the rate of daily wages from the date of the discharge until the date of the commencement of the suit, and entered judgment accordingly. Defendant appealed to the supreme court of the state of Arkansas, which affirmed the judgment, 64 Ark. 83 [37 L. R. A. 504], and this writ of error was then brought.

The act in question is as follows:

"Sec. 1. Whenever any railroad company or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid. *Provided,* such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"Sec. 2. That no such servant or employee who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"Sec. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty.

"Sec. 4. That this act shall take effect and be in force from and after its passage."

Messrs. **John F. Dillon, Winslow S. Pierce,** and **David D. Duncan,** for plaintiff in error:

The act of the legislature of Arkansas of March 25, 1889, is unconstitutional as violative of the 14th Amendment to the Constitution of the United States.

Leep v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264.

Corporations are "persons," within the meaning of the 14th Amendment to the Constitution of the United States.

Smyth v. *Ames,* 169 U. S. 466, 42 L. ed. 819; *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666; *Charlotte, C. & A. R. Co.* v. *Gibbes,* 142 U. S. 386, 35 L. ed. 1051; *Santa Clara County* v. *Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118.

The state cannot, through its reserved power to amend corporate charters whether general or special, withdraw corporations from the guaranties of the Constitution of the United States.

The Railroad Tax Cases, 13 Fed. Rep. 722; *Santa Clara County* v. *Southern P. R. Co.* 18 Fed. Rep. 385; *Sinking Fund Cases,* 99 U. S. 700, 25 L. ed. 496; *United States* v. *Union P. R. Co.* 160 U. S. 1, 40 L. ed. 319; *People* v. *O'Brien,* 111 N. Y. 1, 2 L. R. A. 255.

Messrs. **A. H. Garland** and **R. C. Garland** for defendant in error.

*Mr. Chief Justice **Fuller** delivered the **[406]**
opinion of the court:

Plaintiff in error was a corporation duly organized under the laws of Arkansas and engaged in operating a railroad in that state. The state Constitution provided: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." (Art. 12, § 6.) This Constitution was adopted in 1874, but, prior to that, the Constitution of 1868 had declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; and all such laws may, from time to time, be altered, or repealed." (Art. 5, § 48.)

In *Leep* v. *St. Louis, I. M. & S. Railway Company,* 58 Ark. 407 [23 L. R. A. 264], section one of the act of March 25, 1889, was considered by the supreme court of Arkansas, and was held unconstitutional so far as affecting natural persons, but sustained in

respect of corporations as a valid exercise of the right reserved by the Constitution "to alter, revoke, or annul any charter of incorporation."

The court conceded that the legislature could not under the power to amend take [407] from corporations the right to contract, *but adjudged that it could regulate that right by amendment when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.

As the Constitution expressly provided that the power to amend might be exercised whenever in the opinion of the legislature the charter might "be injurious to the citizens," and as railroad corporations were organized for a public purpose; their roads were public highways; and they were common carriers, it was held that whenever their charters became obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended; and as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to secure that result. And the court said: "If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." But the court added that it did not follow that the legislature could by amendment fix or limit the compensation of employees, and particularly not as the right to amend was to be exercised so "that no injustice shall be done to the corporators;" that, however, this act was not obnoxious to that objection, as it left "to the corporations the right of making contracts with their employees on advantageous terms."

In respect to the provision that the unpaid [408] wages then *earned at the contract rate were to become due and payable on the cessation of the employment, "without abatement or deduction," the court held that that did not "require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby," but that it meant "that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment."

Construing the statute thus, and, by elimination, confining it to the corporations described, its validity was sustained as within the reserved power of amendment; and the case was approved and followed in that before us.

The scope of the power to amend, and the general subject of the lawfulness of limitations on the right to contract were considered at length, with full citation of authority, in both these decisions.

The contention is that as to railroad corporations organized prior to its passage, the act was void because in violation of the Fourteenth Amendment. Corporations are the creations of the state, endowed with such faculties as the state bestows and subject to such conditions as the state imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied. *Missouri P. Railway Company* v. *Mackey*, 127 U. S. 205 [32: 107].

The question then is, whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution.

The power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to *possession of contracts lawfully [409] made" (Waite, Ch. J., *Sinking Fund Cases*, 99 U. S. 700 [25: 496]); but any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights." Gray, J., *Inland Fisheries Commissioners* v. *Holyoke Water Power Company*, 104 Mass. 446, 451 [6 Am. Rep. 247]; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13 [26: 961]; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347 [28: 173].

This act was purely prospective in its operation. It did not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it did impose a duty in reference to the payment of wages actually earned, which restricted future contracts in the particular named.

In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the Supreme Court held the regulation, as promoting the public interest in the protection of employees to the limited extent stated, to be properly within the power to amend reserved under the state Constitution.

Inasmuch as the right to contract is not

absolute, but may be subjected to the restraints demanded by the safety and welfare of the state, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the Fourteenth Amendment. *Orient Insurance Company* v. *Daggs*, 172 U. S. 557 [*ante*, 552]; *Holden* v. *Hardy*, 169 U. S. 366 [42: 780]; *St. Louis & S. F. Railway Company* v. *Mathews*, 165 U. S. 1 [41: 611].

Gulf, Colorado, & Santa Fé Railway Co. v. *Ellis*, 165 U. S. 150 [41: 666], is not to the contrary, and was properly distinguished from this case by the supreme court of Arkansas. There a state statute provided for the assessment of an attorney's fee of not exceeding ten dollars against railroad companies for failure to pay certain debts, and the exaction was held to be a penalty, although no specific duty was imposed for the nonperformance of which it was inflicted.
[410] This court said: "The *statute arbitrarily singles out one class of debtors and punishes it for the failure to perform certain duties —duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state." The conclusion was that the subjection of railroad companies only, to the penalty, was purely arbitrary, not justifiable on any reasonable theory of classification, and that the statute denied the equal protection of the law demanded by the Fourteenth Amendment. In this case the act was passed "for the Protection of Servants and Employees of Railroads," and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid.

Judgment affirmed.

RODMAN M. PRICE, Madeline Price, Governeur Price, Francis Price, and E. Trenchard Price, *Plffs. in Err.*,

v.

ANNA M. FORREST and Charles Borcherling.

(See S. C. Reporter's ed. 410–430.)

Appointment by state court of a receiver of a claim against the government—act for the relief of Rodman M. Price.

1. An order of a state court having jurisdiction of the parties, appointing a receiver of a claim against the government, and ordering the claimant to assign the same to such receiver to be held subject to the order of the court for the benefit of those entitled thereto, is not prohibited by U. S. Rev. Stat. § 3477.
2. The words "or his heirs," in the act for the relief of Rodman M. Price, must be held to mean the same thing as personal representatives, so as not to defeat just demands of Price's creditors in the event of his death.

[No. 105.]

Argued January 3, 4, 1899. Decided March 6, 1899.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a decree of that court affirming the decree of the Chancery Court of that State that the defendants, children and heirs of Rodman M. Price *et al.*, be perpetually enjoined from demanding or receiving from the United States or any officer of the Treasury any money remaining in the Treasury of the United States which was awarded to Rodman M. Price, deceased, under the act of February 23, 1891. *Affirmed.*

See same case below, 52 N. J. Eq. 16, 31, 53 N. J. Eq. 693, 54 N. J. Eq. 669.

The facts are stated in the opinion.

Messrs. **John C. Fay** and **Flavel McGee** for plaintiffs in error.

Messrs. **Cortlandt Parker, R. Wayne Parker,** and *Frank W. Hackett* for defendants in error.

*Mr. Justice **Harlan** delivered the opinion of the court: [411]

The ultimate question in this case is whether the plaintiffs in error, as heirs of Rodman M. Price, are entitled to receive from the United States the amount standing to the credit of the deceased on the books of the Treasury, and which represents the balance of a sum found in his lifetime under the authority of a special act of Congress to be due him upon an adjustment of his accounts as a Purser in the Navy.

The facts out of which arise the questions of law discussed by counsel are as follows:

In the year 1848 the decedent was assigned to duty on the Pacific coast in California as Purser and Fiscal Agent of the *United States [412]
for the Department of the Navy. He acted in that capacity until about December, 1849, or January, 1850, when he was detached from such service and ordered to transfer all public money and property remaining in his hands to his successor, or to such other disbursing officer of the Navy as might be designated by the commanding officer at the naval station at California, and immediately after such transfer to report at the city of Washington for the purpose of settling his accounts.

A. M. Van Nostrand was his successor, in California, as Acting Purser in the Navy.

About December 31st, 1849, Commodore Jones of the Navy, commanding the United States squadron at San Francisco, directed Van Nostrand to receive from Price all books, papers, office furniture, and funds on hand belonging to the Purser's department at that city. Thereupon Price turned over to Van Nostrand as Acting Purser of the Navy at San Francisco, forty-five thousand dollars, that being all the public money remaining in his hands.

Subsequently on the 14th day of January, 1850, and out of his private funds alone,

Price advanced to Van Nostrand seventy-five thousand dollars, taking a receipt therefor as follows:

San Francisco, January 14th, 1850.

Received from Rodman M. Price, Purser U. S. Navy, seventy-five thousand dollars, for which I hold myself responsible to the United States Treasury Department, $75,000.

(Duplicate.)

A. M. Van Nostrand, Acting Purser.

This money was so advanced without the approval and signature of Commodore Jones.

Van Nostrand never returned the $75,000 or any part of it to Price, nor did he account for it to the government.

Price insisted that the United States should reimburse him for the amount so advanced by him, but the officers of the government denied its liability to him on that account. In an elaborate opinion, given March 12th, 1854, Attorney General Cushing held that while the appointment of Van Nostrand as Acting Purser was lawful and valid under the circumstances, the government could not be charged with the private funds paid to him by Price, although the
[413] latter believed *at the time that his advance of money to the former was an accommodation to the government in the then unsettled condition of California. 6 Ops. Atty. Gen. 357.

Finally, by an act approved February 23d, 1891, entitled "An Act for the Relief of Rodman M. Price," the Secretary of the Treasury of the United States was "authorized and directed to adjust upon principles of equity and justice the accounts of Rodman M. Price, late Purser in the United States Navy and acting Navy Agent at San Francisco, California, crediting him with the sum paid over to and receipted for by his successor, A. M. Van Nostrand, Acting Purser, January 14th, 1850, and pay to said Rodman M. Price, or his heirs, out of any money in the Treasury not otherwise appropriated, any sum that may be found due him upon such adjustment." 26 Stat. at L. 1371.

Under the authority conferred by that act the Secretary of the Treasury in August, 1892, adjusted the accounts of Price; and in that adjustment he was credited with the sum advanced to Van Nostrand, leaving due to him from the government the sum of $76,204.08, which of course included the above sum of $75,000.

In order that the precise questions to be determined upon this writ of error may be clearly apprehended we must now refer to certain matters occurring in the courts of New Jersey both prior to and shortly after the passage of the above act of February 23d, 1891.

In the year 1857 Samuel Forrest recovered in the Supreme Court of New Jersey a judgment against Rodman M. Price, for the sum of $17,000 and costs. Execution upon that judgment was returned unsatisfied. Forrest died in 1860 intestate. In 1874 his wife, one of the present defendants in error, was appointed and qualified as administratrix of his estate. In the same year she sued out a writ of scire facias to revive the above judgment, and it was revived. In the bill seeking a revivor of the judgment she alleged facts tending to show that Price had an interest in certain lands, and also that he had equitable things in action or other property to the amount of many thousand dollars, exclusive of all claims thereon and *of all exemptions allowed by law, which she [414]
had been unable to reach by execution on the above judgment. By that bill the administratrix also prayed discovery from Price of all property, real or personal, whether in possession or action, belonging to him, with full particulars in relation thereto, and that the same under the order of court be appropriated in satisfaction of such judgment; further, that a receiver be appointed in the cause to collect and take charge of the property, money, or things in action found to belong to Price, or to which he was in any way entitled, either in law or equity, with power to convert the same into money, and with such powers as were usually granted to receivers in similar cases; and that Price be enjoined from assigning, transferring, or making any other disposition of the real estate and personal property to which he was in anywise entitled and from receiving any moneys then due or to become due to him, except where the same were held in trust or the funds held in trust proceeded from other persons than himself.

The defendants to that bill were Price and his wife and son, the latter being alleged to claim some interest in the property described in the bill. They appeared and filed an answer, Price denying that any part of the properties mentioned in the bill belonged to him, or that he had any interest in them.

After the filing of that answer the cause slept until August 9th, 1892, when Mrs. Forrest, as administratrix of the estate of her husband, filed a petition stating that since the filing of her bill of complaint in that cause no payment had been made on the judgment against Price, and that neither she nor her solicitors had been able to find any personalty or real estate belonging to Price by levy upon and sale of which any part of the amount due on the judgment could be obtained; that it had lately come to her knowledge that about $45,000 was about to be paid to Price by officers of the Treasury of the United States as the sum found to be due him by an accounting then lately had between him and the government; that that sum was to be paid by the delivery to Price or to his attorneys of a draft of the Treasurer of the United States or some other negotiable security made or issued by its financial *officers and drawn payable to [415]
his order, the rules of the Department forbidding that it be made payable to the order of any other person or that said sum should be paid in any other way, and that said draft or negotiable security was to be made and the transaction closed on the 15th day of August thereafter; and that if Price obtained said money from the United States

he would, unless restrained, put the same beyond the reach of the petitioner. The prayer of the petition was that a receiver of the draft or other negotiable security be appointed, and that Price be ordered and directed immediately on the receipt of such draft or security to indorse the same to the receiver, to the end that the amount thereof might be received by him *as an officer of the court and disposed of according to law.*

On the presentation of the petition with affidavits in its support, the Chancellor on the 8th day of August, 1892, issued a rule returnable at chancery chambers September 12th following, that Price show cause why the prayer of the petition should not be granted and an injunction issue and a receiver appointed pursuant to that prayer, which rule further directed that Price should be and was thereby restrained and enjoined from making any indorsement of the draft referred to in the petition.

A duly certified copy of that order, pursuant to directions therein, was served upon Price on the 10th day of August, 1892. Nevertheless, after that date Price received from the Assistant Treasurer of the United States at Washington and without permission of the court collected four several drafts signed by that officer for the respective sums of $2,704.08, $13,500, $20,000, and $9,000, in all the sum of $45,204.08, leaving in the hands of the United States of the amount due on the settlement of Price's accounts the sum of about $31,000.

On the 10th day of October, 1892, Charles Borcherling was appointed by the chancery court receiver in said cause of the property and things in action belonging or due to or held in trust for Price at the time of issuing said executions, or at any time afterwards, and especially of said four drafts, with authority to possess, receive, and sue
[416]for such property and *things in action and the evidence thereof; and it was made the duty of the receiver to hold such drafts *subject to the further order of the court.* The receiver was required to give bond in the sum of $40,000 conditioned for the faithful discharge of his duties. At the same time Price was ordered to convey and deliver to the receiver all such property and things in action and the evidence thereof, and especially forthwith to indorse and deliver the drafts to him, and he and all agents or attorneys appointed by him were enjoined and restrained from intermeddling with the receiver in regard to said drafts, and ordered, if in possession or control thereof, to deliver them to the receiver with an indorsement to that officer or to the clerk of the court for deposit; provided, the order should be void if the drafts other than the one for $9,000 were delivered with Price's indorsement to the clerk, the proceeds to be deposited to the credit of the cause. Price was expressly enjoined from making any indorsement or appropriation of the drafts other than to the receiver or the clerk for deposit.

The receiver gave the required bond, and having entered upon the duties of his office, he caused a copy of the above order to be served upon Price, and demanded compliance with its provisions.

In 1892, the particular day not being stated, the chancery court issued an attachment against Price for contempt of court in disobeying the order of August 8th, 1892. By an order made May 18th, 1894, the court held him to be guilty of such contempt and he was directed to pay to the receiver the sum of $31,704.08 and a fine of $50 and costs, and in default of obedience to that order to be imprisoned in the county jail until it was complied with. 52 N. J. Eq. 16, 31. Upon appeal to the court of errors and appeals the order of the chancery court was affirmed. 53 N. J. Eq. 693.

It is stated that the balance due on the settlement of Price's accounts, about $31,000 was withheld by the officers of the government in the belief that there was a counterclaim against Price. But, it having been determined to pay such balance, the chancery court made another order on the 18th *day of May, 1894, by which Price was [417]
directed to execute two instruments in writing, which he had been previously required by the court to sign, seal, and deliver, one of them consenting that the balance from the government should be paid to the receiver, such consent to be filed with the Treasurer of the United States, and by the other assigning all his property, real and personal, and all his rights and credits.

These last two orders were served upon Price while he was sick, and he died June 8th, 1894, without complying with either of them. So far as was known, he left no will, and no application had been made for the appointment of an administrator of his estate, as in case of intestacy. But letters of administration *ad prosequendum* were granted by the prerogative court of New Jersey to Allen L. McDermott.

The present bill was filed in the chancery court July 5th, 1894, in the name of the administratrix of Samuel Forrest and of the receiver Borcherling. The principal defendants are the children and heirs of Rodman M. Price. The other defendants are John C. Fay and McDermott, the latter as administrator *ad prosequendum.*

That bill alleged that on the 9th day of June, 1894, the defendants executed powers of attorney to the defendant Fay, who was one of the attorneys in the litigation respecting the drafts, authorizing him to apply to the Secretary of the Treasury to pay to them the balance to the credit of Price under the act of February 23d, 1891,—they claiming that such balance belongs to his *heirs,* and not to the receiver. It appears from the bill that in addition to the above four drafts, the United States paid to Price and his attorneys the further sum of $9,000, reducing the balance apparently on the books of the Treasury under the above settlement to the sum of about $23,000. It was further alleged that the officers of the Treasury Department were desirous of doing right and justice in the premises; that demand had been made by

the receiver upon the Treasurer of the United States for the payment to him of said balance of money, and that the Treasurer neither consented nor refused to do so, but awaited [418] the determination *by some lawful tribunal of the right of the receiver in the premises.

The relief asked was: 1. That the cause commenced by the bill of 1874 be revived, and the administrator *ad prosequendum* be adjudged a proper party thereto. 2. That the defendants, the children and heirs of Rodman M. Priee, together with Fay, be perpetually enjoined from making any demand upon or application to the United States or from receiving any part of the money awarded to the deceased then remaining in the Treasury of the United States. 3. That the parties above named be decreed to pay to the plaintiff Borcherling, receiver, to be by him disposed of *under the orders of the court*, any part of the money they might have respectively received or might receive. 4. That the administrator *ad prosequendum*, or any executor or administrator of Price thereafter admitted as defendant in the cause, deliver to the receiver all the property of the deceased, whether in possession or action, which might come to their hands.

The heirs of Price filed pleas asserting their right to the benefit of the act of February 23d, 1891. The case was heard upon the bill and pleas, and the pleas were overruled by Chancellor McGill. The defendants were thereupon ordered to answer the bill.

Upon appeal to the court of errors and appeals, the orders of the chancery court were affirmed, and the cause was remitted to that court with directions to proceed therein according to law. *Price* v. *Forrest*, 54 N. J. Eq. 669.

The heirs then filed an answer, in which they denied that there was any jurisdiction in the chancery court to sequester the moneys in dispute in the Treasury of the United States, and insisted that whatever amount remained in the Treasury as the balance due on the adjustment of the accounts of Rodman M. Price belonged under the act of Congress to the defendants as his heirs.

The case was heard upon bill and answer, and the chancery court was of opinion that the plaintiffs were entitled to the relief asked so far as it related to the collection by the defendants of the moneys men- [419] tioned in the bill of complaint and still *in the Treasury of the United States. It was therefore "ordered and decreed, that the said defendants and each of them be and they are hereby perpetually enjoined and restrained from making any demand upon or application to the government of the United States, or the Secretary of the Treasury of the United States or any officer of the said Treasury, or from receiving from the United States, or its said Secretary of the Treasury or any officer thereof, any part of the money remaining in the Treasury of the United States at the time of filing said bill of complaint, and which was awarded to Rodman M. Price, deceased, as in the said bill stated, or now there remaining." This judgment was affirmed by the court of errors and appeals of New Jersey, (56 N. J. Eq. —), †and the judgment of affirmance is here for review.

1. The first proposition of the plaintiffs in error is that consistently with the statutes of the United States the defendants in error cannot take anything under the orders adjudging that Borcherling, the receiver appointed by the state court, was entitled as between him and the heirs of Price to receive the money remaining to his credit on the books of the Treasury.

This contention is based upon section 3477 of the Revised Statutes of the United States, providing that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read *and fully explained the transfer, as- [420]
signment, or warrant of attorney to the person acknowledging the same."

It is insisted that the orders in the state court assume to transfer or assign Price's claim against the United States in violation or without regard to the requirements of that statute, in that no assignment of the claim has ever been freely made; that no warrant for the payment thereof had been issued when those orders were made; and that the indorsement or assignment that Price was ordered to make did not fall within any of the established exceptions under section 3477, such as assignments in bankruptcy and insolvency, and assignments by operation of law.

Are these propositions supported by the decisions of this court in which it has been found necessary to construe that section?

In *United States* v. *Gillis*, 95 U. S. 407, 416 [24: 503, 506], the question was as to the validity of a voluntary transfer of the legal title to a claim under the abandoned

†This case has not been reported. The opinion is as follows:

Lippincott, J: This appeal from the final decree of the court of chancery, in this cause, brings up for decision the rights of the parties under the act of Congress set out in the pleadings, and under § 3477 of the Revised Statutes of the United States.

These questions having been passed upon in the opinion of this court, on the appeal from the decree of the chancellor, overruling the pleas of the defendants in this cause (54 N. J. Eq. 669), the decree now appealed from, for the reasons there given, must be affirmed, with costs.

and captured property act of March 12th, 1863, for the proceeds of certain cotton seized by the military forces of the United States. The suit was brought by the transferee in the court of claims which found in his favor. By this court it was adjudged that he could not maintain the action. While holding that the act of February 26th, 1853, chap. 81, 10 Stat. at L. 170, from which section 3477 was taken, was of universal application and covered all claims against the United States in every tribunal in which they might be asserted, this court stated that "there are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law," to which the statute did not apply.

In *Erwin* v. *United States*, 97 U. S. 392, 397 [24: 1065, 1067], which was also an action to recover the proceeds of certain cotton captured by the military forces of the United States, it appeared that the original claimant became a bankrupt, and assigned his property to an assignee in bankruptcy. One of the questions was whether the claim for these proceeds, even if it constituted a demand against the government, was capable of assignment under the above statute. This
[421] court said: *"The act of Congress of February 26th, 1853, to prevent frauds upon the Treasury of the United States, which was the subject of consideration in the *Gillis Case*, applies only to cases of voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the court of claims."

In *Goodman* v. *Niblack*, 102 U. S. 556, 560 [26: 229, 231], where the question was whether the above statute embraced voluntary assignments for the benefit of creditors, this court, referring to *Erwin* v. *United States*, said: "The language of the statute, 'all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein,' is broad enough (if such were the purpose of Congress) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent of all his effects, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853."

*The doctrine of these cases has not been [422]
modified by any subsequent decision. Nor, as the argument at the bar implied, is that doctrine inconsistent with the decision subsequently rendered in *St. Paul & D. Railroad Co.* v. *United States*, 112 U. S. 733 [28: 861]. Nothing more was adjudged in that case than that a voluntary transfer by way of mortgage of a claim against the United States for the security of a debt, and finally completed and made absolute by a judicial sale, was within the purview of the prohibition contained in section 3477, and could not be made the basis of an action against the government in the court of claims. Such a voluntary assignment to secure a specific debt was held to be within the mischiefs which that section was intended to remedy. To the same class belongs *Ball* v. *Halsell*, 161 U. S. 72, 79 [40: 622, 624], which was the case of a voluntary transfer of part of a claim against the United States on account of the depredations of certain Indians on the property of the claimant.

While the present case differs from any former case in its facts, we think that the principle announced in *Erwin* v. *United States* and *Goodman* v. *Niblack* justified the conclusion reached by the state court. That court held that it had jurisdiction under the laws of the state, and as between the parties before it, to put into the hands of its receiver any chose in action of whatever nature belonging to Price and of which he had possession or control. The receiver did not obtain from Price in his lifetime an assignment of his claim against the United States. But having full jurisdiction over him the court adjudged that as between Price and the plaintiffs who sued him the claim should not be disposed of by him to the injury of his creditors, but should be placed in the hands of its receiver subject to such disposition as the court might determine as between the parties before it and as was consistent with law. The suit in which the receiver was appointed was of course primarily for the purpose of securing the payment of the judgment obtained by Samuel Forrest in his lifetime against Rodman M. Price. But that fact does not distinguish the case in principle from *Goodman* v. *Niblack;* for the transfer in question to the receiver was the act *of the law, and whatever [423]
remained, whether of property or money, in his hands after satisfying the judgment and the taxes, costs, or expenses of the receivership as might be ordered by the court, would be held by him as trustee for those entitled thereto, and his duty would be to pay such balance into court to the credit of the cause "to be there disposed of according to law." Revision of N. J. 1876, p. 394.

As this court has said, the object of Congress by section 3477 was to protect the gov-

ernment, and not the claimant, and to prevent frauds upon the Treasury. *Bailey* v. *United States*, 109 U. S. 432 [27: 988]; *Hobbs* v. *McLean*, 117 U. S. 576 [29: 944]; *Freedman's Saving & T. Co.* v. *Shepherd*, 127 U. S. 494, 506 [32: 163, 168]. There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor, forbid the claimant from collecting his demand except through a receiver who should hold the proceeds subject to be disposed of according to law under the order of court, we are unable to say that such action would be inconsistent with section 3477. It may be that the officers charged with the duty of allowing or disallowing claims against the government are not required to recognize a receiver of a claim appointed by a court, and may, if the claim be allowed, refuse to make payment except as provided in section 3477. Upon this subject, the Second Comptroller of the Treasury, in his opinion, rendered

[424] July 11th, 1894, *construing the act of February 23d, 1891, and in which he held that Price was entitled to receive, in his lifetime, whatever sum was found to be due him on the adjustment of his accounts, but if he died before such adjustment was made his heirs would take, not by virtue of the act of Congress, but according to the laws of descent at the domicil of the deceased, said: "I do not presume for a moment that the chancery court of New Jersey could issue an execution and compel payment of this money, nor could any of its powers be brought to bear to compel, without at least additional legislation by Congress, the Comptroller to pay its judgment; but while that is true, yet, on the other hand, the Comptroller, so far having awaited the adjudication of that chancery court, ought to abide by the result of that litigation, and await a final adjudication and certification of the amount, as to who are entitled under the laws of that state. This comes more from comity, and from a disposition on the part of the Treasury officers to obey the laws of the land, and to help to enforce the decrees of the courts that have jurisdiction over matters in litigation of this kind, than from any actual authority that a court may have over the Comptroller to compel him to make payment. In conclusion, then, the Comptroller will not at this time act in this matter, but will say to the gentlemen, that they must fight it out in the courts of New Jersey, and that this court will follow the final decision that may be rendered there. . . . Hence this matter will be suspended until such time as the Comptroller may be put into possession of the final decree, either of the New Jersey chancery court, or such court as may have appellate jurisdiction therefrom." Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and void, as between those who are parties to the cause and who are before the court.

It only remains to say touching this part of the case that if section 3477 does not embrace the passing or transfer of claims to heirs, devisees, or assignees in bankruptcy, as held *in *Erwin* v. *United States*, nor a vol- [425]
untary assignment by a debtor of his effects for the benefit of his creditors, as held in *Goodman* v. *Niblack*, it is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the government and ordering the claimant to assign the same to such receiver to be held subject to the order of court for the benefit of those entitled thereto, can be regarded as prohibited by that section.

2. Were the *heirs* of Rodman M. Price entitled upon his death, by virtue of the act of February 23d, 1891, to such balance as then remained to his credit in the Treasury of the United States on the adjustment made of his accounts under that act? If they were so entitled, then the final judgment of the court of errors and appeals affirming the judgment of the chancery court denied to the plaintiffs in error a right specially set up and claimed by them under the above act; and therefore the jurisdiction of this court to re-examine that final judgment cannot be doubted. Rev. Stat. U. S. § 709.

The plaintiffs in error insist that *Emerson* v. *Hall*, 13 Pet. 409, 413, 414 [10: 223, 225, 226], is decisive in their favor. Although this contention is not without some force, we are of opinion that the judgment in that case does not control the determination of the present case. Emerson, surveyor, Chew, collector, and Lorrain, naval officer, at the Port of New Orleans, having seized a brig for a violation of the laws prohibiting the importation of slaves, instituted proceedings that resulted in the condemnation of such vessel and slaves. It had been previously decided in the *Josefa Segunda*, 10 Wheat. 312 [6: 329], that the proceeds could not be paid to the custom-house officers, but vested in the United States. Emerson and Lorrain having died, Congress, on the 31st day of March, 1831, passed an act entitled "An Act for the Relief of Beverly Chew, the *Heirs* of William Emerson, Deceased, and the *Heirs* of Edward Lorrain, Deceased." That act directed the proceeds in court to be paid over to the said Beverly Chew and "the legal representatives" of Emerson and Lorrain, respectively. The question was

whether the Emerson part of the proceeds belonged to his heirs, or were assets primar-
[426]ily liable for his *debts. This court, after observing that Emerson had not acted under any law, nor by virtue of any authority, and that his acts imposed no obligation, legal or equitable, on the government to compensate him for his services, said: "Had Emerson become insolvent and made an assignment, would this claim, if it may be called a claim, have passed to his assignees? We think, clearly, it would not. Under such an assignment, what could have passed? The claim is a nonentity. Neither in law nor in equity has it any existence. A benefit was voluntarily conferred on the government; but this was not done at the request of any officer of the government, or under the sanction of any law or authority, express or implied. And under such circumstances, can a claim be raised against the government, which shall pass by a legal assignment, or go into the hands of an administrator as assets? . . . A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation—a donation made it is true in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government. In the present case, the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And it has, under the title of an act, 'for the relief of the heirs of Emerson,' directed, in the body of the act, the money to be paid to his legal representatives. That the heirs were intended by this designation is clear; and we think the payment which has been made to them under this act has been rightfully made, and that the fund cannot be considered as assets in their hands for the payment of debts."

[427] *Now it is said that the grounds upon which in *Emerson* v. *Hall* the claim of the heirs was sustained exist in the present case; that Price did not act under any law, nor in virtue of any authority, and that his acts imposed no obligation in law or equity upon the government that could have been enforced even if suit could have been maintained against it. And the conclusion sought to be drawn is that Congress must have intended by the act of 1891, as it was held to have intended by the act in *Emerson's Case*, to legislate for the benefit of the heirs or next of kin of the decedent and not for his personal representatives. But there were other facts in the *Emerson Case* which placed that case upon peculiar grounds. Emerson and Lorrain were both dead when the act of March 3d, 1831, was passed, and therefore Congress must have had in mind the question whether the Emerson and Lorrain portions of the money on deposit in court should be given to their respective heirs or not. And the question was solved as indicated by the preamble to that act. The preamble distinctly shows that Congress had in view the *heirs*, and not those who would administer the estate of the two persons whose meritorious services were recognized. Although a preamble has been said to be a key to open the understanding of a statute, we must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute. We mean only to hold that the preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions. *United States* v. *Fisher*, 2 Cranch, 358, 386 [2: 304, 313]; *United States* v. *Palmer*, 3 Wheat. 610, 631 [4: 471, 477]; *Beard* v. *Rowan*, 9 Pet. 301, 317 [9: 135]; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 462 [36: 226, 229]; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550 [36: 537]. In *Emerson's Case* the decision was placed partly on the ground that the title of the act of 1831 indicated that Congress, in using the words "legal representatives" in the body of the act, had in mind the heirs of Emerson and Lorrain, and not technically their personal representatives. It is a fact not without significance
*that the money awarded by the above act of [428]
1831 did not replace any moneys taken by Emerson and Lorrain from their respective estates for the benefit of the government. They had only rendered meritorious personal services for the public upon which no claim of creditors could be based, but which services Congress chose to recognize by making a gift to the heirs. This was substantially the view taken of the case of *Emerson* v. *Hall*, in the recent case of *Blagge* v. *Balch*, 162 U. S. 439, 458 [40: 1032, 1036].

The case before us differs from the *Emerson Case* by reason of circumstances which we must suppose were not overlooked by Congress when it passed the act of 1891. By advancing to Van Nostrand seventy-five thousand dollars to be used for the government, Price's ability to meet his obligations to creditors was to that extent diminished. As he had acted in good faith, and in the belief that he was promoting the best interests of the government, the purpose of Congress was to make him whole in respect of the amount he had in good faith advanced to his successor for public use. He was then alive, and there was no occasion for Congress to think of making any provision for those who might be his heirs. We think that the legislation in question had reference to his financial condition, and there is no reason to suppose that Congress intended that the amount, if any, found due him upon the adjustment of his accounts should not constitute a part of his absolute personal estate, to be received and applied in the

event of his death by his personal representative as required by law.

We concur with the state court in the view that the act of 1891 was not intended to confer a mere gratuity upon Price, but was a recognition of a moral and equitable, if not legal, obligation upon the part of the government to restore to him moneys advanced in the belief at the time that they would be repaid to him in the settlement of his accounts as a disbursing officer; and that the use of the words "or his heirs" in the act was not to make a gift to the heirs of such sum as upon the required adjustment of his accounts was found to be due their ancestor, and thereby exclude his creditors
[429] from *all interest in that sum, but to provide against the contingency of death occurring before the adjustment was consummated, and thus to make it certain that the right to have his accounts credited with the amount paid to Van Nostrand, upon principles of "equity and justice," should not be lost by reason of such death. Under this interpretation of the act, the words "or his heirs" must be held to mean the same thing as personal representatives. We do not perceive either in the words of the act, or in the circumstances attending its passage, anything to justify the belief that Congress had any purpose in the event of the death of Price to defeat the just demands of creditors.

Reference was made in argument to the recent case of *Briggs* v. *Walker*, 171 U. S. 466, 473, 474 [*ante*, 243]. It differs in some respects from both the *Emerson Case* and the present case, but the decision is in accord with the views herein expressed. It arose under "An Act for the Relief of the Estate of C. M. Briggs, Deceased," and the principal question was whether the right given by the act to Briggs' "legal representatives" was for the benefit of his next of kin to the exclusion of his creditors. This court said: "The act of Congress nowhere mentions heirs at law, or next of kin. Its manifest purpose is not to confer a bounty or gratuity upon anyone; but to provide for the ascertainment and payment of a debt due from the United States to a loyal citizen for property of his, taken by the United States; and to enable his executor to recover, as part of his estate, proceeds received by the United States from the sale of that property. The act is 'for the Relief of the Estate' of Charles M. Briggs, and the only matter referred to the court of claims is the claim of his 'legal representatives.' The executor was the proper person to represent the estate of Briggs, and was his legal representative; and as such he brought suit in the court of claims, and recovered the fund now in question, and consequently held it as assets of the estate, and subject to the debts and liabilities of his testator to the defendants in error." It is to be observed that the court in that case looked both to the body of the act and the preamble in order to ascertain the intention of Congress.

[430] *It results that the plaintiffs in error, as heirs of Rodman M. Price, were not denied by the final judgment of the state court any right secured to them by the act of 1891.

Something was said in argument which implied that Price had wrongly resisted the collection of the Forrest claim and judgment. It is proper to say that so far as the record speaks on that subject, the course of the deceased was induced by the belief on his part that it was a claim which he was not bound in law or justice to pay. Our conclusion does not rest in any degree upon the character of that claim, but entirely upon questions of law arising out of matters that were concluded, so far as this court is concerned, by the action of the state court, and which we have no jurisdiction to review.

We find in the record no error of law in respect of the Federal questions presented for consideration, and therefore *the decree below must be affirmed.*

It is so ordered.

CHARLES G. SMITH and Charles G. Smith, Jr., *Appts.*,
v.
CHARLES BURNETT, Suing on His Own Behalf, and Said Charles Burnett and Charles G. Endicott, Executors of Harriet E. Burnett, Deceased, *et al.*

(See S. C. Reporter's ed. 430-439.)

Duty of wharfinger—questions of fact.

1. A wharfinger does not guarantee the safety of vessels coming to his wharves, but he is bound to exercise reasonable diligence in ascertaining the conditions of the berths thereat, and, if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care, and cannot carelessly run into danger.
2. The successive decisions of two courts in the same case, on questions of fact, are not to be reversed unless clearly shown to be erroneous; and if the evidence is conflicting, and there is evidence to sustain the decree, this court will not interfere.

[No. 112.]

Argued January 6, 9, 1899. Decided March 13, 1899.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of the District sitting in admiralty, whereby the above-named appellees, original libellants in the cause, were awarded damages and a cross libel filed by appellants was dismissed. The libel was filed by appellees against appellants for an injury to their vessel, the Schooner Ellen Tobin, while moored in berth at appellants' wharf at Georgetown, and the injury was caused by appellants' negligence in allowing a dangerous rock to remain in the berth at the wharf. *Affirmed.*

See same case below, 10 D. C. App. 469.

Statement by Mr. Chief Justice **Fuller:**

*This is an appeal from the court of appeals for the District of Columbia affirming [431]

a decree of the supreme court of the district, sitting in admiralty, whereby appellees, original libellants in the cause, were awarded damages, and a cross libel filed by appellants was dismissed. 10 D. C. App. 469. As stated by the court of appeals, the libel was filed by appellees against appellants for an alleged injury to their vessel, the schooner Ellen Tobin, while moored in berth at appellants' wharf on the bank of the Potomac at Georgetown, for the purpose of being loaded by and for appellants; and the injury complained of was averred to have been occasioned by appellants' negligently allowing a dangerous rock to remain in the bed of the river within the limits of the berth at the wharf, which the vessel was invited to take, the obstruction being unknown to the master of the vessel, and he having been moreover assured by appellants through their agent that the depth of water in the berth in front of the wharf was sufficient, and that the berth was safe for the loading of the vessel.

The facts, in general, found by that court were: That appellants were lessees of wharf and water rights extending to the channel of the river, and the berth assigned to and taken by the schooner for the purpose of loading was in front of their wharf and within the leased premises; that appellants were engaged in the business of crushing and shipping stone from the wharf to different points; and that the schooner had been brought up the river by prearrangement with a ship broker in Georgetown in order to be loaded by appellants at their wharf with crushed stone to be taken to Fortress Monroe, in Virginia, to be used in government work at that place. That the vessel was staunch and in good repair; was a three-masted schooner of six hundred tons capacity; was registered at the New York custom house as a coasting vessel of the United States, and was owned by appellees at the time of the injury complained of. It was further found "that the vessel was sunk on [Sunday] the 6th of August, 1893, as she was moored in the berth at the wharf, while receiving her cargo of crushed stone from the wharf, by means of a chute extended from the wharf to the hatchway of the vessel. The
[432] vessel *was about two thirds loaded, having received about four hundred tons of her cargo, before signs were discovered of her distressed condition. She was then taking water so rapidly that the pumps could not relieve her, nor could the extra assistance employed by the master avail to save her from breaking and sinking in the berth. The work of loading was stopped on Saturday evening, with the intention of resuming the work of loading on the following Monday morning; and the captain of the vessel at the time of stopping work on Saturday, made soundings around the vessel and supposed that she was then lying all right. But on Sunday morning it was discovered that there was so much water in her that she could not be relieved by her pumps; and by 5 o'clock on the afternoon of that day she had filled with water, and broke in the middle, and sank in her berth, where she remained, with her cargo under water, until the 1st of November, 1893, when the stone was pumped out of her, and she was then condemned as worthless, and was afterwards sold at auction for $25 to one of the owners." Other findings of fact appeared in the opinion.

Appellants denied all negligence, and insisted that they were in no way responsible for the disaster; and in a cross libel asserted a claim for damages caused by the fault of appellees in allowing the vessel to sink in the river in front of their wharf and to remain there for an undue time. The evidence was voluminous and conflicting.

Messrs. **Robert D. Benedict,** *Nathaniel Wilson, James S. Edwards,* and *Job Barnard,* for appellants:

It was the duty of the master, before fully loading the vessel, to ascertain whether the draft of water in the berth was sufficient for his vessel when loaded and drawing $14\frac{1}{2}$ feet of water.

If the loss was directly and solely caused by the negligence of the master and his failure to perform his duty, then appellants are not liable. Or if there was negligence which contributed to the injury, both on the part of the appellants and the master, then the loss resulting therefrom must be shared equally by the libellants and the appellants.

Christian v. *Van Tassel,* 12 Fed. Rep. 884; *O'Rourke* v. *Peck,* 40 Fed. Rep. 907; *Barber* v. *Abendroth Bros.* 102 N. Y. 406; *The Angelina Corning,* 1 Ben. 109.

The master knew there was not water enough in the berth to allow his vessel to lie afloat drawing 12 feet 10 inches forward and 11 feet aft. Then he could no longer rely on defendants' care. He was bound to take the very obvious precaution of moving his vessel away from the berth at the first opportunity.

Christian v. *Van Tassel,* 12 Fed. Rep. 884; *Union Ice Co.* v. *Crowell,* 5 U. S. App. 270, 55 Fed. Rep. 87, 5 C. C. A. 49; *Peterson* v. *Great Neck Dock Co.* 75 Fed. Rep. 683; *Washington* v. *Staten Island Rapid Transit R. Co.* 68 Hun, 87; *Nelson* v. *Phœnix Chemical Works,* 7 Ben. 37.

The cause of the vessel being injured was the master's negligence in not removing her from a danger whose presence he knew.

Odell v. *New York C. & H. R. R. Co.* 120 N. Y. 325; Marsden, Collisions, 3d ed. p. 23.

An antecedent act of negligence is remote when, notwithstanding it, the other vessel, by the exercise of ordinary care, can avoid a collision.

The Portia, 26 U. S. App. 475, 64 Fed. Rep. 811, 12 C. C. A. 427.

Ordinarily an act, though negligent, is not the proximate cause of an injury when but for the intervening negligence of another the injury would not have been inflicted.

Killien v. *Long Island R. Co.* 35 U. S. App. 215, 67 Fed. Rep. 368, 14 C. C. A. 418.

Mr. **William G. Choate,** for appellees:

It being proved that the vessel was injured and wrecked in the bed of the river within the berth occupied by the vessel in front of the wharf of the appellants, and that the appellants assigned this berth to the ves-

sel without any notice to, or knowledge on the part of, the master or owners of such obstruction, the appellants were liable by the maritime law as for a maritime tort for resulting damages. And the evidence showing that appellants had notice of this obstruction, they were clearly liable in this action, and even if they had succeeded in proving that they had no knowledge or notice, then they were liable on the ground that they were guilty of negligence, and want of reasonable care which the law required of them in not ascertaining the existence of the obstruction.

Philadelphia, W. & B. R. Co. v. *Philadelphia & H. de G. Steam Towboat Co.* 23 How. 209, 16 L. ed. 433; *Carleton* v. *Franconia Iron & S. Co.* 99 Mass. 216; *Nickerson* v. *Tirrell*, 127 Mass. 236; *Wendell* v. *Baxter*, 12 Gray, 494; *Thompson* v. *North Eastern R. Co.* 2 Best. & S. 106; *Mersey Docks & Harbour Board* v. *Gibbs*, L. R. 1 H. L. 93; *Parnaby* v. *Lancaster Canal Proprs.* 11 Ad. & El. 223; *Leonard* v. *Decker*, 22 Fed. Rep. 741; *Pennsylvania R. Co.* v. *Atha*, 22 Fed. Rep. 920; *The Moorcock*, L. R. 14 Prob. Div. 64; *The Calliope* [1891] A. C. 11, L. R. 14 Prob. Div. 138.

In admiralty cases where both of the courts below concurred in their conclusions of fact, the burden is upon the appellant to make out clearly that such findings were without evidence or were clearly against the weight of evidence.

The Baltimore, 8 Wall. 382, 19 L. ed. 463; *The Lady Pike*, 21 Wall. 8, 22 L. ed. 501; *The Marcellus*, 1 Black, 417, 17 L. ed. 218.

Where the facts found below and concurred in by both courts have been found upon conflicting evidence, this court will not reverse if there is evidence to support the decree.

Philadelphia, W. & B. R. Co. v. *Philadelphia & H. de G. Steam Towboat Co.* 23 How. 217, 16 L. ed. 433; *The S. B. Wheeler*, 20 Wall. 386, 22 L. ed. 385.

[432] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

Undoubtedly there was jurisdiction in admiralty in the courts below, and the applicable principles of law are familiar.

[433] *Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care, and cannot carelessly run into danger. *Philadelphia, W. & B. Railway Company* v. *Philadelphia & H. de G. Steam Towboat Company*, 23 How. 209 [16: 433]; *Sawyer* v. *Oakman*, 7 Blatchf. 290; *Thompson* v. *North Eastern R. R. Company*, 2 Best & S. 106; Ex. Ch. Id. 119; *Mersey Docks & Harbor Board Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Carleton* v. *Franconia Iron & Steel Company*, 99 Mass. 216; *Nickerson* v. *Tirrell*, 127 Mass. 236; *Barber* v. *Abendroth Bros.* 102 N. Y. 406 [55 Am. Rep. 821].

Carleton v. *Franconia Iron & Steel Company*, 99 Mass. 216, is so much in point that we quote from it, as did the court of appeals. The case was in tort for injury to plaintiffs' schooner by being sunk and bilged in the dock adjoining defendants' wharf, which fronted on navigable waters, where the tide ebbed and flowed. Defendants had dredged out the adjoining space to accommodate vessels which were accustomed to come with iron and coal for defendants' foundries, situated on the wharf. There was in the space dredged a large rock, sunk in the water and thereby concealed from sight, dangerous to vessels, and so situated that a vessel of the draft to which the water at the wharf was adapted, being placed at high water at that part of the wharf, would lie over the rock, and at the ebb of the tide would rest upon it. Defendants had notice of the existence and position of the rock and of its danger to vessels, but neglected to buoy or mark it or to give any notice of it to plaintiffs or anyone in their employment, though their vessel came to the wharf by defendants' procurement, bringing a cargo of iron for them under a verbal charter. Mr. Justice Gray, among other things, observed:

"It does not indeed appear that the defendants owned the soil of the dock in which the rock was embedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf; and such vessels were *accustomed to [434] occupy it, and could not discharge at that point of the wharf without doing so. . . . Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the traveled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway."

And as to the degree of care required of the master or vessel owner, the same court in *Nickerson* v. *Tirrell* rightly said: "The true rule was stated to the jury, that the master was bound to use ordinary care, and could not carelessly run into danger. We cannot say, as matter of law, that he was negligent because he did not examine or measure the dock and berth. It was for the jury to determine whether the conduct and conversation of the defendant excused the master from making any more particular examination than he did make, and whether, upon all the evidence he used such care as men of

ordinary prudence would use under the same circumstances."

The cases necessarily vary with the circumstances. In *The Stroma*, 42 Fed. Rep. 922, the libellant sought to recover damages received by its steamer, while moored alongside respondent's pier, by settling, with the fall of the tide, on the point of a spindle, part of a derrick attached to a sunken dredge. Work was proceeding for the removal of the dredge, and several buoys had been set to indicate the place of its several parts. The agent of the steamer knew of the location of
[435] the wreck; *sought permission to moor outside of it; and undertook to put the ship in position. The liability to danger was as well known to the steamer as to the wharfinger, who made no representation and was free from negligence. The libel was dismissed, and the decree was affirmed by this court. *Panama Railroad Company* v. *Napier Shipping Company*, 166 U. S. 280 [41: 1004].

In *The Moorcock*, L. R. 13 Prob. Div. 157, defendants, who were wharfingers, agreed with plaintiff for a consideration to allow him to discharge his vessel at their jetty which extended into the river Thames, where the vessel would necessarily ground at the ebb of the tide. The vessel sustained injury from the uneven condition of the bed of the river adjoining the jetty. Defendants had no control over the bed, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. It was held that, though there was no warranty, and no express representation, there was an implied undertaking by defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to a vessel, and that they were liable. The judgment was sustained in the court of appeal (L. R. 14 Prob. Div. 64), and was approved by the house of lords in *The Calliope* [1891] A. C. 11, though in the latter case it was ruled, on the facts, that there was no sufficient evidence of any breach of duty on the part of the wharfingers, and that the injury to the vessel was caused by the captain and pilot attempting to berth her at a time of the tide when it was not safe. The berth was in itself safe, but it was held that, under the particular circumstances disclosed by the proofs, the ship owner had assumed as to the approaches the risk of reaching the berth; while the general rule in respect of the duty of wharfingers was not questioned. The Lord Chancellor remarked: "In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have in-
[436] vited the*vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided." Lord Watson: "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay." And Lord Herschell: "I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with the condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use a wharf in the ordinary way; and we are not dealing with a case of what I may call an abnormal obstruction in the river—the existence of some foreign substance or some condition not arising from the ordinary course of navigation."

We are remitted, then, to the consideration of the facts, and as to them the rule is firmly established that successive decisions of two courts in the same case, on questions of fact, are not to be reversed, unless clearly shown to be erroneous. *Towson* v. *Moore*, 173 U. S. 17 [*ante*, 597]; *The Baltimore*, 8 Wall. 382 [19: 464]; *The S. B. Wheeler*, 20 Wall. 386 [22: 385]; *The Richmond*, 103 U. S. 540 [26: 313]. And when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere.

Tested by this rule we must assume on the record that the vessel in question was chartered by appellants, through a ship *broker duly authorized, for the purpose of [437]
being loaded with a cargo of crushed stone, which would be about six hundred tons, by appellants at their wharf, to be discharged at Fortress Monroe; that the contract, which was oral, did not expressly name the number of tons to be loaded, nor guarantee the depth of water, nor the position of the vessel at the wharf, nor embody as part thereof the representations alleged to have been made in respect of the depth of the water; that there was a ridge of rock in the berth assigned to the vessel by appellants, projecting above the bottom of the river and endangering her safety, even when only partially loaded; and that the vessel though staunch, strong, and seaworthy, was wrecked by grounding on that rock.

We also think that the conclusions of the court of appeals, set forth in its opinion, that no ordinary skill or effort on the part of the master or owners could have been exercised effectively to save the vessel from total loss, and that the injury was not increased, nor were the damages enhanced, by delay in attempting to raise and remove the vessel, cannot reasonably be questioned; and that we are not required to pass on the conflicting evi-

dence in respect of the value of the vessel at the time of the injury. In other words, it must be held that the cross libel was properly dismissed, and that the amount of damages awarded is not open to inquiry.

As to knowledge or notice of the obstruction by appellants, the evidence tended to show that they had been for some years in the use of the wharf and of this particular berth; that they had under lease perhaps two and a half miles of river front, containing stone quarries, some of which they were working; that their business was large, and that during the year 1893, before the accident, they had loaded from fifteen to twenty vessels at the same place; that the capacity of the crusher for loading vessels through the chute was from one hundred and fifty to two hundred tons a day; that they employed from one hundred and fifty to three hundred men, and at times many more, and had bins into which they ran crushed stone to be carried off in various ways. It further appeared that in December, 1892, the two-
[438]masted schooner *Baird, carrying five hundred tons, and when loaded drawing fourteen feet, grounded in the same berth, manifestly on a rock, and that that fact and the character of her injuries were known to appellants. There was much other evidence bearing on this point of knowledge or notice, which fully sustained the court of appeals in its conclusion that appellants knew of the existence of the rock, and its dangerous nature; or, if not, that absence of investigation amounted, under the circumstances, to such negligence as to impute notice.

But the stress of the argument is that the master was guilty of negligence which contributed to the injury, and chiefly in not ascertaining the condition of the bottom of the berth and taking precautions, as advised. Yet on this, as on other branches of the case, the evidence was conflicting, and we cannot say that the finding of the court of appeals that the evidence failed to establish "that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel, while she was moored at the wharf for the purpose of being loaded," was clearly erroneous. The master came to the berth on appellants' business; and there was evidence to the effect that the broker, with whom the engagement was made, and appellants' foreman, were both informed that the vessel would draw when loaded from fourteen to fourteen and one-half feet, and that the master was assured by both that there was plenty of water; that the berth had been dredged out to between fourteen and fifteen feet; and that there was fourteen feet "sure at low water." The evidence also tended to show that the foreman suggested on Friday to the master to make some soundings for himself; that there might have been something dropped over from a lighter that he did not know of; that the captain did make soundings and found sufficient water as the vessel then lay; that one of the appellants told the foreman "to tell the captain of the Tobin that he had better sound around the vessel and make sure that it was laying all right;" that the foreman "said the vessel was laying all right, but he would tell the captain," as he afterwards reported he had; that the captain sounded around the vessel on Saturday
*and discovered no dangerous condition; that[439]
the vessel did not commence leaking until Sunday morning; and that the master thereupon did all he could to save her. It does not appear that the master was informed that the bottom was a rock bottom, or that the fact was mentioned that the Baird had previously got on an obstruction in the berth; and there was nothing in what was said to lead the captain to suppose that there was danger provided there was water enough around the vessel. He rather thought the vessel touched bottom on Saturday evening at low tide, but that, if so, did not in itself constitute cause for alarm. In fact, the danger was the existence of the rock in the middle of the berth under the vessel. The evidence is voluminous in respect of the extent and manner of the loading; of what passed between the parties; of the different soundings, and so on; but it is unnecessary to recapitulate it, as we are satisfied that no adequate ground exists for disturbing the result reached.

At all events, we are unable to decide that the court of appeals was not justified in holding on the evidence that appellants were liable for negligence and the want of reasonable care, and that the master was free from contributory negligence; and the decree must, therefore, be *affirmed.*

WILLIAM YERKE, *Appt.*,
v.
UNITED STATES and The Apache Indians.

(See S. C. Reporter's ed. 439–442.)

Claim for Indian depredations—what claims allowable.

1. Under the first clause of the act of March 3, 1891, providing for the adjudication and payment of claims for Indian depredations, one who was not a citizen at the time of the depredation cannot make a claim, although he had previously declared his intention to become a citizen and was afterwards admitted to citizenship.
2. Under the second clause of the said act, a claim for Indian depredations which has only been filed with the Commissioner of Indian affairs is not within the jurisdiction of the court of claims, as a claim which has been "examined and allowed by the Interior Department."

[No. 664.]

Submitted February 20, 1899. Decided March 13, 1899.

APPEAL from a judgment of the Court of Claims dismissing for want of jurisdiction the claim of William Yerke for property taken and destroyed by the Apache Indians, who were in amity with the United States when the depredation was committed. *Affirmed.*

The facts are stated in the opinion.

Messrs. **T. H. N. McPherson** and *C. M. Carter* for appellant.

Messrs. **John G. Thompson,** Assistant Attorney General, and *Lincoln B. Smith* for appellees.

*Mr. Justice **McKenna** delivered the [440]opinion of the court:

The appellant (petitioner in the court below) claimed $3,400.00 under the act approved March 3, 1891, entitled "An Act to Provide for the Adjudication and Payment of Claims Arising from Indian Depredations." He alleged that he was a native of Prussia, and came to the United States in 1828, and declared his intention to become a citizen of the United States on the 8th of January, 1842, and was recognized as a voter of Cochise county, Arizona, from 1884 to 1886; that he made application for and was adjudged and declared a citizen of the United States December 16, 1896; that in March, 1872, he was the owner of certain property (which was described) of the value of $3,400.-00, in Arizona territory, "which was taken, used, and destroyed by the Apache Mohave Indians," who were in amity with the United States "when the depredation was committed." He further alleged "that he presented his claim to the honorable Commissioner of Indian Affairs March 8, 1882, but that no action was had thereon; that said claim has not been paid or any part thereof, nor has any of the property been returned either by the said Indians or the United States."

The United States filed a general traverse.

The court dismissed the petition for want of jurisdiction. This ruling is assigned as error.

The act of March 3, 1891, gives jurisdiction to the court of claims to "inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:"

First. "All claims for property of citizens [441]of the United *States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States. . . ."

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act approved March 3, 1885, and under subsequent acts. (23 Stat. at L. 376.)

The "subsequent acts" do not affect the question; and that part of the act of March 3, which it is necessary to quote, provides as follows:

"For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department, and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending, but not yet examined on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, . . . to be made and presented to Congress at its next regular session. . . ."

Is the demand of appellant within any of these clauses?

1. In *Johnson* v. *United States*, 160 U. S. 546 [40: 529], it was held that citizenship at the time of the depredation was an essential condition of the jurisdiction of the court of claims of demands under the first clause.

2. Speaking of the second clause, it was said: "By that, jurisdiction is extended to 'cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress' of March 3, 1885, and subsequent acts."

The appellant's case was not of the former kind. His claim had not "been examined and allowed by the Interior Department." It had only been filed with the Commissioner of Indian Affairs. Was it hence a case of the second kind? To have been that it must have been one then "pending but not yet examined;" and must have been on behalf of a citizen of *the United States. It was on file, [442] and hence may be said to have been "pending," but it was not on behalf of a citizen of the United States. Appellant was not then a citizen. He did not become such until December 16, 1896.

But appellant urges that the act of 1891 applies to claimants who were inhabitants at the time of the depredations, and that their naturalization afterwards should be held to relate to that time. This view is attempted to be supported by analogy to sections 2289 and 2319 of the Revised Statutes, which respectively give to citizens and to those who have declared their intention to become such the right to enter agricultural or mineral lands, and the practice of the Land Department in such cases to give retroactive effect to a declaration of intention. The answer is ready, and may be brief. The act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other statutes or from the practice under other statutes. The rule is elemental that language which is clear needs no construction. *Lake County* v. *Rollins*, 130 U. S. 662 [32: 1060]. Under both of the clauses of the act of 1891, the claims of which jurisdiction was given were strictly identified; under the first clause, by citizenship at the time of the depredations; maybe also under the act of 1885, which provides the cases of the second clause. But whether, as was said in *Johnson* v. *United States*, the different phraseology of the act of March 3, 1885, would include claims in favor of those not citizens at the time of the depredations by the Indians, it was decided that they must be claims *then* "pending"—that is, pending at the time of the act on behalf of citizens. And as it was such cases which "were authorized to be examined" under the act of 1885, it was to such cases that the jurisdiction of the court of claims was extended by the second clause of the act of 1891.

Judgment affirmed.

[443]REMINGTON PAPER COMPANY, *Plff. in Err.*,
v.
JOHN W. WATSON, Frank H. Pope, and the Louisiana Printing & Publishing Company, Limited.

(See S. C. Reporter's ed. 443–452.)

Review of state judgment.

A judgment by a state court sustaining an *ex parte* appointment of a receiver, as against subsequent proceedings of attachment and sequestration in a Federal court, if determined on grounds which did not involve Federal questions, is not subject to review by writ of error from this court.

[No. 146.]

Argued January 17, 18, 1899. Decided March 13, 1899.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court affirming the judgment of the Civil District Court for the Parish of Orleans, Louisiana, in favor of John W. Watson *et al.*, dismissing the suit of the Remington Paper Company for damages, and adjudging that its demand be rejected, and the appointment of John W. Watson as receiver be maintained, etc. Writ of error *dismissed.*

See same case below, 49 La. Ann. 1296.

The facts are stated in the opinion.

Messrs. **E. T. Merrick** and *Albert Voorhies* for plaintiff in error.

Mr. **Alexander Porter Morse** for defendants in error.

[443] *Mr. Justice **McKenna** delivered the opinion of the court:

It is objected that the record presents no Federal question.

In an action brought in the civil district court for the parish of Orleans, state of Louisiana, John Watson, one of the defendants in error, was appointed, on the 17th day of May, 1893, receiver of the property and assets of the Louisiana Printing & Publishing Company, a corporation created under the laws of the state of Louisiana. As such receiver he took possession of such assets and property. There was no appeal taken from the order of appointment.

The plaintiff in error, a corporation created under the laws of New York, and having its residence in that state, brought an action in the United States circuit court for the district of Louisiana against the Louisiana Printing & Publishing Company, to recover $3,863.55, for paper furnished the company, and sued out writs of sequestration and at-
[444]tachment, by* authority of which, on the 29th day of May, 1893, the United States marshal seized certain property of the company and took the same from the possession of Watson.

On May 30, 1893, Watson as receiver filed a motion in said circuit court to quash the attachment and sequestration sued out, "and said rule on motion concluded with an order which the mover in the rule desired the court to adopt;" and thereupon the judge of the court made the following order:

"Let this rule be filed, and let the Remington Paper Company, through their attorneys, Merrick & Merrick, show cause on Thursday, June 1, at 11 A. M. why the above motion should not be granted."

To which motion the Remington Paper Company filed the following:

"The plaintiff in this case, for the purpose only of objection to the regularity of the rule taken by John W. Watson, calling himself receiver, by way of exception, says:

"That said mover as a pretended receiver cannot interfere in the progress of this suit in the informal and summary manner attempted by him in his said rule, nor has he any right to be heard to demand by the judgment of this court anything of this court without coming into court by regular process and proceedings and in the mode allowed by law, wherein the plaintiff will be entitled to a trial of questions of law and fact in the mode and manner guaranteed by the Constitution and prescribed by law.

"Wherefore this plaintiff says that this rule taken by said John W. Watson should and ought to be dismissed at the cost of said mover. Merrick & Merrick, Att'ys.

"And in the event the foregoing exception to said rule is overruled and this plaintiff is required by your honorable court to answer the same, and not otherwise, this plaintiff denies the allegations contained in said rule and denies that said John W. Watson, the pretended receiver, has any legal right or authority under the *ex parte* proceeding on which he relies to take possession of the property attached in this case nor to *hinder [445]
or delay your petitioner from collecting its just debt against said defendant.

"Merrick & Merrick, Att'ys."

The plaintiff prayed the court to decide the exception to said rule before proceeding further or hearing any testimony on the rule taken.

The court, however, decided to hear the testimony on the allegations of said rule, and after hearing the same, on the 6th day of June, 1893, made the following order:

"This cause having been heard and submitted upon a rule taken by John W. Watson, appointed a receiver of the defendant by the civil district court for the parish of Orleans, to set aside the writs of attachment and sequestration issued in this cause, and upon the exception thereto filed by the plaintiff, and the same having been considered by the court, it is now ordered, for the reasons assigned in the written opinion on file, that the marshal restore the property seized in this cause under the writs of attachment and sequestration to John W. Watson, receiver, unless, within five days, the plaintiff applies for and ultimately receives authority from the civil district court which appointed Watson or from the appellate court to hold same under said writs."

The opinion of the court referred to in the order recites that Watson had been "appointed receiver upon a petition of a creditor and in the intervention of the attorney general; which original and intervening petitions averred that all the officers of the defendant corporation had resigned and that in

fact it was a vacant corporation." It was further said:

"I do not think this court can deal at all with the alleged irregularity in the appointment of the receiver, such as the alleged want of an execution, etc., preceding the appointment. It appearing to this court that a court of concurrent jurisdiction has appointed a receiver who was in actual possession, this court has no right to attempt to dispossess him. All the matter as to irregularity of the appointment must be dealt with by the court that appointed. I understand the doctrine of the comity of courts [446] to be this—that where a court *has jurisdiction of a cause and property and through its proper officer is in possession, it is the duty of all other courts to refrain altogether from the attempt to take that property into possession except by permission of the court in possession. It is not a question of the validity of process, but a question of public order, and the rule of comity is based upon the duty of courts to abstain from anything that might lead to violence. There having been a receiver appointed by a court of competent jurisdiction and he being in possession of the property attempted to be seized by the marshal, and which was in fact seized, I think the duty of this court is to restore the property practically to the situation in which it was when the property was interfered with by the marshal."

The bill of exceptions signed by the circuit judge shows that Watson was in possession of the property, engaged in making an inventory of it when it was seized by the marshal, and had taken the oath of office but had filed no bond.

On the 9th day of June, 1893, three days after the order of the circuit court, the Remington Company filed in the civil district court for the parish of Orleans a petition and action of nullity and for damages under the laws of the state against Watson, receiver, Pope, petitioning creditor, and the Louisiana Printing & Publishing Company.

The petition alleged the indebtedness of the latter company to petitioner, the action by the latter in the United States circuit court, the attachment of property, the motion of Watson as hereinbefore stated, and the ruling and order of the court thereon; that the effect thereof will be to prevent the execution of any judgment rendered, and that "Watson was without right to stand in the way of a just debt because he had given no bond at the date of the seizure of property under the attachment nor complied with the order of the court, nor had proceedings been had to perfect his appointment or to give him the right to control the property or to prevent any suit from being brought or any court from subjecting the property of said defendant by due course of law to the payment of its debts, and the conduct of the said Watson, Frank H. Pope, and those confederating with them in attempting to [447] *screen the property from payment of debts was collusive and a constructive fraud upon petitioner and a violation of its rights under the laws and Constitution of the United States of America," that the order appointing him was null and void because obtained "upon the collusive petition of Frank H. Pope without citation to anyone, without oath or affidavit or any proof and without contest." It was further alleged that the so-called intervention of the attorney general did not cure the nullity of the proceedings of Pope and Watson, and that the state was without authority to intrude itself in that manner into the controversies of private persons. There was a prayer for citation and that the order appointing Watson receiver be declared as against petitioner null and void and of no effect, and the same be ineffectual as a bar to said attachment or sequestration or other proceedings on the part of the petitioner in the circuit court of the United States, and that said Watson and Pope be condemned, as *in solido* or otherwise, to pay petitioner the sum of $3,863.55 damages caused it by the construction of its proceedings in the circuit court, and for general relief.

The petition was subsequently amended, amplifying somewhat the charges of illegality in Watson's appointment, and alleging with more detail his action in the circuit court, and averring "that said *ex parte* order of this court, dated the 17th day of May, 1893, purporting to appoint John W. Watson receiver of the Louisiana Printing & Publishing Company, Limited, was obtained in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in this, that said decree was obtained without due process of law, it being *ex parte* and without affidavits, bond, or proof, as more at large alleged in the original petition, and the said unconstitutional and void order and decree is set up and alleged by the defendants as a bar and a defense to prevent your petitioner from recovering and having its said just and valid debt from its said debtor, the said Louisiana Printing & Publishing Company, Limited, and thus depriving petitioner of its claim duly secured by due and legal process of law on the property of its said debtor, and seized under said *writs from said circuit court of the United States, and said defendants seek through [448] said void *ex parte* order of 17th day of May, 1893, to effect the transfer and —— of the possession and property of said Louisiana Printing & Publishing Company under the seizure of petitioner under its writs to said John W. Watson, thereby screening the same from ordinary and legal pursuits of creditors in the modes pointed out by law, in violation of the Fifth and said Fourteenth Amendments of the Constitution of the United States."

To the petition Watson answered, denying all and singular its allegations except his appointment as receiver, and "assuming the attitude of plaintiff in reconvention," alleged that the Remington Paper Company was a nonresident corporation, and that by its "unlawful and unwarranted seizure of the property of said Louisiana Printing & Publishing Company, Limited, which seizure has been released, said Remington Paper Company has damaged the creditors of said Louisiana Printing & Publishing Company, Limited,

for whose benefit *ut universi* this reconventional demand is now prosecuted."

The damages were itemized and alleged to have amounted to $3,847.15.

The answer concluded as follows:

"Wherefore said John W. Watson prays that said plaintiff's petition be dismissed; that he be quieted in his position as receiver; that his appointment be ratified and confirmed as prayed for by said Louisiana Printing & Publishing Company and by a large majority of its stockholders and its board of directors, and that, as the representative of the creditors of said company, he have judgment on his reconventional demand against plaintiff in the sum of $3,847.15 and all costs of this suit."

Upon the hearing judgment was rendered as follows:

"1st. In favor of John W. Watson and Frank H. Pope, rejecting and dismissing the suit of the Remington Paper Company for damages.

"2d. That the demand of the Remington Paper Company against John W. Watson, Frank H. Pope, and the Louisiana Printing & Publishing Company, represented by John
[449] W. *Watson, receiver, of the nullity of the order appointing said Watson receiver, etc., be also rejected and dismissed, and that said appointment and order be maintained.

"3d. That the reconventional demand for money claimed by Watson as receiver herein be dismissed as of nonsuit, and that the Remington Paper Company be condemned to pay all costs of this suit."

The supreme court affirmed the judgment (49 La. Ann. 1296), and the case was brought here.

The supreme court, after reciting the proceedings taken by the respective parties and stating their contentions, said that the record showed that the Remington Company did not comply with the order of the United States circuit court, "but, on the contrary, this action of nullity and claim for damages was resorted to instead of such an application," and it was held that the action depended necessarily upon a claim for damages, and that the company had no such claim. It was further said:

"In the first place, addressing ourselves to the question of damages, we are of opinion that the plaintiff was plainly at fault in not employing the proper means to protect its own rights; (1) first, because it used no effort to avail itself of the permission granted by the circuit court whereby the seizure might have been retained on the property; (2) second, because it took no means or proceedings looking to the protection and preservation of its alleged vendors' lien upon the property after it had passed into the custody and control of the receiver, either by injunction against a sale by the receiver or a third opposition claiming the proceeds of sale, under a separate appraisement and sale.

"In our view, such measures could have been easily resorted to on the part of the plaintiff, without prejudice to this or its circuit court suit, and, failing in this, an insurmountable obstacle has been raised to its claim for damages.

"For surely the plaintiff cannot be heard to say that Watson and Pope have perpetrated upon it damages resulting from a loss and injury it has occasioned through its own fault.

"The plaintiff's recourse against property stricken by a vendor's *lien was just as effica- [450]
cious against it in the hands of the receiver as it was in that of the marshal, and had it made proper and seasonable application to the judge *a quo*, possibly he might have permitted the marshal to retain in his possession the property seized under the writ of attachment in the circuit court. However vain and nugatory such an effort may have proven, it was none the less its duty to have made the effort at least.

"Surely the receiver cannot be said to have committed a wrong or trespass upon the plaintiff's rights by advertising and making a sale of corporate assets in pursuance of an order of court to pay debts, especially when such sale was neither enjoined nor opposed by it.

"Presumably the proceeds of the sale are yet in the hands of the receiver for distribution according to law, and plaintiff can exercise its rights thereon.

"In our opinion, this is not a case in which we are called upon to examine and scrutinize the legality of the appointment of a receiver, for the reason that the complaining creditor has not suffered any injury thereby and is itself seeking a preference.

"We think the ends of justice would be best subserved by preserving and maintaining the *status quo*."

The assignments of error are somewhat involved in statement, but they are based on the ground that the order appointing Watson receiver was null and void because the ownership of property in the Louisiana Printing & Publishing Company, the debtor of plaintiff, "could not be devested to the prejudice of creditors on an arbitrary order without due process of law," and the use of such order to obtain the ruling of the United States circuit court, which directed the United States marshal to restore to him the property attached, deprived the plaintiff in error of a right without due process of law, and that therefore the judgment of the lower court was erroneous.

The appointment of a receiver to take possession of the property of an insolvent corporation upon the petition of a creditor is certainly "due process." This, of course, is not denied, but *the invalidity of the order [451]
of appointment is asserted because it was made *ex parte*, and because Watson had not fully qualified. It is hence argued that the appointment was a nullity—constituted "no legal obstacle" to the proceedings in the United States circuit court.

This view was not entertained by that court, but, on motion of Watson, the court ordered the property which had been attached restored to him and remitted the plaintiff (plaintiff in error here) to the state court. Its order was "that the marshal restore the property seized in this court under the writs of attachment and sequestration to John W. Watson, receiver, unless

within five days the plaintiff applies for and ultimately receives authority from the civil district court which appointed Watson or from the appellate court to hold same under said writs." If this was error its review cannot be had on this record.

The plaintiff did not apply to "the civil district court which appointed Watson," the supreme court in its opinion says, but brought an action for nullity of the order of appointment under the Code of the state (Code of Pr. of La. arts. 604 *et seq.*) and for damages.

The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the supreme court of the state.

The plaintiff in error thus sought in the state court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guaranties of the Constitution of the United States were denied because the litigation did not result successfully. *Central Land Co.* v. *Laidley*, 159 U. S. 112 [40: 95]; *Walker* v. *Sauvinet*, 92 U. S. 80 [23: 678]; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 26 [28: 889, 895]; *Morley* v. *Lake Shore & M. S. Railroad Co.* 146 U. S. 162, 171 [36: 925, 930]; *Bergemann* v. *Backer*, 157 U. S. 655 [39: 845].

It follows that this writ of error cannot be maintained.

The rule was announced in *Eustis* v. *Bolles*, 150 U. S. 370 [37: 1113], "that when we find it unnecessary to decide any Federal
[452] *question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error." See also *St. Louis, C. G. & Fort Smith R. Co.* v. *Missouri* [*Merriam*], 156 U. S. 478 [39: 502]; *Hamblin* v. *Western Land Co.* 147 U. S. 531 [37: 267]; *Castillo* v. *McConnico*, 168 U. S. 674 [42: 622].

Writ of error dismissed.

Mr. Justice **White** took no part in this decision.

Ex parte HENRY WARD.

(See S. C. Reporter's ed. 452-456.)

Habeas corpus, when not allowed.

Where a person is convicted by a judge *de facto*, though not *de jure*, and detained in custody in pursuance of his sentence, he cannot be properly discharged upon habeas corpus; the right of such judge to exercise judicial functions cannot be determined on such writ.

[Original. No number.]

Submitted February 20, 1899. Decided March 20, 1899.

APPLICATION for leave to file petition for writ of habeas corpus by Henry Ward, applicant, to be relieved from imprisonment on a sentence to the penitentiary, on the ground that said sentence was void because the judge before whom he was tried was not properly appointed and commissioned. Leave to file petition *denied*.

The facts are stated in the opinion.

Messrs. **R. C. Garland** and **W. Wright, Jr.**, for petitioner.

*Mr. Chief Justice **Fuller** delivered the opinion of the court: [452]

Ward was tried and found guilty before Edward R. Meek, judge of the district court of the United States for the northern district of Texas, for "having in his possession counterfeit moulds," and was sentenced October 22, 1898, to *the penitentiary at Fort [453]
Leavenworth, Kansas, at hard labor for a period of one year and one day, and committed accordingly to the custody of the warden of said prison. He now makes application for leave to file a petition for habeas corpus on the ground that the sentence was void because Judge Meek was appointed July 13, 1898, after the adjournment of the previous session of the Senate of the United States, and commissioned by the President to hold office until the end of the next succeeding session of the Senate; and from the date of the appointment and commission, until after the conviction and the sentence, there was no session of the Senate, though it is not denied that the appointment was afterwards confirmed.

By the act of February 9, 1898 (30 Stat. at L. 240, chap. 15), provision was made for an additional judge for the northern judicial district of the state of Texas, to be appointed by the President, by and with the advice of the Senate, and that when a vacancy in the office of the existing district judge occurred, it should not be filled, so that thereafter there should be only one district judge. It is stated that Judge Rector was district judge of the northern district of Texas when the statute was passed (February 9, 1898), that he died (April 9, 1898) before Judge Meek's appointment and while the Senate was still in session; and argued that the appointment could not be treated as one to fill the vacancy causd by Judge Rector's death, because that was forbidden by the act, and must be regarded as an appointment to the office of "additional district judge" created thereby. Clause three of section two of article two of the Constitution provides that "the President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session;" but it is insisted that the office in this instance was created during a session of the Senate, and that it could not be filled at all save by the concurrent action of the President and the Senate.

And it is further contended that the President could not during the recess of the Senate and without its concurrence, *by his com- [454]
mission invest an appointee with any portion of the judicial power of the United States government as defined in article three of the Constitution, because that article re-

quires that judges of the United States courts shall hold their offices during good behavior, and hence that no person can be appointed to such office for a less period and authorized to exercise any portion of the judicial power of the United States as therein defined.

We need not, however, consider the elaborate argument of counsel in this behalf, since we regard the well-settled rule applicable here that where a court has jurisdiction of an offense, and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer *de facto;* and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of habeas corpus.

[455] *In *Griffin's Case,* Chase, Dec. 364, 425, this was so ruled, and Mr. Chief Justice Chase said: "This subject received the consideration of the judges of the supreme court at the last term, with reference to this and kindred cases in this district, and I am authorized to say that they unanimously concur in the opinion that a person convicted by

[456] a judge *de *facto,* acting under color of office, though not *de jure,* and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus." And to that effect see *Sheehan's Case,* 122 Mass. 445 [23 Am. Rep. 374]; *Fowler* v. *Bebee,* 9 Mass. 235 [6 Am. Dec. 62]; *People* [*Ballou*] v. *Bangs,* 24 Ill. 187; *Re Burke,* 76 Wis. 357; *Re Manning,* 76 Wis. 365; *Re Manning,* 139 U. S. 504 [35: 264]; Church, Habeas Corpus, §§ 256, 257, 369, and cases cited.

In *McDowell* v. *United States,* 159 U. S. 596 [40: 271], one of the circuit judges in the fourth circuit designated the judge of one of the district courts in North Carolina to hold a term in South Carolina, and his power to act was challenged by an accused on his trial and before sentence. The cause was carried to the court of appeals for that circuit, which certified questions to this court. We decided that whether existing statutes authorized the designation of the North Carolina district judge to act as district judge in South Carolina was immaterial, since he must be held to have been a judge *de facto,* if not *de jure,* and his actions as such so far as they affected other persons were not open to question. *Cocke* v. *Halsey,* 16 Pet. 71, 85, 86 [10: 891, 896]; *Hussey* v. *Smith,* 99 U. S. 20, 24 [25: 314, 315]; *Norton* v. *Shelby County,* 118 U. S. 425, 445 [30: 178, 187]; *Ball* v. *United States,* 140 U. S. 118, 128, 129 [35 L. ed. 377, 381, 382].

The result of the authorities is that the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked, and as Judge Meek acted, at least, under such color, we cannot enter on any discussion of propositions involving his title to the office he held.

Leave denied.

THIRD STREET & SUBURBAN RAILWAY COMPANY, *Appt.,* [457]
v.
MEYER LEWIS.

(See S. C. Reporter's ed. 457-460.)

Decree of circuit court of appeals, when final.

A decree of the circuit court of appeals in a case in which the jurisdiction at the outset depended on diversity of citizenship is final, even if another ground of jurisdiction was alleged in a supplemental bill by which a new defendant was made a party.

[No. 212.]

Submitted March 10, 1899. Decided March 20, 1899.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming the decree of the Circuit Court of the United States for the District of Washington for the foreclosure of a mortgage and sale of mortgaged premises, in a suit by Meyer Lewis against the Third Street & Suburban Railway Company. *Appeal dismissed.*

See same case below, 48 U. S. App. 273.

Statement by Mr. Chief Justice **Fuller:**

This was a supplemental bill of complaint filed October 9, 1895, in the circuit court of the United States for the district of Washington. The original bill does not appear in the record, but the supplemental bill alleged—

"Meyer Lewis, a citizen of the city and county of San Francisco in the state of California, with leave of court first had and obtained, brings this his supplemental bill, against the Third Street & Suburban Railway Company, a corporation duly organized and existing under the laws of the state of Washington, defendant, with its principal place of business in the city of Seattle, in said state; the original bill herein being brought by this plaintiff against Western Mill Company, a corporation organized and existing under the laws of the state of Washington, with its principal place of business in Seattle, in said state, John Leary and J. W. Edwards, citizens of Washington and residents of Seattle, James Oldfield, citizen of Washington and a resident of Seattle, Malcolm McDonald, a citizen of Washington, and a resident of Fort Blakely, in said state the city of Seattle, a municipal corporation duly organized and existing under the laws of the *state of Washington, Washington Savings [458] Bank, a corporation duly organized and existing under the laws of Washington, with its principal place of business in Seattle, in said state, and other defendants, against whom decrees *pro confesso* have been entered in the above-entitled cause prior to the bringing of this supplemental bill."

And set forth in paragraph one:

"That at all times hereinafter mentioned the defendant, Third Street & Suburban Railway Company, was and it now is a corporation, duly organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business in the city of Seattle, in said state."

The supplemental bill then stated that the Western Mill Company, in May, 1884, and certain other defendants as sureties, made and delivered to plaintiff their note, to secure the payment of which, and the interest thereon and attorneys' fees, it executed a certain mortgage, which plaintiff sought by his bill to foreclose.

The eighth paragraph was as follows:

"That on or about the 14th day of October, 1891, the defendant, Western Mill Company, mortgagor herein, by its certain deed of sale, sold said mortgaged premises and every part thereof to the Ranier Power & Railway Company, a corporation organized under the laws of Washington, and having its principal place of business in Seattle; that thereafter, and on or about the 13th day of February, 1895, in the cause of *A. P. Fuller* v. *The Ranier Power & Railway Company*, No. —, then pending before this honorable court, Eben Smith, Esq., the duly appointed, qualified, and acting master in chancery in said cause, made, executed, and delivered to A. M. Brockes, Angus McIntosh, and Frederick Bausman, purchasers of said premises, at a sale theretofore had, to satisfy a decree in said cause theretofore rendered by this court, a deed of sale to said mortgaged premises and each and every part thereof; that thereafter, on the 12th day of February, 1895, for a valuable consideration, said Angus McIntosh, A. M. Brookes, and Frederick Bausman
[459] duly bargained and sold *by their deed of sale, their right, title, and interest in and to said premises, and every part thereof to the Third Street & Suburban Railway Company, defendant herein, who now claims some interest in or lien upon said mortgaged premises through said deed of purchase, so made subsequent to the commencement of plaintiff's action, but that said interest in or lien upon said property is subsequent, subject, and inferior to the lien of plaintiff's mortgage."

Thereupon plaintiff prayed judgment against the parties to the note for the sum alleged to be due with interest and attorneys' fees; that a decree for the sale of the mortgaged premises be entered, the proceeds to be applied in payment of the amount found due on the note and mortgage; that the railway company, and all persons claiming under it, be barred and foreclosed from setting up any claim or equity therein thereafter; and that plaintiff have judgment over for any deficiency on the sale. The defendant, the railway company, answered; a demurrer was sustained to its answer; and a decree was entered against the parties to the note for the amount due thereon and for the sale of the premises mortgaged, with judgment against them for any deficiency; and also for the distribution of any surplus that might remain after the application on the mortgage of the proceeds from the sale.

The case was carried on appeal to the circuit court of appeals for the ninth circuit, and the decree below was by that court affirmed. 48 U. S. App. 273. And from its decree this appeal was allowed.

Mr. **Frederick Bausman** for appellant.

Messrs. **J. W. Blackburn, Jr.,** and **George E. Hamilton** for appellee.

*Mr. Chief Justice **Fuller** delivered the opinion of the court: [459]

Although the record does not contain the original bill, it is apparent that the jurisdiction of the circuit court was invoked on the ground of diverse citizenship, and that the *interest of appellants in the mortgaged [460]
premises was acquired after the commencement of the action.

This supplemental bill made appellant a party defendant as claiming an interest, but the jurisdiction still rested on diversity of citizenship. The decree of the circuit court of appeals was, therefore, made final by the statute, and the appeal cannot be sustained.

But it said that because plaintiff saw fit to set forth the manner in which appellant obtained its interest, and it appeared that appellant claimed under a conveyance from the purchasers at a sale made pursuant to a decree of the circuit court, the jurisdiction was not entirely dependent on the citizenship of the parties. The averments, however, in respect to the acquisition of its interest by appellant, were no part of plaintiff's case, and if there had been no allegation of diverse citizenship the bill unquestionably could not have been retained. The mere reference to the sale and foreclosure could not have been laid hold of to maintain jurisdiction on the theory that plaintiff's cause of action was based on some right derived from the Constitution or laws of the United States.

It is thoroughly settled that under the act of August 13, 1888, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454 [38: 511]; *Metcalf* v. *Watertown*, 128 U. S. 586, 589 [32: 543, 544]; *Colorado Central Consol. Min. Company* v. *Turck*, 150 U. S. 138 [37: 1030]. If it does not appear at the outset that the suit is one of which the circuit court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defense. And so when jurisdiction originally depends on diverse citizenship the decree of the circuit court of appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings. *Ex parte Jones*, 164 U. S. 691 [41: 601].

Appeal dismissed.

[461] J. M. TURNER *et al.*, *Plffs. in Err.*,
v.
BOARD OF COMMISSIONERS OF WILKES COUNTY *et al.*

(See S. C. Reporter's ed. 461-464.)

Federal question—construction of the Constitution and laws of a state.

1. A Federal question which will support a writ of error to a state court is not raised by a decision of a state court against the validity of a state statute under which bonds were issued, although it had held the statute valid before their issue, where its decision is based upon the Constitution and laws of the state.
2. This court is bound by the decision of a state court in regard to the meaning of the Constitution and laws of its own state; and its decision upon such state of facts raises no Federal question.

[No. 642.]

Submitted February 20, 1899. Decided March 20, 1899.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment of that court in an action brought by the Board of Commissioners of Wilkes county *et al.* against Clarence Call, treasurer of said county adjudging that certain bonds issued by the county of Wilkes in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company were void by reason of the invalidity of the laws under which they were issued. On motion to dismiss or affirm. *Dismissed.*

The facts are stated in the opinion.

Mr. **A. C. Avery** for defendant in error in favor of the motion.

Mr. **Richard N. Hackett** for plaintiff in error in opposition to the motion.

[461] *Mr. Justice **Peckham** delivered the opinion of the court:

This action was commenced in the superior court of Wilkes county in the state of North Carolina, by the board of commissioners of Wilkes County and C. C. Wright, against Clarence Call. Mr. Wright was a taxpayer of the county, while the defendant Call was its treasurer. The action was brought to test the validity of certain bonds issued by the county of Wilkes in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company.

The defendants Turner and Wellborn were the owners of some of the bonds, and after the bringing of this action they were, on their own motion, brought in as parties defendant, and they invited all other bondholders to come in and join them in resisting the action.

[462] *It was claimed by the holders of the bonds that authority for their issue existed under an ordinance chartering the Northwestern North Carolina Railroad Company, which ordinance was adopted by the constitutional convention of North Carolina, March 9, 1868, the Constitution being itself ratified April 25, 1868. It was also insisted that the bonds were authorized under sections 1996 to 2000 of the Code of North Carolina, as enacted in 1869, and subsequently ratified in 1883; also that the charter of the railroad company, as amended in 1879, and again in 1881, authorized the issuing of the bonds. The bonds were in fact issued in 1890, and therefore subsequent to all the legislation above referred to. The bonds recited on their face that they were issued under the act of 1879.

As grounds for their contention that the bonds were invalid, the plaintiffs below asserted that neither the above-mentioned act of 1879, nor the amended act of 1881, had been constitutionally passed; that the bonds were not issued under the ordinance adopted by the constitutional convention; and that by the doctrine of estoppel the bondholders could not claim that the bonds were issued under such ordinance or by virtue of any other authority than that recited on their face, *viz.*, the act of 1879.

The supreme court of the state held that the bonds were void because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the Constitution. The court further held that the bonds were not authorized by the above sections of the Code, and that as they purported, by recitals on their face, to have been issued under the act of 1879, the bondholders were estopped from setting up any other authority for their issue, such as the ordinance of the constitutional convention above mentioned.

The bondholders have brought the case here, claiming that by the decision below their contract has been impaired, because, as they allege, the supreme court of the state had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their issue, and that in holding the contrary after the issue of these bonds the state court had impaired the obligation of the contract, *and its [463]
decision raised a Federal question proper for review by this court.

But in this case we have no power to examine the correctness of the decision of the supreme court of North Carolina, because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own Constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the state court in regard to the meaning of the Constitution and laws of its own state, and its decision upon such a state of facts raises no Federal question. Other principles obtain when the writ of error is to a Federal court.

The difference in the jurisdiction of this court upon writs of error to a state as distinguished from a Federal court, in questions claimed to arise out of the contract clause of the Constitution, is set forth in the opinion of the court in *Central Land Company* v. *Laidley*, 159 U. S. 103 [40: 91],

and from the opinion in that case the following extract is taken (page 111 [40: 94]):

"The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the Constitution of the state of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The supreme court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the district court of the United States for the district of Iowa, following the later decisions of the state court, was reviewed on the merits and reversed by this court, for misconstruction of the Constitution of Iowa. *Gelpcke* v. *Dubuque,* 1 Wall. 175, 206 [17:520, 526]. But a writ of error to review one of those
[464] decisions of *the supreme court of Iowa was dismissed for want of jurisdiction, because, admitting the Constitution of the state to be a law of the state within the meaning of the provision of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Mississippi & M. Railroad Co.* v. *McClure,* 10 Wall. 511, 515 [19: 997, 998].

An example of the jurisdiction exercised by this court when reviewing a decision of a federal court with regard to the same contract clause is found in the same volume. *Folsom* v. *Ninety Six,* 159 U. S. 611, 625 [40: 278, 283].

This case is governed by the principles laid down in *Central Land Company* v. *Laidley, supra,* and the writ of error must, therefore, be *dismissed.*

UNITED STATES, *Appt.,*
v.
NEW YORK INDIANS.

(See S. C. Reporter's ed. 464-473.)

Findings of court of claims—when case will not be remanded—power of said court—when an appeal will not be entertained.

1. The findings of the court of claims in an action at law determine all matters of fact, like the verdict of a jury; and where there is any evidence of a fact which said court finds, and no exception is taken, its finding is final.
2. This court will not remand a case to the court of claims with directions to return whether certain distinct propositions in requests for findings of fact, presented to that court at the trial of the case, were established and proved by the evidence, if the object of its being so remanded is to ask this court to determine questions of fact upon the evidence.
3. The court of claims is not at liberty to redetermine who were parties to the treaty of Buffalo Creek, and entitled to the benefits of its provisions, after that has been determined by this court on a former appeal.
4. An appeal will not be entertained by this court from a decree entered in an inferior court, in exact accordance with the mandate of this court upon a previous appeal.

[No. 697.]

Motion for additional findings submitted January 30, 1899. Motion to dismiss or affirm submitted February 20, 1899. Decided March 20, 1899.

ON APPEAL from a judgment of the Court of Claims in favor of the claimants, the New York Indians, for the recovery from the United States of the amount received by it for the Kansas lands set apart for said Indians and subsequently sold by the United States. On motion to dismiss or affirm and also on motion by the United States for additional findings. *Dismissed.*

See same case on former appeal 170 U. S. 1, 42 L. ed. 927.

Statement by Mr. Justice **Brown:**

This case arose from a motion by the Indians to dismiss the appeal of the United States for want of jurisdiction, or, in the alternative, to affirm the judgment of the court of claims, upon the ground that the question involved is so frivolous as not to need further argument; and also from a counter motion by the United States for an order upon the court of claims to make a further finding of facts.

*By an act of Congress, passed January [465]
28, 1893 (27 Stat. at L. 426), the court of claims was authorized to hear and determine, and to enter up judgment upon the claims of the Indians "who were parties to the treaty of Buffalo Creek, New York," of January 15, 1838, to enforce an alleged liability of the United States for the value of certain lands in Kansas, set apart for these Indians and subsequently sold by the United States, as well as for certain amounts of money agreed to be paid upon their removal.

In its findings of fact the court of claims decided that the Indians described in the jurisdictional act, above referred to as "the New York Indians, being those Indians who were parties to the treaty of Buffalo Creek, New York, on the 15th of January, 1838, were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the state of New York, Tuscaroras, Tuscaroras residing in the state of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis resided in the state of New York, Stockbridges, Munsees, Brothertowns."

Upon the whole case, however, the court of claims found as a conclusion of law from the facts that the Indians had abandoned their claim, and accordingly dismissed their

petition. On appeal to this court, under the act of Congress above mentioned, the judgment of the court of claims was reversed (170 U. S. 1 [42: 927]), this court being of opinion:

1. That the title acquired by the Indians under the treaty was a grant *in præsenti* of a legal title to a defined tract, described by metes and bounds, containing 1,824,000 acres in the now state of Kansas;

2. That there was no uncertainty as to the land granted or as to the identity of the grantees;

3. That the tribes for whom the Kansas lands were intended as a future home were the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Mun-
[466] sees, and Brothertowns, *residing in the state of New York, as found in the first finding of fact by the court of claims;

4. That the grant to the Indians was of the entire tract as specified in article two of the treaty, and not an allotment to them of 320 acres for each emigrant;

5. That the government had received the full consideration stipulated by the treaty, so far as such consideration was a valuable one for the Kansas lands, and had neglected to render any account of the same;

6. That the Indians had neither forfeited nor abandoned their interest in the Kansas lands, and that they were entitled to a judgment.

Thereupon the case was remanded to the court of claims with instructions "to enter a new judgment for the net amount actually received by the government for the Kansas lands, without interest, less any increase in value attributable to the fact that certain of these lands were donated for public purposes, as well as the net amount which the court below may find could have been obtained for the lands otherwise disposed of, if they had all been sold as public lands, less the amount of land upon the basis of which settlement was made with the Tonawandas, and less 10,240 acres allotted to the thirty-two New York Indians as set forth in finding 12, together with such deductions as may seem to the court below to be just, and for such other proceedings as may be necessary and in conformity with this opinion."

In obedience to this mandate the court of claims on November 14, 1898, made certain further findings of fact, set forth in the mar-
[467] gin,† and as a conclusion of law decreed* that the claimants recover from the United States the sum of $1,967,056; whereupon the United States took this appeal, and now move the court that the court of claims be ordered to further find and certify to this court:

"First. What constituted the Onondagas at Onondaga, Onedias at Green Bay, Stockbridges, Munsees, and Brothertowns, parties to the treaty of Buffalo Creek, as proclaimed April 4, 1840;

"Second. Whether or not the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns resided in the state of *New [468]
York when the treaty of Buffalo Creek was proclaimed, or when they became parties thereto."

Messrs. **L. A. Pradt,** Assistant Attorney General, and **Charles C. Binney** for appellant, on motion to dismiss or affirm.

Mr. **John K. Richards,** Solicitor General, for appellant, on motion for an order to the court of claims to make additional findings of fact.

Messrs. **Guion Miller** and **Jonas H. McGowan** for appellees on both the above motions.

*Mr. Justice **Brown** delivered the opinion [468]
of the court:

As a disposition of either one of these motions will practically dispose of the other, both may properly be considered together.

The preamble to the treaty of Buffalo Creek of January 28, 1838 (7 Stat. at L. 550), recites that "the following articles of a treaty are entered into between the United States of America and the several tribes of the New York Indians, the names of whose chiefs, headmen, and warriors are hereto subscribed, and those who may hereafter assent to this treaty in writing, within such time as the President shall appoint." The second article of the treaty also recites that "it is understood and agreed that the above described country" (the land ceded) "is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the state of New York, and the same is to be divided equally among them according to their respective numbers, as mentioned in the schedule hereunto annexed." The treaty purports to be signed by the headmen of the Senecas, Tuscaroras, Oneidas residing in the state of New York as well as at Green Bay, St. Regis, Onondagas residing on the Seneca reservation, the principal Onondaga warriors, Cayugas and the principal Cayuga warriors; but the schedule, immediately following the signatures, con-

---

†*Findings.*

Assuming that the claimants were entitled to 1,824,000 acres of land under the treaty of January 15, 1838, the court finds that of these lands the defendant sold 84,453.29 acres, for which they received the sum of $1.25 per acre. They otherwise disposed of the balance of said lands in granting the same for public purposes, and for the lands disposed of for public purposes they could have obtained the sum of $1.25 per acre.

The land at $1.25 per acre amounts to the sum of $2,280,000. The court's finding that the defendants could have sold the land at $1.25 does not take into consideration any increase value given to such lands because of any donation of land for public purposes; and the court finds that the price at which the defendants sold the land was not increased because of any donation of other lands for public purposes. The court finds that the cost and expense of surveying and platting said lands was the sum of $45,600. The court finds that the number of acres allowed the Tonawanda band of the claimants in the settlement of their claim was 208,000 acres, which, at the price of $1.25 per acre,

tains also the names of the Stockbridges, Munsees, and Brothertowns. The commissioner on behalf of the United States certifies that this schedule was made before the
[469] execution *of the treaty. Following this there are certain certificates by the commissioner to the effect that the treaty was assented to by the Senecas, Tuscaroras, St. Regis, Oneidas, Cayugas, and Onondagas. On January 22, 1839, the President sent the treaty to the Senate with the following message:

To the Senate of the United States:

I transmit a treaty negotiated with the New York Indians which was submitted to your body in June last and amended.

The amendments have, in pursuance of the requirement of the Senate, been submitted to each of the tribes assembled in council, for their free and voluntary assent or dissent thereto. In respect to all the tribes, except the Senecas, the result of this application has been entirely satisfactory. It will be seen by the accompanying papers that of this tribe, the most important of those concerned, the assent of forty-two out of eighty-one chiefs has been obtained. I deem it advisable under the circumstances, to submit the treaty in its modified form to the Senate for its advice in regard of the sufficiency of the assent of the Senecas to the amendment proposed. (Signed) M. Van Buren.

Washington, 21st January, 1839.

The assent of the Senecas having been procured, the treaty was afterwards ratified.

The question was thus presented to the court of claims whether the Stockbridges, Munsees, and Brothertowns—who did not actually sign the treaty—gave their assent, and the court of claims found as a fact that they were actually parties to it. There was certainly some evidence in support of this finding which also accorded with the opinion of this court in *Fellows* v. *Blacksmith*, 19 How. 366 [15: 684], in which an objection was taken on the argument to the validity of the treaty, on the ground that the Tonawanda band of the Seneca Indians was not represented by the chief and headmen of the band in the negotiations and execution of it. "But," said the court, "the answer to this is, that the treaty, after executed and
[470] *ratified by the proper authorities of the government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an act of Congress."

But we are now asked to direct the court of claims to find:

First. What constituted the Onondagas at Onondaga, Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns parties to the treaty of Buffalo Creek, as proclaimed April 4, 1840?

Second. Whether or not the Oneidas at Green Bay, Stockbridges, Munsees, and Brothertowns resided in the state of New York when the treaty of Buffalo Creek was proclaimed, or when they became parties thereto?

But if these be material facts, they were equally so when the findings were made at the first hearing, and the attention of the court should have been then called to the matter, and a more particular finding requested. The motion contemplates an order upon the court to send up the testimony upon which it had found the ultimate fact that these three tribes were parties to the treaty, and inferentially for us to pass upon the sufficiency of that testimony to establish such ultimate fact. If the finding of these probative facts were deemed material within the case of *United States* v. *Pugh*, 99 U. S. 265 [25: 322], application should have been made when the case was first sent here for a finding of such facts. In the *Pugh Case* the court of claims found certain circumstantial facts, and the question this court was called upon to decide was whether those facts were sufficient to support the judgment. But this court did not hold that, where the court of claims was satisfied that the evidence before it fully established a fact, it was bound to insert all the evidence upon that point, if the losing party thought the court made a mistake. This court has repeatedly held that the findings of the court of claims in an action at law determine all matters of fact, like the verdict of a jury, and that where there is any evidence of a fact which they find, and no exception is taken, their finding is final (*Stone* v. *United States*, 164 U. S. 380 [41: 477]; *Desmare* v. *United States*, 93 U. S. 605 [23: 959]; **Talbert* v. *United* [471]
States, 155 U. S. 45 [39: 64]); and in *McClure* v. *United States*, 116 U. S. 145 [29: 572], this court distinctly held that it would not remand a case to the court of claims with directions to return whether certain distinct propositions, in requests for findings of fact presented to that court at the trial of the

less the proportionate cost and expense of surveying and platting, amounts to the sum of $254,800. The number of acres allotted to the 32 Indians as set forth in finding twelve was 10,340 acres, which, at the rate of $1.25 per acre, less the proportionate cost and expense of surveying and platting, amounts to $12,544.

The court further finds that, after deducting the costs and expense of surveying and platting said lands, the amount paid by the defendants in the settlement with the Tonawanda band and the value of the allotment to the 32 Indians, there remains of said $2,280,000 the sum of $1,967,056.

The court further finds: The New York Indians who were parties to the treaty of Buffalo Creek of 1838, as amended and proclaimed, were the following:

Senecas	2,309
Onondagas on Senecas' reservation	194
Cayugas	130
	2,633
Onondagas at Onondaga	300
Tuscaroras	273
Saint Regis in New York	350
Oneidas at Green Bay	600
Oneidas in New York	620
Stockbridges	217
Munsees	132
Brothertowns	360
Total	5,485

case, were established and proved by the evidence, if it appeared that the object of the request to have it so remanded was to ask this court to determine questions of fact upon the evidence. In *The Santa Maria*, 10 Wheat. 431, 444 [6: 359, 362], it was said by Mr. Justice Story: "We think, therefore, that upon principle every existing claim which the party has omitted to make at the hearing upon the merits, and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by the court, if they had been previously brought to its notice." See also *Hickman* v. *Fort Scott*, 141 U. S. 415 [35: 775].

But it is difficult to see how the proposed findings, if made, could be deemed material. This court held that the treaty of Buffalo Creek was a grant *in præsenti* of a certain tract of lands in Kansas, described by metes and bounds. The second article of the treaty indicates that the grant was made upon the basis of 320 acres for each inhabitant, the recital "being 320 acres for each soul of said Indians as their numbers are at present computed." But the grant was not of 320 acres for each soul, but of a tract of land *en bloc*. Under the decision of the court a present title thereto passed to the Indians. This being the case, the United States are in no position to show that the government erred in its computation of souls, or that certain tribes who are named in the treaty did not assent to it. If the land passed under the treaty, then it is only a question between the Indians themselves who were signatories thereto or assented to its terms. The only object of the proposed order, though it is but faintly outlined in the briefs, must be to show that if the Stockbridges, Munsees, and
[472] Brothertowns *never assented to the treaty, the grant should be reduced in the proportion of 320 acres to each member of these tribes. But this is an indirect attack upon the decree. The case was remanded to the court of claims, not to determine who were actually parties to the treaty, or to recompute the number of souls, or in any other way to reduce the extent of the grant, but to render a judgment for the amount received by the government for the Kansas lands, less an amount of lands upon the basis of which settlement had been made with the Tonawandas, and less the 10,240 acres allowed to thirty-two New York Indians, "together with such other deductions as may seem to the court below to be just." But there is nothing to indicate that the court of claims was at liberty to redetermine who were parties to the treaty, and entitled to the benefit of its provisions. That question had already been settled beyond recall. The motion for additional findings must therefore be denied.

The denial of this motion practically disposes of the appeal, as the action of the court below in its supplemental findings was in strict conformity with the mandate of this court. It found the amount of land sold by the United States, the cost and expense of surveying and platting said lands, the number of acres allowed to the Tonawanda band, the number allotted to the thirty-two Indians, and, after deducting the expense of surveying and platting, the amount paid by the United States in settlement of the Tonawanda band and thirty-two Indians, there remained of the value of the land at $1.25 per acre the sum of $1,967,056. The court further found who the New York Indians were, who were parties to the treaty, and as a conclusion of law judgment was entered for the above amount. This court has repeatedly held that a second writ of error does not bring up the whole record for re-examination, but only the proceedings subsequent to the mandate, and if those proceedings are merely such as the mandate command, and are necessary to its execution, the writ of error will be dismissed, as any other rule would enable the losing party to delay the issuing of the mandate indefinitely. *The Santa Maria*, 10 Wheat. 431 [6: 359]; *Roberts* v. *Cooper*, 20 How. 467 [15: 969]; *Tyler* v. *Maguire*, 17 Wall. 253 [21: 576]; *The *Lady Pike*, 96 U. S. 461 [24: 672]; *Wayne* [473]
County Supervisors v. *Kennicott*, 94 U. S. 498 [24: 260]; *Stewart* v. *Salamon*, 97 U. S. 361 [24: 1004].

In *Stewart* v. *Salamon*, *supra*, Mr. Chief Justice Waite observed: "An appeal will not be entertained by this court from a decree entered in a circuit or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded with proper directions for the correction of the error. The same rule applies to writs of error." *Humphrey* v. *Baker*, 103 U. S. 736 [26: 456]; *Clark* v. *Keith*, 106 U. S. 464 [27: 302]; *Mackall* v. *Richards*, 116 U. S. 45 [29: 558].

The appeal will therefore be *dismissed*.

The **Chief Justice**, Mr. Justice **Harlan**, and Mr. Justice **Brewer** dissented.

---

†DAVID BROWN, *Appt.*,
v.
ETHAN A. HITCHCOCK, Secretary of the Interior.

(See S. C. Reporter's ed. 473-479.)

Swamp land act—questions of title—Secretary of Interior cannot be enjoined.

1. Under the swamp land act the legal title passes only on delivery of the patent.

†This case was originally brought against Cornelius N. Bliss, Secretary of the Interior, for whom his successor, Ethan A. Hitchcock, was subsequently substituted.

2. So long as the legal title remains in the government all questions of right to those lands should be solved by appeal to the Land Department, and not to the courts.

3. A selection of lands under the swamp land act by a state, and an approval of that selection by the Secretary of the Interior, do not entitle a purchaser of such lands from the state to an injunction restraining the Secretary of the Interior and his subordinate officers from carrying out his orders annulling the approval of such selection, and receiving applications and allowing entries of such lands as public lands of the United States.

[No. 581.]

Argued February 23, 24, 1899. Decided April 3, 1899.

APPEAL from a decree of the Court of Appeals for the District of Columbia affirming the decree of the Supreme Court of that District sustaining a demurrer and dismissing a suit in equity brought by David Brown, plaintiff for an injunction restraining the Secretary of the Interior and the officers of the Land Department from carrying out certain orders of said Secretary, and from permitting any entries upon certain lands purchased as claimed by said plaintiff, and from interfering with him in his title and ownership of such lands. *Affirmed.*

Statement by Mr. Justice **Brewer:**

[474] *On May 10, 1898, the appellant, as plaintiff, filed in the supreme court of the District of Columbia his bill, setting forth, besides certain jurisdictional matters, the swamp land act of September 28, 1850; the extension of that act to all the states by the act of March 12, 1860; a selection of lands thereunder by the state of Oregon (evidenced by what is called "List No. 5"), and an approval on September 16, 1882, of that selection by the Secretary of the Interior; a purchase in 1880 from the state by H. C. Owen, of certain of those selected lands, and subsequent conveyances thereof to plaintiff. Then, after showing the appointment of Hon. William F. Vilas, as Secretary of the Interior, the bill proceeds:

"That, as plaintiff is informed and believes, on the 27th day of December, A. D. 1888, the said Secretary of the Interior, then the said William F. Vilas, made and entered an order annulling, canceling, and revoking the said 'list number 5,' and the approval thereof, and annulling and revoking the said judgment and determination so made by his said predecessor in said office, the said Henry M. Teller, whereby his said predecessor had adjudged and determined that the lands aforesaid were swamp and overflowed lands within the meaning of the acts aforesaid, and made and entered an order purporting to adjudge and determine that certain of the lands described in said 'list number 5' including the lands hereinbefore described were not swamp and overflowed lands within the meaning of the acts aforesaid.

"That thereafter, as plaintiff is informed and believes, divers proceedings were taken before the said Secretary of the Interior and in the General Land Office of the United States by the state of Oregon and by the grantors of this plaintiff to set aside and have held for naught the orders and rulings so made *by the said William F. Vilas as such [475] Secretary of the Interior, which proceedings came to an end within one year last past.

"That, as plaintiff is informed and believes, since the said proceedings last aforesaid came to an end, the defendant, as such Secretary of the Interior, is proceeding to put in force and to carry out the orders and rulings so as aforesaid made by the said William F. Vilas as such Secretary of the Interior and to hold the lands hereinbefore described to be public lands of the United States and subject to entry under the laws of the United States, and threatens and intends to receive and permit the officers of the Land Department of the United States to receive applications for and allow entries of the lands aforesaid as public lands of the United States."

After alleging the invalidity of these proceedings, the bill goes on to aver that the proceeding thus initiated by Secretary Vilas throws a cloud upon appellant's title, "and is likely to cause many persons to attempt to settle upon the said lands and to enter the same in the Land Department of the United States as public lands of the United States subject to such entry, and that plaintiff will be unable to remove such persons from said lands or to quiet his title thereto as against them without a multiplicity of suits, and that therefore this plaintiff is entitled in this court to an order enjoining and restraining the defendant, as such Secretary of the Interior, and his subordinate officers of the Land Department of the United States, from in any way carrying said last-mentioned orders and rulings into effect, and from permitting any entries upon said land or holding the same open to entry, and from in any way interfering with or embarrassing the plaintiff in his title and ownership of the lands aforesaid."

Upon these facts plaintiff prayed a decree canceling the order of December 27, 1888, restraining the officers of the Land Department from carrying it into effect, and forbidding the defendant and his subordinates from holding the lands to be public lands of the United States or subject to entry under the general land laws. To this bill a demurrer was filed which was sustained, and the bill dismissed. Plaintiff appealed to the court of appeals of the District, and upon an affirm-*ance of the decree by that court brought the [476] decision here for review.

Messrs. **W. B. Treadwell** and *Charles A. Keigwin* for appellant.

Mr. **Willis Van Devanter,** Assistant Attorney General, for appellee.

*Mr. Justice **Brewer** delivered the opin- [476] ion of the court:

Under the swamp land act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, "at the request of said governor [the

governor of the state], cause a patent to be issued to the state therefor; and on that patent, the fee simple to said lands shall vest in the said state." (9 Stat. at L. 519, chap. 84; *Rogers Locomotive Mach. Works* v. *American Emigrant Company*, 164 U. S. 559, 574 [41: 552, 559]; *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 592 [42: 591, 592]).

In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States.

Until the legal title to public land passes from the government inquiry as to all equitable rights comes within the cognizance of the Land Department. In *United States* v. *Schurz*, 102 U. S. 378, 396 [26: 167, 172], which was an application for a mandamus to compel the delivery of a patent, it was said:

"Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

While a delivery of the patent was or-
[477] dered, yet that was so *ordered because it appeared that the patent had been duly executed, countersigned, and recorded in the proper land records of the Land Department, and transmitted to the local land office for delivery, and it was held that the mere manual delivery was not necessary to pass the title, but that the execution and record of the patent were sufficient. And yet from that conclusion Chief Justice Waite and Mr. Justice Swayne dissented. The dissent announced by the chief justice only emphasizes the proposition laid down in the opinion, as heretofore quoted, that so long as the legal title remains in the government all questions of right should be solved by appeal to the Land Department, and not to the courts. See, in support of this general proposition, *Michigan Land & Lumber Co.* v. *Rust, supra* (which, like the present case, arose under the swamp land act), and cases cited in the opinion. Indeed, it may be observed that the argument in behalf of appellant was avowedly made to secure a modification of that opinion. We might well have disposed of this case by a simple reference to that decision; but in view of the earnest challenge by counsel for appellant of the views therein expressed, we have re-examined the question in the light of that argument and the authorities cited. And after such re-examination we see no reason to change, but on the contrary we reaffirm the decision in *Michigan Land & Lumber Co.* v. *Rust*. As a general rule no mere matter or administration in the various executive departments of the government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States. When the legal title to these lands shall have been vested in the state of Oregon, or in some individual claiming a right superior to that of the state, then is inquiry permissible in the courts, and that inquiry will appropriately be had in the courts of Oregon, state or Federal.

We do not mean to say that cases may not arise in which a party is justified in
coming into the courts of the District to *as- [478]
sert his rights as against a proceeding in the Land Department, or when the department refuses to act at all. *United States* v. *Schurz, supra*, and *Noble* v. *Union River Logging Railroad Co.* 147 U. S. 165 [37: 123], are illustrative of these exceptional cases.

Neither do we affirm that the administrative right of the departments in reference to proceedings before them justifies action without notice to the parties interested, any more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.

"Power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." (*Cornelius* v. *Kessel*, 128 U. S. 456, 461 [32: 482, 484]. "The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." *Orchard* v. *Alexander*, 157 U. S. 372, 383 [39: 737, 741].

But what we do affirm and reiterate is that power is vested in the departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the courts must, as a general rule, be resorted to only when the legal title has passed from the government. When it has so passed the litigation will proceed, as it generally ought to proceed, in the locality where the property is situate, and not here, where the administrative functions of the government are carried on.

In the case before us there is nothing to
show that proper *notice was not given; that [479]
all parties in interest were not fully heard, or that the adjudication of the administrative department of the government was not

justified by the facts as presented. The naked proposition upon which the plaintiff relies is that upon the creation of an equitable right or title in the state the power of the Land Department to inquire into the validity of that right or title ceases. That proposition cannot be sustained. Whatever rights, equitable or otherwise, may have passed to the state by the approval of List No. 5 by Secretary Teller, can be determined, and should be determined, in the courts of Oregon, state or Federal, after the legal title has passed from the government. The decree of the Supreme Court of the District of Columbia, sustained by the opinion of the Court of Appeals of the District, was right, and is *affirmed.*

Mr. Justice **McKenna** takes no part in the decision of this case.

DARWIN C. ALLEN, *Plff. in Err.,*
v.
SOUTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 479-492.)

Time of allowance of writ of error to state court—decision upon grounds independent of Federal question—power to review.

1. A writ of error from this court to a state court may be allowed within two years from the final decree. This rule was not changed by the 6th section of the act of 1891.
2. When the state court decided the case upon sufficient grounds wholly independent of the Federal questions involved, this court will not consider such Federal questions.
3. When the decree of the state court is adequately sustained by an independent, nonfederal question, there is no issue presented on the record which this court has power to review.

[No. 144.]

Argued January 17, 1899. Decided April 3, 1899.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the trial court condemning the defendant, Darwin C. Allen, to pay certain instalments upon contracts for the sale of land within a certain time, or that he be forever barred and foreclosed of all right or interest in said lands, and that said contracts be declared void, in an action commenced by the Southern Pacific Railway Company, plaintiff, against Darwin C. Allen. *Dismissed for want of jurisdiction.*

See same case below, 112 Cal. 455.

Statement by Mr. Justice **White:**

[480] *This suit, commenced by the Southern Pacific Company (the defendant in error here), against Darwin C. Allen, who is plaintiff in error, was based on eighty-four written contracts entered into on the first day of February, 1888. All these contracts were made exhibits to the complaint and were exactly alike, except that each contained a description of the particular piece of land to which it related. By the contracts the Southern Pacific Company agreed to sell and Darwin C. Allen to buy the land described in each contract upon the following conditions: Allen paid in cash a stipulated portion of the purchase price and interest at seven per cent in advance for one year on the remainder. He agreed to pay the balance in five years from the date of the contracts. The deferred payment bore interest at seven per centum per annum, which was to be paid at the end of each year. He moreover bound himself to pay any taxes or assessments which might be levied on the property. The contracts provided:

"It is further agreed that upon the punctual payment of said purchase money, interest, taxes, and assessments, and the strict and faithful performance by the party of the second part (Allen, the purchaser), his lawful representatives or assigns, of all the agreements herein contained, the party of the first part (the Southern Pacific Company) will, after the receipt of a patent therefor from the United States, upon demand and the surrender of this instrument, execute and deliver to the party of the second part, his heirs and assigns, a grant, bargain, and sale deed of said premises, reserving all claim of the United States to the same as mineral land."

There was a stipulation that the purchaser should have a right to enter into possession of the land at once, and by which he bound himself until the final deed was executed not to injure the property by denuding it of its timber. The contracts contained the following:

"The party of the first part (the Southern Pacific Company) claims all the tracts hereinbefore described, as part of a grant of lands to it by the Congress of the United States; that patent has not yet issued to it for said tracts; that it will *use ordinary dil- [481]
igence to procure patents for them; that, as in consequence of circumstances beyond its control, it sometimes fails to obtain patent for lands that seem to be legally a portion of its said grant, therefore nothing in this instrument shall be considered a guaranty or assurance that patent or title will be procured; that in case it be finally determined that patent shall not issue to said party of the first part for all, or any, of the tracts herein described, it will, upon demand, repay (without interest) to the party of the second part all moneys that may have been paid to it by him on account of any of such tracts as it shall fail to procure patent for, the amount of repayment to be calculated at the rate and price per acre, fixed at this date for such tracts by said party of the first part, as per schedule on page 3 hereof; that said lands being unpatented, the party of the first part does not guarantee the possession of them to the party of the second part, and will not be responsible to him for damages, or cost, in case of his failure to obtain and keep such possession."

It was averred that after the execution of

the contracts Allen, the purchaser, had entered into possession of the various tracts of land, and so continued up to the time of the commencement of the suit. The amount claimed was three annual instalments of interest on the deferred price which it was alleged had become due in February 1889, 1890, and 1891. The prayer of the complaint was that the defendant be condemned to pay the amount of these respective instalments within thirty days from the date of decree, and in the event of his failure to do so that himself, his representatives and assigns, "be forever barred and foreclosed of all claim, right, or interest in said lands and premises under and by virtue of said agreements, and be forever barred and foreclosed of all right to conveyance thereof, and that said contracts be declared null and void."

The defendant, whilst admitting the execution of the contracts, denied that he had ever taken possession of any of the land, and charged that the contracts were void because at the time they were entered into and up to the time of the institution of the suit the seller had no ownership or interest of any
[482] *kind in the land, and therefore that no obligation resulted to the buyer from the contracts. By way of cross-complaint it was alleged that the defendant had been induced to enter into the contracts by the false and fraudulent representations of the complainant that it had a title to or interest in the property; that, in consequence of the error of fact produced by these misrepresentations of the plaintiff, the defendant had paid the cash portion of the price and the interest in advance for one year on the deferred instalment; that, owing to the want of all title to or interest in the land on the part of the complainant, the defendant had been unable to take possession thereof, and that some time after the contracts were entered into the defendant had an opportunity to sell the land for a large advance over the amount which he had agreed to pay for it, which opportunity was lost in consequence of the discovery of the fact that the complainant had no title whatever to the property. The prayer of the cross-complaint was that the moneyed demand of the plaintiff be rejected; that the contracts be rescinded, and that there be a judgment against the plaintiff for the amount paid on account of the purchase price and for the damage which the defendant had suffered by reason of his failure to sell the property at an advanced price. The complainant put the cross-complaint at issue by denying that it had made any representations as to its title to or interest in the land except as stated in the contracts. It denied that at the time of the contracts it had no interest in the land, or that the defendant had been prevented from taking possession or had been prevented from selling at an advanced price because of a want of title. Upon these issues the case was heard by the trial court, which made a specific finding of fact embracing, among other matters, the following: That the contracts sued on had been entered into as alleged and the instalments claimed thereunder were due despite demand; that no representations had been made by the plaintiff as to its title other than those which were recited in the contract; that the defendant had not lost the opportunity to sell at an advanced price, as alleged in the cross-complaint. *As to the title to the land embraced in the contracts, the facts were found to be as follows:

"That the lands and premises therein described were portions of the public domain of the United States and were granted to plaintiff by an act of the Congress of the United States, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast,' approved July 27, 1866. That all of said lands, save sec. 5, in township 23 south, range 19 east, M. D. M., are situated within a belt more than 20 miles and less than 30 miles from plaintiff's railroad, generally known as the indemnity belt; the said sec. 5 being within 20 miles of said railroad.

"That the loss to plaintiff of odd-numbered sections within said granted limits, *i e.*, within 20 miles of said railroad, because of the various exceptions and reservations in said act provided for, is fully equal to all the odd-numbered sections within said indemnity belt.

"That on March 19, 1867, an order was made by the Secretary of the Interior of the United States withdrawing or purporting to withdraw from sale or settlement under the laws of the United States, all of said lands situated in said indemnity belt; and that on August 15, 1887, another order was made by said Secretary of the Interior, revoking, or purporting to revoke, said first-named order, and restoring said lands to the public domain for the usual sale and settlement thereof. The first said order of withdrawal is set forth in vol. — of 'Decisions of the Secretary of the Interior' at p. —, and the said second order in vol. 6 of said 'Decisions' at pp. 84-92; and which said orders as so set forth are here referred to, and make a part of this finding. That plaintiff is the owner of said lands in fee under the provisions of said act of Congress; that patents or a patent therefor have not yet been issued to plaintiff by the government of the United States; that it has not been finally determined that patents or a patent shall not issue therefor, or for any part thereof, but proceedings are now pending before the proper department of the government of the United States, instituted by plaintiff, to obtain patents or *a patent for [483]
said lands and premises, and the whole thereof. That plaintiff has not been guilty of any want of ordinary diligence in instituting or prosecuting said proceedings to obtain said patents or patent."

There was a decree allowing the prayer of the complaint and rejecting that of the cross-complaint. On appeal the case was first heard in Department No. 1 of the supreme court of California, and the decree of the trial court was in part reversed. In accordance with the California practice the cause was transferred from the court in department to the court in banc, where the decree of the trial court was affirmed. (112 Cal.

455.) To this decree of affirmance this writ of error is prosecuted.

Messrs. **Wilbur F. Zeigler** and *Edward R. Taylor* for plaintiff in error.

Messrs. **Maxwell Evarts** and *William F. Herrin* for defendant in error.

[484] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

It is asserted that the record is not legally in this court because the writ of error was allowed by the chief justice of the state after the expiration of the time when it could have been lawfully granted. It was allowed within two years of the decree by the state court, but after more than one year had expired. The contention is that writs of error from this court to the courts of the several states cannot now be lawfully taken after the lapse of one year from the final entry of the decree or judgment to which the writ of error is directed.

This rests on the assumption that the act of March 3, 1891 (26 Stat. at L. 826), not only provides that writs of error or appeals in cases taken to the Supreme Court from the circuit courts of appeals created by the act of 1891, shall be limited to one year, but also fixes the same limit of time for writs of error or appeal in cases taken to the Su-
[485] preme Court from the *circuit and district courts of the United States, thereby repealing the two years' limitation as to such circuit and district courts previously established by law. (Rev. Stat. § 1008.) As this asserted operation of the act of 1891 produces a uniform limit of one year for writs of error or appeals as to all the courts of the United States, in so far as review in the Supreme Court is concerned, the deduction is made that a like limit necessarily applies to writs of error from the Supreme Court to state courts, since such state courts are (Rev. Stat. § 1003) subject to the limitation governing judgments or decrees of "a court of the United States." The portion of the act of 1891 from which it is claimed the one year limitation as to writs of error and appeal from the Supreme Court to all the courts of the United States arises is the last paragraph of section 6 of that act. The section of the act in question in the portions which precede the sentences relied upon, among other things, defines the jurisdiction of the circuit courts of appeals established by the act of 1891, and determines in what classes of cases the jurisdiction of such courts is to be final. After making these provisions the concluding part of section 6 provides as follows:

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

It is apparent that the language just quoted relates exclusively to writs of error or appeal in cases taken to the Supreme Court from the circuit courts of appeals. The statute, in the section in question, having dealt with the jurisdiction of the circuit courts of appeals and defined in what classes of cases their judgments or decrees should be final and not subject to review, follows these provisions by conferring on the Supreme Court the power to review the judgments or decrees of the circuit courts of appeals, not made final by the act. To construe the section as relating to or controlling the review by *error or appeal, by the Su- [486]
preme Court, of the judgments or decrees of circuit or district courts of the United States, would not only disregard its plain letter but do violence to its obvious intent. Relating only, then, to writs of error or appeal from the Supreme Court to the circuit courts of appeals, it follows that the limitation of time, as to appeals or writs of error, found in the concluding sentence, refers only to the writs of error or appeal dealt with by the section, and not to such remedies when applied to the district or circuit courts of the United States, which are not referred to in the section in question. This is made manifest by the statement, not that all appeals or writs of error to the Supreme Court from all the courts of the United States shall be taken in one year, but that "no such appeal shall be taken unless within one year," etc. If these words of limitation were an independent and separate provision of the act of 1891, thereby giving rise to the implication that the words "no such appeal or writ of error" qualified and limited every such proceeding anywhere referred to in the act of 1891, the contention advanced would have more apparent force. As, however, this is not the case, and as, on the contrary, the words "no such appeal or writ of error" are clearly but a portion of section 6, it would be an act of the broadest judicial legislation to sever them from their connection in the act in order to give them a scope and significance which their plain import refutes, and which would be in conflict with the meaning naturally begotten by the provision of the act with which the limitation as to time is associated. Nor is there anything in section 4 of the act of 1891, destroying the plain meaning of the words "such appeal or writ of error" found in the concluding sentence of section 6. The language of section 4 is as follows:

"All appeals by writ of error or otherwise, from said district courts, shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established *according- [487]
ing to the provisions of this act regulating the same."

This section refers to the jurisdiction of the courts created by the act of 1891, and to the changes in the distribution of judicial power made necessary thereby. If the con-

cluding words of section 4, "according to the provisions of this act regulating the same," were held to govern the time for writs of error or appeal to the Supreme Court from the district or circuit courts of the United States, the argument would not be strengthened, since there is no provision in the act governing the time for such writs of error or appeal. The contention that Congress cannot be supposed to have intended to fix two distinct and different limitations for review by the Supreme Court, one of two years as to the circuit and district courts of the United States, and the other of one year as to the circuit courts of appeals, affords no ground for disregarding the statute as enacted, and departing from its unambiguous provisions upon the theory of a presumed intent of Congress. Indeed, if it were conceded that the provisions of section 4 referred to the procedure or limit of time in which appeals or writs of error could be taken, in cases brought to the Supreme Court, from the circuit or district courts of the United States, such concession would be fatal to the contention which we are considering, for this reason. The concluding portion of section 5 of the act of 1891 is as follows:

"Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases."

Whilst this language clearly relates to jurisdictional power, and not to the mere time in which writs of error may be taken, yet the same reasoning which would impel the concession that section 4 related to procedure and not to jurisdictional authority would give rise to a like conclusion as to the provision in section 5 just quoted. It follows, therefore, that the only reasoning by which it is possible to conclude that the act of 1891 was intended to change the limit of time in which writs of error could issue from the Supreme
[488] Court to the circuit *or district courts, or in which appeals could be taken from such courts to the Supreme Court, would compel to the conclusion that the act of 1891 had expressly preserved the two years' limitation of time then existing as to writs of error from state courts to the Supreme Court.

From the conclusion that the sixth section of the act of 1891 did not change the limit of two years as regards the cases which could be taken from the circuit and district courts of the United States to the Supreme Court, it follows that the act of 1891 did not operate to reduce the time in which writs of error could issue from the Supreme Court to the state courts. That period was two years, in analogy to the time limit established by statute with reference to writs of error to the district and circuit courts of the United States, which courts, at the time of the passage of the act of 1891, answered to the designation of "a court of the United States" contained in section 1003 of the Revised Statutes, regulating the subject of writs of error to state courts. The circumstance that Congress, in creating a new court of the United States, affixed a different limitation as to the time for prosecuting error to such court and left unchanged the limitation as to the time within which error might be prosecuted to the courts whose practice in this particular governed the practice in state courts, irresistibly warrants the inference that it was intended that the practice in the state courts as to the time of suing out writs of error should continue unaltered. The writ of error in this case having been allowed within two years from the final decree, was therefore seasonably taken.

We are brought, then, to consider whether there arises on the record a Federal question within the intendment of Revised Statutes, § 709. The claim is that two distinct Federal issues are presented by the record or are necessarily involved therein. They are: First. That by a proper construction of the act of Congress granting land to the railroad (14 Stat. at L. 292, chap. 278), no title to lands which were beyond the place limits, but in the indemnity limits, passed to the railroad until approved selections of such lands had taken place, hence that it was not only drawing in question the validity of an authority exercised *under the United States, **[489]**
but also denying a privilege or immunity claimed under the statute of the United States to decide that the railroad had before such approved selection any right to contract to sell the lands in question. Second. That it was drawing in question the validity of an authority exercised under a law of the United States, and denying a privilege or immunity claimed under such law to hold that the right of the railroad to the lands in question had not been irrevocably adversely determined by the action of the Secretary of the Interior, revoking his previous action withdrawing such lands, even although at the time of such cancelation of the prior general withdrawal, there were pending in the Land Department claims of the railroad to the land in question which at that time were not finally disposed of.

Conceding *arguendo* only that the contentions thus advanced would give rise to the Federal questions as claimed, it becomes wholly unnecessary to consider them if it be disclosed by the record that the state court rested its decision upon grounds wholly independent of these contentions, and which grounds are entirely adequate to sustain the judgment rendered by the state court without considering the Federal questions asserted to arise on the record. *McQuade* v. *Trenton*, 172 U. S. 636 [*ante*, 581]; *Capital Bank* v. *Cadiz Bank*, 172 U.S. 425 [*ante*, 502].

In inquiring whether this is the case we are unconcerned with the conclusions of the trial court, or with those of a department of the supreme court of California, and consider only the final action of the supreme court of the state in disposing of the controversy now before us. A reference to the opinion of the supreme court of California makes patent the fact that that court rested its decision solely upon a construction of the contract, and therefore that it decided the case upon grounds wholly independent of the Federal questions now claimed to be involved. The court held that the contract disclosed that both parties dealt with reference

to the existing state of the title to the lands, the vendor selling his hope of obtaining title and the vendee buying such expectation; that the result of the contract was that the vendor in advance agreed to sell such title,
[490] if any, as he might obtain *in the future, and that the vendee agreed for the sake of obtaining in advance the right to the title, if the vendor could procure it, to pay the amount agreed upon, subject to the return of the price in the event it should be finally determined that the hope of title in the vendor, as to which both parties were fully informed, should prove to be illusory. On these subjects the court said:

"The defendant further contends that the contracts were void *ab initio*, for want of mutuality or consideration, or amounted at most to mere offer to purchase on his part. This contention cannot be sustained. Plaintiff claimed title to these lands, but its title had not been perfected by patent. Defendant had the same opportunity as plaintiff of knowing the nature and probable validity of that claim. Under these circumstances plaintiff agreed to convey to defendant when it should obtain a patent, and to permit defendant to enter into possession of the land at once. In consideration of these premises defendant agreed to purchase when a patent should be issued, paid at once one fifth of the purchase price and one year's interest on the balance and agreed to pay the remainder (with interest thereon annually in advance) on or before a given date, with the right to a repayment without interest in the event of an ultimate failure to obtain a patent. These promises were strictly mutual, and each constituted a sufficient consideration for the other. Plaintiff by its contract surrendered its right to contract with or sell to any one else, and yielded to defendant the present right to possession which it claimed. These concessions were clearly a detriment to plaintiff, and, in a legal sense, an advantage to defendant; and they, therefore, furnish a consideration for defendant's promise to pay."

Upon the question of the final determination of the hope of title upon which the return of the price was by the contract made to depend, the court concluded as follows:

"The only question really involved in the case is as to the construction of the contracts sued upon. It is contended by the defendant that he was under no obligation to purchase the land or to pay the remainder of the pur-
[491] chase price, unless the *plaintiff should, *within the five years*, obtain a patent for the land; and that, as the plaintiff had failed to obtain a patent within that time, and as the action was not tried until after the expiration of that time, the defendant was entitled to a rescission of the contract. But clearly the contracts will not bear any such construction. The defendant contracted unconditionally to pay the remainder of the purchase price 'on or before' a certain day named, and to pay interest annually in advance on the remainder; but the plaintiff contracted to convey to defendant only 'upon the receipt of a patent,' and was to repay the money only 'in case it be *finally determined* that patent shall not issue.' The defendant, therefore, was not entitled to terminate the contract or to require a repayment of the moneys paid, until the question of the issue of a patent to the plaintiff should be 'finally determined.' The findings state that proceedings are now pending in the United States Land Department for the issue of patent to the plaintiff, and that it has not been finally determined that such patent shall not issue. At the time, therefore, at which defendant contracted to pay the balance of the purchase price, plaintiff was not in default, nor was it in default at the time of the trial."

We cannot say that the state court has erroneously construed the act of Congress, since its decree rests alone upon the conclusion reached by it, that by the contracts between the parties there existed a right to recover, whatever may have been the existing state of the title. The conclusion that the parties were competent to contract with reference to an expectancy of title involved no Federal question. The decision that the final determination of title, referred to in the contracts, related to the proceedings in the Land Department which were pending at the time the contracts were entered into and not to the cancelation by the Secretary of the Interior of the withdrawal order, which had been made by that officer before the date of the contracts, precludes the conception that the state court erroneously denied the legal consequence flowing from the order of withdrawal. It follows then that as the decree of the court below was adequately *sustained [492]
by an independent non-Federal question, there is no issue presented on the record which we have the power to review, and the cause is therefore *dismissed for want of jurisdiction.*

LUCETTA R. MEDBURY, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 492-500.)

Jurisdiction of the court of claims—act of June 16, 1880—recovery back of moneys paid for public lands.

1. The court of claims has jurisdiction by the act of March 3, 1887, of a claim founded upon the act of June 16, 1880, for the repayment of $1.25 per acre to the purchaser of public lands for which he has paid double minimum price, which have been found afterwards not to be within the limits of a railroad land grant.
2. The act of 1880 refers to a mistake in location when the entry was made.
3. Where, at the time the entry was made and the double minimum price paid for the lands, they were within the place limits of a railroad grant, and eighteen years thereafter the lands were forfeited to the government because the railroad was not built, the purchaser cannot recover back from the government the $1.25 per acre under the act of 1880.

[No. 225.]

Argued March 17, 1899. Decided April 3, 1899.

APPEAL from a judgment of the Court of Claims dismissing for want of jurisdiction the claim of Lucetta R. Medbury against the United States for the recovery back of half the double minimum price paid for public lands entered when they were within the limits of a railroad land grant which was afterwards forfeited. *Judgment modified and* as modified *affirmed.*

Statement by Mr. Justice **Peckham:**

The appellant herein filed her petition in the court of claims and sought to recover judgment by virtue of the provisions of the act approved June 16, 1880, chap. 244 (21 Stat. at L. 287).

The Attorney General denied all the allegations of the petition, and the case was tried by the court upon the following agreed statement of facts: Congress made a grant of lands to the Wisconsin Central Railroad Company by the act of May 5, 1864, chap. 80 (13 Stat. at L. 66), which contained the condition that the railroad should be built as therein provided. After the grant the price of the lands reserved within its place limits
[493] was raised from $1.25 per acre to $2.50 *per acre under the authority of law and by the direction of the Secretary of the Interior. In 1872, one Samuel Medbury made an entry of more than seven thousand acres of land, within the place limits of that grant and at the double minimum price of $2.50 per acre, and he died in 1874, leaving his widow, the appellant herein, and a son and daughter, who subsequently conveyed to the appellant all their interest in the claim herein made.

The conditions upon which the grant of lands was made to that particular section of the proposed railroad were never complied with and the proposed railroad was never constructed, for which reason the grant was by the act of Congress of September 29, 1890 (26 Stat. at L. 496), forfeited to the United States. By reason of this failure to build the railroad, and because of the forfeiture of the land grant by Congress, the lands purchased by Medbury ceased to be alternate sections of land within a railroad land grant, although they were such when he purchased them. Thereafter, and on the 14th of November, 1894, Lucetta R. Medbury, as the widow and heir of Samuel Medbury, made application to the Secretary of the Interior for the repayment of the excess of $1.25 per acre upon the seven thousand and odd acres of land entered by her husband, the application being made under the second section of the act of June 16, 1880, chap. 244 (21 Stat. at L. 287), and on October 5, 1897, the application was denied by the Secretary. Upon these findings of fact the court of claims decided, as a conclusion of law, that the petition should be dismissed for want of jurisdiction. From that decision the claimant has appealed to this court.

Messrs. **Russell Duane, Harvey Spalding,** and *E. W. Spalding* for appellant.

Mr. **George Hines Gorman** and *Louis A. Pradt,* Assistant Attorney General, for appellee:

The court of claims had no jurisdiction to entertain this action for the reason that the same is founded solely and exclusively upon a legislative act, which provides the remedy and the manner of its enforcement at the same time that it creates the right; and the right so created can only be enforced in the exact manner provided in the statute.

Wells v. *Pontotoc County Supers.* 102 U. S. 625, 26 L. ed. 122; *Janney* v. *Buell,* 55 Ala. 408; *Phillips* v. *Ash,* 63 Ala. 414; *Hollister* v. *Hollister Bank,* 2 Keyes, 245; *Dickinson* v. *Van Wormer,* 39 Mich. 141; Sutherland, Stat. Constr.

The creation of a new jurisdiction is not to be presumed, in the absence of adequate language.

Warwick v. *White,* Bumb. 106; *Kite's Case,* 1 Barn. & C. 107; *Reg.* v. *Baines,* 2 Ld. Raym. 1269; *Ex parte Story,* L. R. 3 Q. B. Div. 166; *James* v. *Southwestern R. Co.* L. R. 7 Exch. 296; *Streat* v. *Rothschild,* 12 Daly, 95; *Re Contested Election of McNeill,* 111 Pa. 235; *Druse* v. *Horter,* 57 Wis. 644; *Re Hersom,* 39 Me. 476; *Pitman* v. *Flint,* 10 Pick. 506.

Nor will a construction be adopted which enlarges the jurisdiction of courts, in the absence of express words or necessary implication.

Ex parte Story, L. R. 3 Q. B. Div. 166; *Kite's Case,* 1 Barn. & C. 107; *Thomas* v. *Adams,* 2 Port. (Ala.) 188; *Grove* v. *School Inspectors,* 20 Ill. 532; *Thompson* v. *Cox,* 53 N. C. (8 Jones, L.) 311; *Druse* v. *Horter,* 57 Wis. 644; *Daffin* v. *State,* 11 Tex. App. 76.

Nothing is to be taken by intendment, and only such jurisdiction is given as is set forth plainly and expressly.

Clyde v. *United States,* 13 Wall. 39, 20 L. ed. 481; *Finn* v. *United States,* 123 U. S. 227, 31 L. ed. 128; *Schillinger* v. *United States,* 155 U. S. 163, 39 L. ed. 108; *Ex parte Greene,* 29 Ala. 61.

Statutes which create liabilities where none existed before are always strictly construed, and the liability will never be extended beyond the plain and express provisions of the statute.

Re Hollister Bank, 27 N. Y. 393; *Cohn* v. *Neeves,* 40 Wis. 393; *Moyer* v. *Pennsylvania Slate Co.* 71 Pa. 293; *Lane's Appeal,* 105 Pa. 49, 51 Am. Rep. 166; *Detroit* v. *Chaffee,* 70 Mich. 80; *Detroit* v. *Putnam,* 45 Mich. 265.

The language of the statute is not general but special, and limited to the Secretary of the Interior and the General Land Office. But even if it had been general, it should be remembered that language though apparently general, may be limited in its operation and effect, where it may be gathered from the object and purpose of the whole statute that the language was designed to apply only to certain persons or things, or was to operate only under certain conditions or to be enforced only by certain officers.

McKee v. *United States,* 164 U. S. 287, 41 L. ed. 437; *Jones* v. *Jones,* 18 Me. 308; *Murray* v. *Gibson,* 15 How. 421, 14 L. ed. 755;

Brewer v. *Blougher*, 14 Pet. 198, 10 L. ed. 417; *United States* v. *Saunders*, 22 Wall. 492, 22 L. ed. 736; *Torrance* v. *McDougald*, 12 Ga. 526; *Greenhow* v. *James*, 80 Va. 636.

[493] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

Two questions arise in this case: (1) Whether the court of claims had jurisdiction of the claim; and (2) whether, if it had, what is the true construction of the act of June 16, 1880, requiring the repayment to the purchaser of the excess of $1.25 per acre
[494] *where the land purchased has afterwards been found not to be within the limits of a railroad land grant.

The ground upon which the learned court of claims decided that it had no jurisdiction in the case was that the remedy afforded by the act of 1880 to obtain the repayment of the excess of the price was exclusive of any other. Thus if the Secretary of the Interior erroneously construed the act and refused payment in a case where the claimant was justly entitled thereto, under its provisions, the claimant would be without redress, even though there were no dispute in regard to the facts, and the decision of the Secretary was a plain mistake in regard to the law. In this construction as to the jurisdiction of the court of claims, we are unable to agree.

The first section of the act of June 16, 1880, chap. 244, does not refer to such a case as this. Section 2 of that act reads in full as follows:

"In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, *and in all cases where parties have paid double the minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.*"

Section 3 authorizes the Secretary of the Interior to make the payments provided for in the act out of any money in the Treasury not otherwise appropriated, and by section 4 the Secretary is authorized to draw his warrant on the Treasury in order to carry the provisions of the act into effect.

[495] *The portion of section 2, which is in italics, is the part of the act upon which this claim is founded. The question is whether the court of claims has jurisdiction in this case upon the facts found.

By the act of March 3, 1887 (24 Stat. at L. 505), the court of claims is given jurisdiction to hear and determine, among other things, all claims founded upon any law of Congress. As the claim in this case is founded upon the law of Congress of 1880, it would seem that under this grant of jurisdiction the court of claims had power to hear and determine the claim in question. The act of 1887 was not, however, the first act giving jurisdiction to the court of claims in regard to a law of Congress. It had the same power when the case of *Nichols* v. *United States*, 7 Wall. 122 [19: 125], was decided, and a question of jurisdiction arose in that case. It there appeared that Nichols & Company were merchants in New York, and they made in 1847 an importation from abroad upon which duties were imposed on the quantity invoiced. The importation consisted of casks of liquor, and a portion of the liquor had leaked out during the voyage, and was thus lost, and consequently was never imported in fact into the United States. Notwithstanding these circumstances Nichols & Company paid the duties as imposed under the invoice, and without any deduction for leakage, and made no protest in the matter. An act of Congress of February 26, 1845, provided that no action should be maintained against any collector to recover duties paid unless a protest had been made in writing and signed by the claimant at the time of the payment. Where a protest had been made the importer could thereafter bring a suit against the collector for a recovery of the money so paid, and the suit would be tried in due course of law. The importers having made no protest, and being therefore unable under the provisions of the law to bring suit against the collector, brought suit in the court of claims to recover back the overpayment, upon the ground that the court had power to hear and determine all claims founded upon any law of Congress, or upon any regulation of the executive department, or upon any contract, express or implied, with the government of the *United States. **[496]**
This court held that the court of claims had no jurisdiction, and in the course of the opinion of the court, which was delivered by Mr. Justice Davis, and in giving the grounds upon which the court denied jurisdiction, it was said:

"Congress has from time to time passed laws on the subject of revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment."

And again the court said:

"Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong,

intended to give to the taxpayer and importer a further and different remedy? The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the court of claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong, in the operation of the revenue laws, than such as are particularly given by those laws."

The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and
[497] that the act giving *jurisdiction to the court of claims had no application. The principle asserted in the case cited has no application to this case.

Although the right to recover back the excess of payment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We cannot suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the court of claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right.

If there were any disputed questions of fact before the Secretary his decision in regard to those matters would probably *be conclu- [498]
sive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the court of claims has jurisdiction of such a case.

We have been referred to no case in this court which holds views contrary to those herein presented. We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute, and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not, in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute.

This case bears more resemblance to *United States* v. *Kaufman*, 96 U. S. 567 [24: 792]; and *United States* v. *Real Estate Savings Bank*, 104 U. S. 728 [26: 908], than it does to *Nichols* v. *United States*, 7 Wall. 122 [19: 125].

In *United States* v. *American Tobacco Company*, 166 U. S. 468 [41: 1081], the statute permitted the holder of stamps which he had paid for and not used, and which were spoiled or destroyed, etc., to apply to the Commissioner of Internal Revenue to redeem or make allowance for such stamps. Application was so made, but the Commissioner refused to redeem or make the allowance because of other facts stated in the case. The applicant filed his petition in the court of claims, and that court gave him judgment which was here affirmed. It is true that no question of jurisdiction was raised, but if the case at bar was properly decided by the court below, the court in that case had no jurisdiction, because the right to obtain redemption or payment was given by the same statute which provided the procedure to secure it, and the so-called remedy would have been exclusive in that case, as it is held to be exclusive in this. The party had to apply to the Commissioner and to comply with regulations, etc., all of which was but a part of the right which was granted, and when the Commissioner *erro- [499]
neously refused to make the redemption as provided for by the statute, the claimant, founding his claim upon a law of Congress, pursued his only remedy in the court of claims, and obtained it without any question of jurisdiction. We think the court had jurisdiction in that case, and that it also existed in this.

We come now to the question as to the true construction of the act itself, and whether it is applicable to the facts in this case.

It is conceded by the appellant that at the time the entry was made and the double minimum price paid for the lands, they were

within the place limits of the grant to the Wisconsin Central Railroad. The payment therefore was a proper payment, and necessary to have been made in order to obtain the lands. There was no mistake or misunderstanding of the facts at the time the entry was made. It was made eight years after the passage of the land grant by Congress, May 5, 1864, and at the time the payment was made the railroad had not been built. The government of course was no guarantor that the railroad ever would be built, and the party thus making an entry of lands within the place limits of a railroad grant necessarily took his chances of the future building of the road. That it was not certain to be built was sufficiently apparent at the time of the entry, for eight years had then elapsed, and no road had been built at that time. It was not until eighteen years after the entry, *viz.*, in 1890, that the government finally forfeited the lands because of the failure of the company to build the road. With reference to these facts, we think that the construction placed upon the act of 1880 by the Secretary of the Interior is the correct one.

The Secretary decided that the act does not apply to a case such as this, where at the time of the entry the lands were within the limits of the railroad land grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the government consequent upon such failure that the land then ceased to be within such limits.

Whatever may have been the reason of
[500]Congress in making *the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the place limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

Here no mistake whatever has been made. The lands were within the limits of the land grant at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. Whether the railroad would fulfil its obligations and in good time build its road through the land grant was a matter which the future alone could determine, was a matter which the entryman could judge of as well as the government, and was a matter in regard to which the government gave no guaranty, express or implied. Hence, when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the government was under no obligations whatever by virtue of the act of 1880 or otherwise to repay the difference in price for these lands.

While we agree with the Court of Claims in the dismissal of the petition, it is for a different reason. The petition should have been dismissed upon the merits, but we do not think it necessary to reverse the judgment on that account, as we can modify it so that it shall provide for dismissing the petition on that ground.

Judgment modified, and as modified affirmed.

JOHN W. BLYTHE and Henry T. Blythe, [501]
Appts.,
v.
FLORENCE BLYTHE HINCKLEY.

(See S. C. Reporter's ed. 501-508.)

Appeal or writ of error from circuit court to this court on question of jurisdiction—decision that remedy is in law, and not in equity, not a decision as to jurisdiction—decision that judgment of state court was a bar—appeal cannot be taken to this court where there is no denial of its jurisdiction or the decree rests on independent grounds.

1. An appeal or writ of error may be taken directly from the circuit court to this court, in a case in which the jurisdiction of that court as a Federal court is in issue; the question alone of jurisdiction being certified to this court.
2. The decision of the circuit court that the remedy in the suit was at law, and not in equity, was not a decision that the circuit court had no jurisdiction as a court of the United States.
3. The decree of the circuit court dismissing the suit on the ground that the judgment of the state court was a bar and could not be reviewed by that court is not a decision of want of jurisdiction because the circuit court was a Federal court, but a decision that it was unable to grant relief because of the judgment of the state court.
4. An appeal cannot be taken to this court where the decree of the circuit court rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, and the decree also rested on the independent ground that the remedy was at law.

[No. 367.]

Submitted January 30, 1899. Decided April 3, 1899.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California in a suit in equity brought by John W. Blythe *et al.*, plaintiffs, against Florence Blythe Hinckley *et al.*, to quiet the plaintiffs' title to certain real property claimed to belong to plaintiffs. On motion to dismiss or affirm. *Dismissed.*

See same case below, 84 Fed. Rep. 246.

Statement by Mr. Chief Justice **Fuller**:

This was a "complaint to quiet title," brought in accordance with the Code of Civil Procedure of California by John W. Blythe and Henry T. Blythe, citizens of the States of Kentucky and Arkansas, respectively, against Florence Blythe Hinckley, Freder-

ick W. Hinckley, and the Blythe Company, all citizens of California, which alleged that complainants were owners as tenants in common of the real property described therein, and that the defendants, "and each of them, claim that they have or own adversely to plaintiffs some estate, title, or interest in said lands; but plaintiffs allege that said claims of defendants are false and groundless and without warrant of law, and their claims to said lands are a cloud upon plaintiffs' title thereto." Then followed an amended complaint, which repeated the allegations of the original complaint, with some other averments, among them, "that at the
[502] *time of the commencement of this suit neither one of the parties was in possession of said lands or any part thereof." Thereafter a "second amended and supplemental bill in equity" was filed, which, among other things, set forth that Thomas H. Blythe was the owner of the real estate described at the time of his death; that he died in the city and county of San Francisco, April 4, 1883, being a citizen of the United States, and of the state of California, and a resident of said city and county; and that "after the death of said Thomas H. Blythe, as hereinbefore alleged, the public administrator of the city and county of San Francisco took charge of the estate of said Blythe and entered upon the administration of the same;" that Florence Blythe Hinckley was borne in England, the child of an unmarried woman; that the mother was a British subject; that Florence remained in England until after the death of Thomas H. Blythe, when and in 1883, she came to California, being then an infant ten years old, and "ineligible to become a citizen of the United States;" and that she was "when she arrived in California a nonresident alien."

It was then averred that the laws in force in California in 1883 relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of a deceased citizen of the state of California, were the treaty of 1794 between His Britannic Majesty and the United States, the naturalization laws of the United States, and section seventeen of article one of the Constitution of California of 1879, which was made mandatory and prohibitory by section twenty-two; that there were at the death of Blythe certain laws in force in said state, to wit, sections 230 and 1387 of the Civil Code, providing for the adoption and legitimation, and institution of heirship, of illegitimate children; that there was not at any time during Blythe's lifetime any law in force in England under or by force of which he could have legitimated the said Florence or made her his heir at law, or under which he could have absolved the said Florence from allegiance to her sovereign, or, without bringing said Florence into California, have changed her status from a subject of England to that of a bona fide resident of California.

[503] *It was further alleged that on a direct proceeding in the superior court of San Francisco, sitting in probate, brought on behalf of said Florence to determine the question of heirship, and to which action and proceeding complainants appeared, denying and contesting her application, that court adjudged in favor of Florence, and "decided, in substance and effect, that said Thomas H. Blythe had in his lifetime adopted and legitimated the said Florence;" that from that decree complainants appealed to the supreme court of the state, and that court "in substance and effect, decided that said Thomas H. Blythe did not adopt or legitimate the said Florence under or in conformity with said section 230 of the Civil Code, but that he had constituted her his heir under and pursuant to the provisions of section 1387 of said Civil Code." And it was charged that neither the superior court nor the supreme court had jurisdiction to render judgment in the matter, and that the decision of the supreme court was in violation of the Constitution of the state of California, and inconsistent with numerous former decisions of that court.

The bill then set forth that said Florence filed in the superior court in the matter of the estate of Thomas H. Blythe a petition for distribution, to which complainants appeared, and the court on hearing granted a decree of partial distribution, which complainants charged was void for want of jurisdiction; that thereafter and after the marriage of said Florence to defendant Hinckley, she filed in the superior court her petition for final distribution of the estate, which was resisted by complainants, but the court entered thereon a decree of final distribution, which complainants charged was void for want of jurisdiction.

It was further stated that when the original bill was filed neither party was in possession of the land described, but that the same was in the possession of the public administrator of said city and county of San Francisco, and that since then Florence had secured and was now in possession of the property. The bill prayed for a decree quieting complainants' alleged title; for an accounting as to rents and profits; for a receiver; and for general relief.

*After the filing of the second amended and [504]
supplemental bill, Mrs. Hinckley moved to dismiss the suit for want of jurisdiction, which motion was sustained by the circuit judge, for reasons given in an opinion filed December 6, 1897. 84 Fed. Rep. 246.

After the court ordered the dismissal of the suit, the record shows that leave was given to complainants "to amend their bill upon the understanding that it would not necessitate any further argument, but should be subject to the prior motion to dismiss the second amended and supplemental bill and to the order for a final decree entered thereon." Accordingly, on December 22, 1897, complainants filed their "third amended and supplemental bill in equity." This bill was substantially the same as that immediately preceding, though it set up reasons why an action at law would not be an adequate remedy, and amplified certain matters alleged to bear on the jurisdiction of the state courts.

It averred that section 671 of the Civil Code of California, providing that "any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state;" and section 672, providing: "If a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred;" were void as to aliens, because encroachments upon the treaty-making power of the United States, and in conflict with section ten of article one of the Constitution of the United States, and with section 1978 of the Revised Statutes, and that therefore those courts were without jurisdiction; and also that when the state courts adjudged in favor of Florence because of Blythe's action under section 1387 of the Code, reading, "Every illegitimate child is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child," that section was made to operate in favor of Florence outside of the geographical jurisdiction and boundaries of California, and, as thus applied, was in violation of section ten, article one, of the Federal Constitution, and of section 1978 of the Revised Statutes, and an invasion of the jurisdiction of international intercourse, wherefore the adjudication
[505]was without *jurisdiction; and complainants further said that sections 671, 672, and 1387 of the Code were in conflict with treaties between the United States and Russia, France, Switzerland, and England, and with the Constitution of the United States; and hence that the circuit court had jurisdiction "on the ground that the construction and application of the Federal Constitution are involved as well as on the ground of diverse citizenship of the parties, and because said section of said Civil Code violated the Federal Constitution as herein stated." On the same day, December 22, 1897, the final decree was entered in the case, the third paragraph of which was as follows: "That the original 'complaint' of the complainants, John W. Blythe and Henry T. Blythe, filed December 3d, 1895, and also the 'amended complaint' of said complainants, filed December 12th, 1895, and also the 'second amended and supplemental bill in equity' of said complainants, filed January 14th, 1897, and also the complainants' third amended and supplemental bill, filed by leave of court this 22d of December, 1897, after the rendition of the decision of the court upon the matters determined herein, but before the signing of this decree, be, and the same are each hereby, finally dismissed as against each and all of the parties named therein respectively as defendants, and in all respects and in every particular, for want of either Federal or equity jurisdiction and without prejudice to complainants' right to bring or maintain an action at law."

From this decree John W. Blythe and Henry T. Blythe prayed an appeal to this court, which was allowed and bond given March 2, 1898, and on the same day the circuit judge filed a certificate, certifying "to the Supreme Court of the United States pursuant to the judiciary act of March 3, 1891," fifteen questions of law, which it was stated arose "upon the face of said third amended and supplemental bill and upon said motion" namely the motion to dismiss.

The first ten of these questions set forth that the circuit court sustained the motion to dismiss for want of jurisdiction to entertain the suit, and ordered it to be dismissed accordingly. The remaining five contained no statement as to their disposition.

*It appears from the opinion of the circuit[506]
judge that the various bills were dismissed on the grounds: First, that the jurisdiction of the circuit court could not "be maintained because the state court, in the exercise of its general jurisdiction, determined the eligibility of the defendant Florence to inherit an estate which that court was called upon to distribute under the laws of the state; and that "the other propositions contended for by complainants are for the same reason deemed insufficient to take this case out of the general rule that after a court of a state, with full jurisdiction over property in its possession, has finally determined all rights to that property, a court of the United States will not entertain jurisdiction to annul such decree and disturb rights once definitely determined."

Second, that the remedy of complainants, if any, was at law, and not in equity.

Messrs. **W. H. H. Hart, Frederick D. McKenney, Robert Y. Hayne, John Garber,** and **A. R. Cotton** for appellees, in favor of motion to dismiss or affirm.

Messrs. **S. W. Holladay, E. B. Holladay, Jefferson Chandler,** and **L. D. McKisick** for appellants in opposition to motion.

*Mr. Chief Justice **Fuller** delivered the[506]
opinion of the court:

We have heretofore determined that review by certificate is limited by the act of March 3, 1891, to certificates by the circuit courts, made after final judgment, of a question in issue as to their own jurisdiction; and to certificates by the circuit courts of appeal of questions of law in relation to which the advice of this court is sought. *United States* v. *Rider*, 163 U. S. 132 [41: 101].

Appeals or writs of error may be taken directly from the circuit courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this *court. The cir-[507]
cuit court held that the remedy was at law and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States. *Smith* v. *McKay*, 161 U. S. 355 [40: 731]; *Blythe Company* v. *Blythe* [mem.] 172 U. S. 644 [*post*, —].

The circuit court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the circuit court was a Federal court, but a decision that the circuit

court was unable to grant relief because of the judgments rendered by those other courts.

If we were to take jurisdiction on this certificate, we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect.

Nor can we take jurisdiction on the ground that the case involved the construction or application of the Constitution of the United States, or that the validity or construcion of a treaty was drawn in question, or that the Constitution or law of a state was claimed to be in contravention of the Constitution of the United States, within the meaning of the judiciary act of March 3, 1891.

The circuit court by its decree passed on none of these matters, unless it might be said that they were indirectly involved in holding the judgments of the state courts to be a bar; and, moreover, the decree rested on the independent ground that the remedy was at law.

Even if the decree had been based solely on the binding force of the state judgments, still we cannot hold that an appeal directly to this court would lie.

The superior court of San Francisco was a court of general jurisdiction, and authorized to take original jurisdiction "of all matters of probate," and the bill averred that Thomas H. Blythe died a resident of the city and county of San Francisco and left an estate therein; and that court repeatedly decreed
[508]*that Florence was the heir of Thomas H. Blythe, and its decrees were repeatedly affirmed by the supreme court of the state. So far as the construction of the state statutes and state Constitution in this behalf by the state courts was concerned, it was not the province of the circuit court to re-examine their conclusions. As to the question of the capacity of an alien to inherit, that was necessarily involved in the determination by the decrees that Florence did inherit, and that judgment covered the various objections in respect of section 1978 of the Revised Statutes, and the tenth section of article one of the Constitution of the United States, and any treaty relating to the subject.

We are not to be understood as intimating in the least degree that the provisions of the California Code amounted to an invasion of the treaty-making power, or were in conflict with the Constitution or laws of the United States, or any treaty with the United States; but it is enough for the present purpose that the state courts had concurrent jurisdiction with the circuit courts of the United States, to pass on the Federal questions thus intimated, for the Constitution, laws, and treaties of the United States are as much a part of the laws of every state as its own local laws and Constitution, and if the state courts erred in judgment, it was mere error, and not to be corrected through the medium of bills such as those under consideration.

Appeal dismissed.

JAMES NICOL, *Appt.*, [509]
v.
JAMES AMES, United States Marshal, etc.

(Original.)

Ex parte: In the Matter of GEORGE R. NICHOLS, *Petitioner.*

EDWIN S. SKILLEN, *Appt.*,
v.
JOHN C. AMES, United States Marshal, etc.

CHARLES H. INGWERSEN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 509-527.)

War revenue act—provisions of—said act legal—power of Congress—tax on certain sales, a duty or excise upon the privilege—sales of merchandise at an exchange—uniformity of tax—written memorandum to be made—sales at stock yards.

1. Under the act of June 13, 1898, to provide means to meet war expenditures, a member of a board of trade selling for immediate delivery products or merchandise without making a memorandum, or making a memorandum but omitting to put stamps on it, or making a sale for future delivery and failing to put stamps on the memorandum, with intent to evade the provisions of the act,—is guilty of a misdemeanor.
2. A seller at stock yards, delivering a memorandum but omitting to affix the stamps thereto, with like intent, is also guilty of a misdemeanor.
3. Said act of June 13, 1898, is not illegal as imposing a direct tax, or because the same is not apportioned as required by the Constitution; or because the tax imposed is a stamp tax on documents not required by the state law to render the sale valid; or because Congress has no power to require a written memorandum to be made in order to place a stamp thereon.
4. In searching for proper subjects of taxation to raise moneys for the support of government, Congress has a right to recognize the manner in which the business of the country is transacted; and this court has the right to consider such facts without particular proof of them.
5. The tax is a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act, and is not a direct tax within the meaning of the Constitution.
6. A sale at an exchange forms a proper basis for classification which excludes sales made elsewhere from taxation; and the classification being proper and legal, there is that uniformity which the Constitution requires.
7. Nor is there a want of uniformity because the tax is imposed on those only who make such sales, and not on those who make purchases; and upon those who sell products

or merchandise, and not those who sell bonds, stocks, etc.

8. Congress has power to require the written memorandum to be made as a means for identifying the sale and for collecting the tax by means of the required stamp, and for that purpose to secure by proper penalties the making of the memorandum.

9. The statute covers sales made at union stock yards; it is a "similar place" to an exchange or board of trade within the meaning of the statute.

[Nos. 435, 4 Original, 625, and 636.]

Argued and Submitted December 13, 14, 1898. Decided April 3, 1899.

The first of the above-named cases is an appeal from an order of the Circuit Court of the United States for the Northern District of Illinois discharging a writ of habeas corpus and remanding the petitioner, James Nicol, to the custody of the marshal under a conviction for violation of the war revenue act for selling, at the Chicago Board of Trade, certain merchandise without making a memorandum or bill of such sale, as required by said act. *Affirmed.*

The second of said cases, No. 4 Original, is an application for leave to file a petition for a writ of habeas corpus to bring before the court the petitioner, George R. Nichols, who was convicted under said act of Congress for selling merchandise at said Board of Trade, and making and delivering a bill and memorandum of the sale without affixing the proper internal revenue stamps thereon. Petition for writ of habeas corpus *denied.*

The third of said cases, No. 625, is an appeal to this court from an order of the said circuit court of the United States discharging a writ of habeas corpus and remanding to custody the petitioner, Skillen, who was convicted for selling merchandise at said Board of Trade, and unlawfully failing and refusing to make and deliver to the buyer any bill or memorandum as required by said revenue act. *Affirmed.*

The last of said above cases, No. 636, is a writ of error to the United States District Court for the Northern District of Illinois to review a conviction of said Charles H. Ingwersen for making a sale of certain cattle at said stock yards and delivering the same without making any written memorandum, etc., as required by said revenue act. *Affirmed.*

The above cases were all considered together.

Statement by Mr. Justice **Peckham:**

[510] *These cases involve the validity and construction of some of the provisions of section 6, and a portion of schedule "A," therein referred to, of the act of Congress approved June 13, 1898 (30 Stat. at L. 448), entitled "An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes," commonly spoken of as the War Revenue Act. The cases come before the court in this way:

No. 435 is an appeal to this court from an order made by the circuit court of the United States for the northern district of Illinois, discharging a writ of habeas corpus and remanding the petitioner to the custody of the marshal. The petition to the circuit court for the writ alleged that the petitioner Nicol had been convicted in the United States court for the northern district of Illinois, upon an information duly filed charging him with selling, at the Chicago Board of Trade and at its rooms, two carloads of oats, "without then and there making and delivering to the buyer any bill, memorandum, agreement, or other evidence of said sale, showing the date thereof, the name of the seller, the amount of the same, and the matter or thing to which it referred, as required by the act of Congress," above mentioned. He was sentenced to pay a fine and to be imprisoned until paid. He refused to pay, and was taken into custody by the marshal. That part of the act referring to the making and delivering of a bill or memorandum, etc., the petitioner claimed was unconstitutional. The circuit court, after argument, held the law valid and the conviction legal.

No. 4 Original is an application to this court for leave to file a petition for a writ of habeas corpus to bring before the court the petitioner George R. Nichols, and for a rule requiring the marshal for the northern district of Illinois, in whose custody the petitioner is, to show cause why the writ should not issue. The petition states that Nichols was convicted and sentenced, under the act of Congress above mentioned, upon an information filed in the district court of the United States for the northern district of Illinois, for selling at the Chicago Board of Trade, of which he was then a member, for immediate delivery, to one Roloson, also a member of such board, *ten tierces, or three [511]
thousand pounds of hams, then in Chicago, at a price named, amounting to $195, and on the sale unlawfully making and delivering to Roloson a bill and memorandum of the sale showing the date thereof, the name of the seller, the amount of the same, and the matters and things to which it referred, without having the proper stamps affixed to said bill or memorandum denoting the internal revenue accruing upon said sale, bill, or memorandum, as required by law, but on the contrary unlawfully refusing and neglecting to affix any such stamps to said bill or memorandum. Upon the trial the jury rendered a verdict finding the petitioner guilty as charged in the information, and the court sentenced him to pay a fine of $500 and to be committed to the county jail until such fine and costs should be paid. The petitioner refused to pay the fine and an order of commitment was made out and placed in the hands of the marshal, who arrested the petitioner and he is now in the custody of the marshal. The petitioner upon the trial claimed that the act in regard to the matters named in the information was unconstitutional, and therefore no offense was charged in the information; that the court had no jurisdiction to try him, and that his conviction and subsequent arrest

and detention were wholly without jurisdiction. The petitioner gives as a reason for his application to this court for the writ of habeas corpus that one James Nicol (the appellant in No. 435) had been convicted of substantially the same offense in the district court for the northern district of Illinois, and that he had made application for a writ of habeas corpus to the circuit court held in that district, which court, after a hearing upon the writ, decided against Nicol, and in favor of the constitutionality of the act of Congress herein questioned, and the petitioner herein alleges that it would be a vain act to apply for a writ of habeas corpus to the same circuit court which had already, after a hearing, decided the question in a way unfavorable to the claims of the petitioner herein.

No. 625 is also an appeal to this court from an order of the circuit court of the United States for the northern district of Illinois, discharging a writ of habeas corpus and remanding
[512] *the petitioner Skillen to the custody of the marshal. The petitioner was convicted upon an information of the same nature as is above set forth in No. 435, excepting that the information in this case alleged that the contract was for future delivery of 5,000 bushels of corn, and that Skillen unlawfully failed and refused to make and deliver to the buyer any bill or memorandum as required by the act. The petitioner was convicted upon a trial had upon such information, and the court imposed upon him a fine in the sum of $500 besides costs, and directed that he should be committed to the county jail until such fine and costs were paid. The same proceedings were then taken as are set forth in No. 435.

No. 636 is a writ of error to the district court of the United States for the northern district of Illinois, to review a conviction of the plaintiff in error upon an information charging him with making a sale of certain cattle at the Union Stock Yards, Chicago, and delivering the same without making any written memorandum, etc., as required by the act of Congress. The information also charged in a second count a sale, at the same place, of certain live stock and a delivery of a memorandum of the kind mentioned in the act of Congress and a failure and refusal to affix the stamps as provided for in such act. Upon the trial a *nolle prosequi* was duly entered upon the first count. The plaintiff in error claims that the act of Congress is unconstitutional on the same grounds mentioned in the other cases, and sets up as a special and separate defense that a sale at the stock yards is not included in the act of Congress, as it is not an "exchange or board of trade or other similar place," within the meaning of that act.

Messrs. **Henry S. Robbins** and **John G. Carlisle,** for appellant in No. 435 and No. 625, and for petitioner in No. 4 Original:

Habeas corpus is the proper remedy where the prisoner is in custody upon conviction for an offense created by an unconstitutional law.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; *Ex parte Royall,* 117 U. S. 248, 29 L. ed. 870; *Re Coy,* 127 U. S. 758, 32 L. ed. 281; *Neilsen, Petitioner,* 131 U. S. 182, 33 L. ed. 120.

The circuit court having in both cases upheld the constitutionality of the present law, and having, in the case of James Nicol, denied a writ of habeas corpus, an application by George R. Nichols to that court would have been useless; hence, an application by him directly to this court is in accordance with its practice.

Ex parte Terry, 128 U. S. 289, 32 L. ed. 405; *Sawyer's Case,* 124 U. S. 200, 31 L. ed. 402; *Ex parte Bain,* 121 U. S. 1, 30 L. ed. 849; *Re Tyler,* 149 U. S. 164, 37 L. ed. 689; *Re Ayers,* 123 U. S. 443, 31 L. ed. 216.

The tax in question, if an indirect tax, is a stamp tax upon documents. It is not a privilege tax. A commercial exchange is a voluntary association (the Chicago Board of Trade, although incorporated, has been decided to be such—*Chicago Bd. of Trade* v. *Nelson,* 162 Ill. 431), and neither the privilege of being a member of the exchange nor of having one's property sold there, nor of being a seller there, is a privilege in the legal sense—that is a taxable privilege.

Columbia v. *Guest,* 3 Head, 414; Cooley, Taxation, 2d ed. 571; *Charleston* v. *Oliver,* 16 S. C. 47.

Nor is this an occupation tax—such tax being imposed elsewhere in this act upon brokers, and the law not presuming double taxation.

Cooley, Taxation, 227; *Montgomery County Bd. of Revenue* v. *Montgomery Gaslight Co.* 64 Ala. 273.

Nor is it a tax on sales, which would in reality be a tax on the commodity sold.

Cook v. *Pennsylvania,* 97 U. S. 566, 24 L. ed. 1015; *Brown* v. *Maryland,* 12 Wheat. 419, 6 L. ed. 678.

For agreements to sell for future delivery are taxed, and in these there is usually no commodity to tax, such contracts, although generally settled by the payment of differences, being legal (*Bibb* v. *Allen,* 149 U. S. 499, 37 L. ed. 827; *Miles* v. *Andrews,* 40 Ill. App. 155), and, whether legal or not, would be taxable.

License Tax Cases, 5 Wall. 463, 18 L. ed. 497.

Almy v. *California,* 24 How. 169, 16 L. ed. 644, as construed by *Woodruff* v. *Parham,* 8 Wall. 123, 19 L. ed. 382, is not in conflict with the proposition that this is a stamp tax only.

Congress is without constitutional power to require written memoranda of intrastate contracts or transactions. This act, by imposing a penalty and creating a misdemeanor, prohibits oral sales or contracts of sales, and thereby interferes with intrastate commerce—this regardless of whether it makes the sale void or not.

Brown v. *Maryland,* 12 Wheat. 433, 6 L. ed. 683.

Congress cannot regulate intrastate commerce.

United States v. *De Witt,* 9 Wall. 44, 19 L. ed. 594; *Lane County* v. *Oregon,* 7 Wall. 76, 19 L. ed. 74.

Nor can it do this as a "necessary and proper" means of levying taxes.

"Necessary and proper", under sub-clause 18, § 8, of the Constitution, authorizes only such laws as are (1) "appropriate and plainly adapted" to the levying of the tax, and (2) "consist with the spirit of the Constitution."

McCulloch v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Legal Tender Cases*, 12 Wall. 457, 20 L. ed. 287.

But the only purpose of requiring written memoranda is to increase the number of such documents to be taxed, which is not a proper incident to the taxing power.

United States v. *DeWitt*, 9 Wall. 42, 19 L. ed. 593; *License Tax Cases*, 5 Wall. 463, 18 L. ed. 497.

Congressional interference with state commerce, in whatever form or degree, is to be as much condemned as has been state interference, in whatever form or degree, with interstate or foreign commerce.

Henderson v. *New York*, 92 U. S. 271, 23 L. ed. 549; *Webber* v. *Virginia*, 103 U. S. 350, 26 L. ed. 567; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 35, 29 L. ed. 786; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Leloup* v. *Port of Mobile*, 127 U. S. 641, 32 L. ed. 312, 2 Inters. Com. Rep. 134; *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Guy* v. *Baltimore*, 100 U. S. 434, 25 L. ed. 743.

This interference with oral contracts within the state does not "consist with the spirit of the Constitution."

Moore v. *Moore*, 47 N. Y. 467, 7 Am. Rep. 466; *Sammons* v. *Halloway*, 21 Mich. 163, 4 Am. Rep. 465; *Craig* v. *Dimock*, 47 Ill. 310; *Davis* v. *Richardson*, 45 Miss. 500, 7 Am. Rep. 732; *Forcheimer* v. *Holly*, 14 Fla. 243; *Sporrer* v. *Eifler*, 1 Heisk. 633; *Duffy* v. *Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Carpenter* v. *Snelling*, 97 Mass. 452.

Such legislation, if independent of a tax law, would be class legislation, because depriving some, but not all, of the right to contract orally.

Millett v. *People*, 117 Ill. 298, 57 Am. Rep. 869; *Harding* v. *People*, 160 Ill. 459, 32 L. R. A. 445; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Godcharles* v. *Wigeman*, 113 Pa. 431; *Kuhn* v. *Detroit*, 70 Mich. 537; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220.

If the right to thus discriminate respecting oral contracts be sustainable at all, it can only be when it is necessary to taxation, and not where, as here, it is neither necessary nor usual. In the latter case it is clearly contrary to the "spirit of the Constitution." It takes from a taxpayer, as a part of his tax, his constitutional right to contract or trade orally as others do.

A liberal construction is to be resorted to for the protection of constitutional rights.

Boyd v. *United States*, 116 U. S. 635, 29 L. ed. 753; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 325, 37 L. ed. 468; *Oakley* v. *Aspinwall*, 3 N. Y. 547.

This tax, if a stamp or other indirect tax, violates the rule of uniformity.

The Constitution requires, not merely "geographical uniformity," but practical uniformity between taxpayers, which means, not that all persons or all property must be taxed, if any are, but that all persons similarly situated, and all property of the same kind, be proportionately taxed, if any such person or property is taxed.

This construction is required by the state of history and political economy at the time of the adoption of the Constitution, as well as by the circumstances attending the insertion of this uniformity clause in the Constitution.

The power to tax implies the power to destroy.

McCulloch v. *Maryland*, 4 Wheat. 431, 4 L. ed. 607; *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *Citizens' Sav. & L. Asso.* v. *Topeka*, 20 Wall. 655, 22 L. ed. 455.

Uniformity has been defined as above by this court in—

United States v. *Singer*, 15 Wall. 111, 21 L. ed. 49; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798.

This rule of taxation requires an essential difference between the subjects taxed and those untaxed.

Pacific Exp. Co. v. *Siebert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Senior* v. *Ratterman*, 44 Ohio St. 661.

This does not arise from the mere difference of locality of a sale of the thing taxed, nor from greater convenience attending the making of such sale.

Messrs. **John S. Miller** and *Merritt Starr*, for plaintiff in error in No. 636:

The words "at any exchange or board of trade or other similar place," in Schedule A of the act in question, refer to the place of sale; and they mean the room or floor or place provided by associations of that kind for trading among their members, and to the privileges of which only members are admitted. And the tax levied is only upon sales at those places.

This is a fact of common knowledge, and appears in adjudged cases and works of standard authority; and it must be held to have been known to and in contemplation of Congress in passing the act in question. It appears in the following, among other, authorities:

Dos Passos, Stock Brokers, 88, 208; Melsheimer & Laurence Stock Exchange, 1, 2; Bisbee & Simons, Produce Exchange, 71; *Speight* v. *Gaunt*, L. R. 22 Ch. Div. 727; *Leech* v. *Harris*, 2 Brewst. (Pa.) 575; *Metropolitan Grain & Stock Exchange* v. *Chicaga Bd. of Trade*, 15 Fed. Rep. 849.

The words "or similar place" in Schedule A of the act do not bring within the tax but exclude therefrom, sales at any different place.

Harlow v. *Tufts*, 4 Cush. 453.

The Union Stock Yards in Chicago, or its pens, in one of which the sale in question

was made, or other similar stock yards in the United States where live stock is received and where it is sold by the owner or by his agent, are not exchanges or boards of trade, or other similar places, within the meaning of the act in question.

If it is competent for Congress, as contended by counsel for the government in board of trade cases, to put into a class, for the purposes of taxation, sales made on 'change,—it is not possible to bring within that class sales of cattle in the pens of the Union Stock Yards, and still preserve the uniformity required by the Constitution.

Head Money Cases, 112 U. S. 580, 28 L. ed. 798; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666.

The phrase "or other similar places," in Schedule A of the war revenue act, if open to the interpretation given by the court below, is void for uncertainty and for indefiniteness.

Hughes's Case, 1 Bland, Ch. 46; *Weale* v. *Proprietors of West Middlesex Waterworks Co.* 1 Jac. & W. 371; *Bank of Columbia* v. *Ross*, 4 Harr. & M'H. 456; *State* v. *Boon*, 1 N. C. (Taylor & C.) 103, 246; *Drake* v. *Drake*, 15 N. C. (4 Dev. L.) 114; *State* v. *Partlow*, 91 N. C. 550; *Com.* v. *Bank of Pennsylvania*, 3 Watts & S. 173; *Leavitt* v. *Lovering*, 64 N. H. 607, 1 L. R. A. 58; *Ward* v. *Ward*, 37 Tex. 389; *Green* v. *Wood*, 7 Q. B. 178; *Doe, Davenish*, v. *Moffatt*, 15 Q. B. 257; *McConvill* v. *Jersey City*, 39 N. J. L. 38.

If this tax applies to the sale of cattle here in question then the tax is a direct tax and violates the rule of apportionment.

A tax upon a sale of merchandise is a tax upon the merchandise itself.

Brown v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Dobbins* v. *Erie County Comrs.* 16 Pet. 435, 10 L. ed. 1022; *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 644; *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 581, 39 L. ed. 819.

Mr. **John K. Richards**, Solicitor General, for appellee in No. 435 and No. 625, and for respondent in No. 4 Original, and for defendant in error in No. 636:

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

Sinking-Fund Cases, 99 U. S. 700, 25 L. ed. 496; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162; *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Livingston County* v. *Darlington*, 101 U. S. 407, 25 L. ed. 1015.

The Constitution expressly confers upon Congress the taxing power.

Congress may make all the laws which shall be necessary and proper for carrying into execution the foregoing power.

McCulloch v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.

The selection of the means rests with Congress. Unless these means are forbidden by the Constitution the courts will not interfere.

Fong Yue Ting v. *United States*, 149 U. S. 698, 37 L. ed. 905; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545.

With the exception and under the limitation of the Constitution, the taxing power reaches every subject of taxation.

License Tax Cases, 5 Wall. 462, 18 L. ed. 497; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 19 L. ed. 95; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. ed. 179.

In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in distributing equitably the burdens of government.

Magoun v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037.

This is a tax upon the sale, agreement of sale, or agreement to sell, not upon the memorandum thereof.

Cook v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015.

Only those sales, agreements of sale, or agreements to sell, are taxed which are made on commercial exchange. Such sales are made under conditions which distinguish them from other sales, thus affording a ground for classification.

The court will take judicial notice of what a commercial exchange is.

Anderson v. *United States*, 171 U. S. 604, *ante*, 300; *Hopkins* v. *United States*, 171 U. S. 578, *ante*, 290; *Hansen* v. *Boyd*, 161 U. S. 397, 40 L. ed. 746; *Nelson* v. *Board of Trade*, 58 Ill. App. 399.

The tax is uniform because every sale, agreement of sale, or agreement to sell, made at an exchange, is taxed alike. All persons similarly situated are treated in the same way and subjected to an equal burden. The tax operates with the same force and effect in every place in the United States where the subject of it is found.

Head Money Cases, 112 U. S. 580, 28 L. ed. 798; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189.

The tax is not on personal property or the income thereof. It is therefore not a direct tax. It is the duty on the disposition or transfer of merchandise, which, payable in the first instance by the seller who voluntarily goes upon the exchange, may be shifted in whole or in part to the buyer. It is therefore an indirect tax—an excise.

Pollock v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 158 U. S. 601, 39 L. ed. 1108; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1; *Brown* v. *Houston*, 114

U. S. 623, 29 L. ed. 257; *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 19 L. ed. 95.

[513] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

These cases may be considered together, because they involve substantially the same question, only the last one includes, in addition, a question of construction as distinguished from a question of the validity of the statute.

That portion of the act which is involved is set forth in the margin.† 30 Stat. at L. 448, 450, 458.

[514] *It is seen that the cases embrace the facts of a member of the Board of Trade of Chicago, selling for immediate delivery, products or merchandise: (*a*) without making a memorandum; (*b*) making a memorandum but omitting to put stamps on it; (*c*) making a sale for future delivery and failing to put stamps on the memorandum.

In the *Nicol Case* (No. 435), the sale was by a citizen to a citizen of the state of Illinois.

The case of sales at the Union Stock Yards at Chicago is also included, where a memorandum is delivered, but the vendor neglects and refuses to affix the stamps to the memorandum.

The objections to the validity of the act are, stated generally, that it is a direct tax, and is illegal because not apportioned as required by the Constitution. If an indirect tax, it is a stamp tax on documents not required to be made under state law in order to render the same valid, and Congress has no power to require a written memorandum to be made of transactions within the state for the purpose of placing a stamp thereon. It is not a privilege tax within the meaning of that term, because there is no privilege other than that which every man has to transact his own business in his own house or in his own office under such regulations as he may choose to adopt, and such a choice cannot be in any fair use of the term a privilege which is subject to taxation.

These questions are involved in each case, while in the last one it is further objected that the sales at the stock yards are not included in the terms of the act, and evidence was adduced upon the trial as to the nature of the business conducted at the stock yards, and the manner in which it was performed. It will be adverted to hereafter when we come to a discussion of the meaning and proper construction of the act.

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been
*said, is in favor of the validity of the act, [515]
and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or inadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare, and the only constitutional restraint upon the power is that all duties, imposts, and excises shall be uniform throughout the United States, and that no capitation, or other direct, tax shall be laid,

†Adhesive Stamps.

Sec. 6. That on and after the first day of July, 1898, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule.

Schedule A.—Stamp Taxes. (30 Stat. at L. 448–458.)

. . . Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent; *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale. And every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person or persons liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person or persons, who shall make any such sale or agreement of sale, or agreement to sell, or who shall, in pursuance of any such sale, agreement of sale, or agreement to sell, deliver any such products or merchandise without a bill, memorandum, or other evidence thereof, as herein required, or who shall deliver such bill, memorandum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or both, at the discretion of the court.

unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any state. Constitution, article 1, sec. 8, and sec. 9, subdivisions 4 and 5. As thus guarded, the whole power of taxation rests with Congress.

The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economical or theoretical nature of the tax should
[516] be *indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

In searching for proper subjects of taxation to raise moneys for the support of the government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on.

Coming to a consideration of the objections raised to this statute it is well to first consider the nature of an exchange or board of trade, and then to inquire more in detail as to the validity of the act with reference to sales at such places. The Chicago Board of Trade may be taken as a type of the *others [517]
in existence throughout the country, because the same features exist in all of them, while the size and importance of the Chicago institution serve only to make such features more prominent and their effect more easily discernible. We say the same features exist in all of the exchanges or boards of trade because we have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country, and while we could not take notice without proof as to any particular constitution or by-law of a body of this description, yet we are not thereby cut off from knowledge of the general nature of those bodies and of the manner generally in which business therein is conducted.

It appears in this record that the Chicago Board of Trade is a voluntary association of individuals who meet together at a certain building owned by the association for the purpose of there transacting business. This particular board is incorporated under an act of the legislature of Illinois, though its corporate character does not, in our judgment, form a material consideration in the inquiry. The members of the association meet daily between certain business hours for the purpose of buying and selling flour, wheat, corn, oats, and other articles of food products, and for the transaction of such other business as is incident thereto. Among its members are some whose business it is to purchase in the country or to receive on consignment from persons in the country some or all the articles which are dealt in on the floor of the exchange, and there are other members whose business it is to buy such articles upon the exchange either for themselves or on commission, and to deliver or ship the same to consumers or distributors throughout the country and in Europe.

It is common knowledge that these exchanges encourage and promote honest and fair dealing among their members; that they provide penalties for the violation of their rules in that regard, and that contracts between members relating to business on the exchange have the advantage of the sanction provided by the exchange for such purposes. They furnish a *meeting place for [518]
those engaged in the purchase and sale of commodities or other things to be sold, and in that way they offer facilities for a market for them. Dealings among members so engaged tend to establish the market price of the articles they deal in, and that price is very apt to be the price for the same article when bought or sold outside. The price is arrived at by offers to sell on the one side and to purchase on the other until, by what has frequently been termed the "higgling" of the market, a price is agreed upon and the sales are accomplished. In arriving at this price, of course the great law of the cost of production and also that of supply and demand enter into the problem, and it is upon a consideration of all matters regarded as

material that the agreement to buy and sell is made. The prices thus fixed are usually followed when the transaction occurs outside, and the market price means really the exchange price. That an enormous amount of the business of the country which is engaged in the distribution of the commodities grown or produced therein is transacted and takes place through the medium of boards of trade or exchanges cannot be doubted. Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the government or by a state, ought nevertheless to be recognized as existing facts and to be subject to the judgment of Congress as fit matters for taxation.

We will now examine the several objections that have been offered to this statute.

It may be stated, of course, that if the tax herein is a direct tax within the meaning of the Constitution, it is void, for there is no apportionment as required by that instrument.

It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown* v. *Maryland*, 12 Wheat. 419 [6: 678], down to those involving the validity of the income tax ([*Pollock* v. *Farmers' Loan & T. Co.*] 157 U. S. 429 [39: 759]; 158 U. S. 601 [39: 1108]), for the purpose of proving the correctness of this proposition. All the
[519] cases involved the question whether the *taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. The tax laid in the same act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker, while in the other case the tax, although measured in amount by a reference to the value of the thing sold, is in reality upon the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an excise. The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. A tax on professional receipts was recognized by the present Chief Justice in delivering the opinion of the court on the first hearing of the income tax case ([*Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 579 [39: 759, 818]), as an excise or duty and *therefore indirect, while a tax on [520]
the income of personalty he thought might be regarded as direct. And upon the rehearing (158 U. S. 601 [39: 1108]), it was distinctly held that the tax on personal property or on the income thereof was a direct tax. This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or board of trade.

It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to someone else. This, however, assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale.

We do not see that any material difference exists when the sale is for future delivery. The thing agreed to be sold is the same, whether for immediate or future delivery, and the fact that the sale for future delivery may subsequently be carried out by the actual payment of the difference between the agreed and the market price at the time agreed upon for such delivery does not affect the case. The privilege used is the same whether for immediate or future delivery, and the same rule applies to both.

Passing these grounds of objection, it is urged that if this is an indirect tax, it is not uniform throughout the United States as required by the Constitution. Sales at an exchange or board of trade, it is said, are singled out for taxation under this act, although they differ in no substantial respect from sales at other places, and there is therefore no just ground for segregating or classifying such sales from those made elsewhere. A sale at an exchange or board of trade, it is claimed, is not a privilege or facility which can or justly ought to be taxed while all other sales at all other places are exempted from *taxation, and there is no rea- [521]
sonable ground therefore for the assertion

that such a tax is uniform within the meaning of the Constitution. It is said not to be uniform because it is unequal, taxing sales at exchanges and exempting all other sales, while at the same time there is no natural basis for any distinction between such sales, the distinction made being purely arbitrary and unreasonable.

This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word "uniform" is to be understood in what has been termed its "geographical" sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax, we think this tax is valid within either meaning of the term. In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a state or by Congress. In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the government. The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, C. & S. F. Railroad Company* v. *Ellis*, 165 U. S. 150-155 [41: 666-668]; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294 [42: 1037, 1043]. If the classification be proper and legal, then there is the requisite uniformity in that respect.

A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and [522] plain a difference from a sale *elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject-matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot, and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.

In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things, whether at an exchange or elsewhere.

Another objection taken is that Congress taxes only those who make sales and not those who make purchases, and those who sell products or merchandise and not those who sell bonds, stocks, etc. These are discriminations, it is said, which do not follow the rule of uniformity, and hence render the tax void.

A purchase occurs whenever a sale is effected, and to say that a purchaser at an exchange sale must be taxed for the facilities made use of in making the purchase, or else that the tax on the seller is void, is simply to insist upon doubling the tax.

*Nor is it necessary to tax the use of the [523] privilege under all circumstances in order to render the tax valid upon its use in particular cases. We see no reason why it should be necessary to tax a privilege whenever it is used for any purpose, or else not to tax it at all. It is not in its nature indivisible. A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. It may be the same privilege, but when it is used in different cases to accomplish sales of wholly different things, between which there is no relation whatever, one use may be taxed and the other not, and no rule of uniformity will thereby be violated.

It is also objected that there is no power in Congress to require a party selling personal property, in the course of commerce within the state, to make a written note or memorandum of the contract, and to punish him by fine and imprisonment for a failure to do so; if the state do not require a memorandum on a sale, Congress cannot in the exercise of the taxing power compel a citizen to make one in order that it may be taxed by the United States.

In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of the state in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the

name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp, which by the laws of the state would otherwise be valid. It does not assume to enact anything in opposition to the law of any state upon the subject of sales. It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it
[524] secures by proper penalties the making of *the memorandum. Instead of a memorandum, Congress might have required a sworn report with the proper amount of stamps thereon to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.

The means actually adopted do not illegally interfere with or obstruct the internal commerce of the states, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means for collecting the tax which would prove less troublesome or annoying to the taxpayer, can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

We come now to the special objection raised in the case of Ingwersen, No. 636, and which applies to this case alone.

The sales were made at the Union Stock Yards, and it is claimed the statute does not cover the case of sales there made, because it is not an exchange or board of trade or other similar place.

The facts upon which the question arises are found in the record, and it shows that the Union Stock Yard & Transit Company of Chicago is a corporation which was incorporated under the laws of the state of Illinois in 1865. Under that charter the company had power to maintain cattle yards for the reception and safekeeping, feeding, weighing, and transfer of cattle and other matters connected therewith, which are set out in full in the charter. The character of the business and the manner in which it is conducted are fully set forth in the record, from which the following extract is taken:

"The Union Stock Yards described in this information, at the respective times therein mentioned and theretofore and since, covered and cover three hundred and thirty-five acres of land situated between Thirty-ninth street
[525] and Forty-seventh *street and Halstead street and Ashland avenue, in the city of Chicago, in the county of Cook and state of Illinois, of which two hundred acres are covered by pens, which are made by fences surrounding and enclosing the same, there being alleys running through the yards separating the pens, into which alleys gates lead from the pens. The number of the pens is about five thousand and they are in size respectively from eight feet square to fifty feet square. Railway tracks belonging to and operated by the Chicago Junction Railway Company, which connect with all the lines of railway to the city of Chicago, extend into the yards, over which cattle, hogs, and other live stock received at or shipped from the Union Stock Yards are carried. Upon the arrival of cattle, hogs, or other live stock at the Union Stock Yards, consigned to the commission merchant at the Union Stock Yards, such cattle, hogs, or other live stock are placed by the owner or consignee thereof or his or its agents, in one or more of the pens, and are there cared for, fed, and watered by such owner or consignee. Any person is at liberty to send, take, or to receive cattle, hogs, or other live stock into the Union Stock Yards, and there place or have the same placed in a pen or pens, care for the same, and there sell any cattle belonging to him or which he has the right to sell. Any person has access to the pens containing cattle, hogs, or other live stock for the purpose of buying the same, and has liberty to purchase or negotiate for the purchase thereof. Sales of cattle, hogs, and other live stock in the yards are at private sale. Commission merchants having cattle, hogs, or other live stock in a pen or pens in the yards seek and solicit a buyer therefor, and when a proposed buyer is so found take him to the pens in which such live stock is contained, and there exhibit such live stock; and to such proposed buyer, or to any person who may come to said pen and who may desire to buy, such live stock is sold in the pen in which they are yarded. Sales of cattle, hogs, and sheep in the yards are by weight, and upon a sale thereof being made such live stock is taken by the owner or commission merchant having charge thereof from the pen in which it is confined to a scale or scales in the yard and belonging to the Union Stock *Yard & Transit Company, and are [526]
there weighed by a weighmaster employed by the Union Stock Yard & Transit Company and in charge of the scale in which said live stock are weighed, and the weight of such live stock is thereby determined as the weight for which the purchaser pays upon his purchase, and the amount of the purchase price at the price per pound or per hundred pounds fixed in such sale is thereby determined."

The corporation has nothing to do with the selling or purchasing of stock of any kind. The market at the Union Stock Yards is unquestionably the largest in the country.

The plaintiff in error at these yards as agent for a corporation then carrying on the business of a live-stock commission character and which was a dealer in live stock, sold to another as agent for the Eastman Company, also a corporation created for the purpose of dealing in live stock, a certain amount of merchandise for present delivery without affixing any stamp to the memorandum.

We cannot see any real distinction sufficient in substance to call for a different decision between the Union Stock Yards and an exchange or board of trade. We think it is a "similar place" within the meaning of the statute under consideration.

It is true that there are no sales or purchases of stock made by members of the stock-yards company as such. Anyone is accorded the right to bring his cattle to the stock yards upon payment of the regular fees and compliance with the regulations made by the company, and having brought his cattle he has the right accorded him by the company to have them kept, fed, watered, etc., and to sell them himself or by a commission merchant who need not be a member of the stock-yards company.

It is plain to be seen that the privilege or facility for a sale of the cattle or other stock at the yards of such company is of precisely the same nature and character as that which exists at an exchange or board of trade which is so described in terms. That the sales are made by the owners of the cattle or by commission merchants who are not
[527] members of the *stock-yards company, is not material. The facilities for a sale exist and are made use of in each case, and are in truth the same in each. A perusal of the facts contained in the record in the case shows that those yards answer all the purposes of an exchange or board of trade, and that they in truth amount in substance to the same thing. The differences existing between them are unsubstantial so far as this point is concerned. The sales at that place are accomplished with a facility which it is plain could not exist but for the conditions and advantages afforded by the use of those yards.

The owner of the cattle who brings them to the yards and avails himself of the privilege of selling them at that place does without doubt make use of a privilege which everyone knows is an advantage sufficient to constitute a material difference between a sale at the yards and a sale elsewhere. This advantage, although one which any person could use, is yet of precisely the same nature as that existing in the case of an exchange or board of trade, and it is therefore a similar place within the meaning of the statute. Being a similar place, the reasons stated in the foregoing cases apply with equal force here and demand the same judgment.

For the reasons above stated, we make the following disposition of the cases before us:

In Nos. 435 and 625, the orders of the Circuit Court of the United States for the Northern District of Illinois are *affirmed.*

In No. 4 Original, the petition for a *writ of habeas corpus is denied.*

In No. 636, the judgment of the District Court of the United States for the Northern District of Illinois is *affirmed.*

So ordered.

Mr. Justice **Brown** and Mr. Justice **White** concurred in the result.

GUTHRIE NATIONAL BANK, *Plff. in Err.* **[528]**
and *Appt.*,
v.
CITY OF GUTHRIE.

(See S. C. Reporter's ed. 528–540.)

Jurisdictional amount—territorial act of Oklahoma—power of territorial legislature—jury trial—notice to parties.

1. Interest may be computed upon the claim involved in a suit, to the time of the decision of the court appealed from, in order to determine whether the amount involved is sufficient to give jurisdiction to this court.
2. The act of December 25, 1890, of the territorial legislature of Oklahoma, providing a method by which to raise the necessary funds to pay the indebtedness incurred by the provisional governments of certain cities, was within the power of the territorial legislature to pass, and is a valid act.
3. The territorial legislature had the power to compel any of its political subdivisions to recognize claims founded upon equity and justice, although not of legal obligation, but which there was a plain moral duty to pay.
4. The above-named territorial act does not infringe upon the amendment to the United States Constitution regarding a jury trial in cases where the matter in controversy exceeds $20.
5. The district court to which the claims are to be reported has power to investigate them and to provide for reasonable notice, by rules, so as to prevent surprise.

[No. 133.]

Submitted January 13, 1899. Decided April 3, 1899.

IN ERROR to and appeal from the Supreme Court of the Territory of Oklahoma to review a judgment of that court affirming the judgment of the District Court of Logan County in that Territory dismissing proceedings by the Guthrie National Bank against the city of Guthrie to enforce certain claims against the said city. *Reversed,* and case remanded, with directions to reverse the judgment of the District Court and that the last-named court hear the claims upon their merits.

Statement by Mr. Justice **Peckham:**

The President of the United States by proclamation dated March 23, 1889 (26 Stat. at L. 1544), declared that the Territory of Oklahoma would be open for settlement on April 22, 1889, subject to the restrictions of the act, chapter 412, approved March 2, 1889. 25 Stat. at L. 980, 1004. By that act the lands were to be disposed of to actual settlers under the homestead laws only, and until the lands were open for settlement under the proclamation of the President no person was permitted to enter upon or occupy the same.

By the act, chapter 182, approved May 2,

1890 (26 Stat. at L. 81), Congress provided a temporary government for the territory, and by the act, chapter 207, approved May 14, 1890 (26 Stat. at L. 109), provision was made for town-site entries.

From the opening of the territory, under the proclamation of the President, down to the passage of the act of May 2, 1890, Congress failed to establish any government for it. During that period settlers had come
[529] into the territory and a number *of townsites had been located and settled upon by them. Many persons located and took up their residence upon the land contained in the present boundaries of the city of Guthrie. The lands were surveyed into streets, alleys, squares, blocks, and lots, and what were known as provisional municipal governments were formed. By the general consent of these residents four distinct provisional municipal corporations or villages, denominated Guthrie, East Guthrie, Capitol Hill, and West Guthrie, comprising some 320 acres each, were created. They were all without any law governing them, although officers were selected by the people occupying the lands, and a form of government was carried on by a kind of mutual understanding. The persons chosen as officers incurred indebtedness in administering the affairs of the municipalities, but there was no authority to raise the necessary revenues by taxation or otherwise, to pay the same. These officers exercised in fact the powers usually delegated to municipal corporations. Public improvements, such as grading streets, constructing bridges, and erecting buildings were made, laws and ordinances were adopted, and offenders were punished. Schools were maintained, and the right of possession of the various claimants to town lots within their respective boundaries was regulated and certificates were issued by the local tribunals constituted by the municipal authorities for determining the rights of settlers and occupants of the various lots within the limits of the municipal governments, and the certificates thus issued were by the second section of the townsite act, above mentioned (26 Stat. at L. 109), to be taken as evidence of the occupancy of the holder thereof of the lot or lots therein described, except that where there was an adverse claim to the property the certificate was to be only prima facie evidence of the claim or occupancy of the holder.

The claims mentioned in the act of the territorial legislature hereafter spoken of arose out of these circumstances and represented the expenditures of the provisional governments for some or all of the objects above enumerated.

In December, 1890, a code of laws for the permanent government of the territory was
[530] enacted by the territorial *legislature, and these provisional village governments lying adjacent to one another were incorporated under that authority into the regularly organized village of Guthrie, and on April 7, 1893, the city of Guthrie became the successor of the village of that name.

On December 25, 1890, the territorial legislature passed an act, chapter 14 of the laws of that year, for the purpose of providing a method by which to raise the necessary funds to pay the indebtedness incurred by the provisional governments of the four villages above named. The act is set forth in the margin.†

*Pursuant to the provisions of that act the [531]
district judge duly appointed the commission, which proceeded to hear the cases, and on September 1, 1891, it filed in the district court of Logan county its final report. That report contained, among other things, a reference to the various claims which were therein said to be owned by the Guthrie National Bank, and it showed the allowance of such claims, separately and in detail, and that they were all based upon warrants which had been issued by the provisional governments. The report also showed that the city attorney of the city of Guthrie appeared at the hearing and allowance of the claims and defended for the city. The amount allowed against the city in favor of the bank was $4,315.22. Other claims in favor of other parties were allowed and many were disallowed by the commission. On the coming in of this report the case was docketed as a pending case in the district court, and was continued from time to time until March 17, 1893, when the bank made a motion to approve the findings of the commission as regarded the claims held by it, which motion was not then decided. On April 7, 1893, the city filed exceptions to the report of the commission. Nothing further was done until March 28, 1896, at which time the city attorney filed a motion in the *district [532]
court to dismiss the proceedings by the bank and all other proceedings based upon the act of the territorial legislature creating the com-

†Chapter 14.—CITY INDEBTEDNESS.

An Act for the Purpose of Providing for the Allowance and Payment of the Indebtedness Heretofore Created by the People and Cities of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, now Consolidated into the Village of Guthrie.

Article 1.—GUTHRIE, EAST GUTHRIE, WEST GUTHRIE, AND CAPITOL HILL.

Sec. 1. That the district judge of Logan county is hereby empowered to appoint three disinterested persons to act as a commission or referees to inquire into and pass upon all claims and demands of every character heretofore issued by the city governments mentioned in the caption of this act, for all purposes.

Sec. 2. That the owners and holders of any kind of scrip, warrants, or other evidence of indebtedness heretofore issued by the city governments of Guthrie, East Guthrie, West Guthrie, and Capitol Hill, shall present their claims to the commissioners or referees, to be appointed by the district judge, under oath, stating that the same is a bona fide claim, that they performed the labor or advanced the money or furnished the materials or purchased same for a valuable consideration, and that they believe the city, issuing the same, did so for necessary expenses incurred in running the city government, and said master shall hear further evidence if he deem necessary before allowing the same.

mission, for the reason, as stated, that the act and all proceedings under it were void. On April 2, 1896, the matter came on for hearing upon the motion of the bank to confirm the report of the commission and the motion of the city to dismiss the proceedings, and on the last-named day the court sustained the motion of the city and dismissed the proceedings upon the ground that the act under which the commission was appointed was wholly void. This decision of the court was excepted to by the bank, and thereupon it prosecuted a writ of error from the supreme court of the territory to reverse such decision. On June 11, 1897, that court affirmed the decision of the district court, and rendered judgment against the bank for costs. To reverse this judgment an appeal has been taken to and a writ of error sued out from this court.

Messrs. **Henry E. Asp** and **John W. Shartell** for plaintiff in error and appellant.

Messrs. **W. J. Hughes' John L. Lott, John K. Richards** and *D. R. Widmer* for defendant in error and appellee.

[532] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

A motion is made in this case to dismiss the appeal and writ of error on the ground that the sum involved is not sufficient to give jurisdiction to this court. 26 Stat. at L. 81, § 9. It is claimed that the amount is less than $5,000 and that this fact appears from the report of the commission, which allowed but $4,315.22 as the amount due from the city to the bank.

Section 4 of the act of the territorial legislature, under which the commission acted, provides that claims which are allowed and approved by the district judge are to be certified to the mayor and council of the village of Guthrie, who are directed to issue warrants upon the village for the amounts,
[533] *which bear interest at the rate of 6 per cent from the date of the allowance by the commission, and a tax is to be levied as therein provided for the payment of the warrants.

On March 28, 1896, when the city of Guthrie filed its motion in the district court to dismiss the proceeding by the bank, over four years and six months' interest had accrued upon the claim reported by the commission, and as by the terms of the act interest was to be allowed from the filing of that report up to the time of the issuing of the warrant, which could not issue until after the report had been approved by the district court, it is plain that more interest had then accrued than was necessary to bring the amount then in issue beyond the sum of $5,000. It is proper to compute interest as part of the claim. *Woodward* v. *Sewell*, 140 U. S. 247 [35: 478]. We think this is an answer to the motion to dismiss.

Other objections are made to the act by the representatives of the city which will be noticed.

It is claimed that it violates the act of Congress, chapter 818, approved July 30, 1886 (24 Stat. at L. 170), prohibiting the passage of local or special laws in the territories. That act, among other things, provides that where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof, and it also provides that the territorial legislatures shall not pass local or special laws in any of the cases therein enumerated, among which is a law to regulate the practice in courts of justice. Both of these provisions are said to have been violated in the passage of the act in question.

Whether a general law can be made applicable to the subject-matter in regard to which a special law is enacted by a territorial legislature, is a matter which we think rests in the judgment of the legislature itself. *State, [Johnson]*, v. *Hitchcock*, 1 Kan. 184 [81 Am. Dec. 503]. That body is specially prohibited from passing any local or special law in regard to certain subjects enumerated in the act. Outside and beyond that limitation is the provision above mentioned, and whether or not a general law can be made applicable to the subject is a matter which is confided to the judgment of the legislature.

*Neither does the act in this case regulate [534]
the practice in courts of justice. The prohibition of the statute of Congress relates to

---

Sec. 3. The commission or referees shall keep a record of all claims filed with them for allowance and keep their office open during the hours of nine o'clock in the morning and four o'clock P. M., and shall be allowed sixty days to hear and determine all claims, or longer if the district judge so orders. Said commission or referees shall immediately after this appointment extend ten days' notice in some newspaper published in the village of Guthrie, notifying all parties holding or owning any claims mentioned in this act to present the same to them for allowance; and all persons who fail to present their claims within thirty days from date of publication mentioned in this section shall be forever precluded from so doing hereafter.

Sec. 4. That after the commission or referees shall have passed upon and allowed any and all claims mentioned in this act, they shall make a report to the district court of same showing the names and amounts allowed by them and also all claims and the names of persons and amounts disallowed by them, for approval or disapproval of the district judge. And all claims allowed and approved by the district judge shall be certified to the mayor and council of the village of Guthrie, who are hereby authorized and directed to issue warrants upon the village and payable by the village to the holders and owners, payable in instalments, each of the amounts to be in one, two, three, four, and five years, to bear interest at the rate of six per cent per annum from the date of the allowance by the commission or referees, and said mayor and council of the village of Guthrie shall levy a tax upon the property of the residents of said village to pay the warrants herein referred to, levying same upon each subdivision heretofore constituting Guthrie, East Guthrie, West Guthrie, and Capitol Hill, according to the amount of indebtedness created by the city councils, the mayors, and school boards, heretofore acting for and in behalf of the people resident of said cities. Each of sa'd cities to be liable for and taxable under this act for the amount of indebtedness created by them.

the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice in some particular locality or in some special case, thus altering in such locality or for such case the ordinary course of practice in the courts. The statute here in question is of an entirely different nature. It creates a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon the property situated in the city. Such an act does not in any way regulate the practice in courts of justice.

The important question in this case is whether the territorial legislature by virtue of the grant to it of legislative powers had authority to create this commission and to provide for the payment of claims of the nature mentioned in the act.

By section 6 of the above-mentioned act of Congress of May 2, 1890, chapter 182 (24 Stat. at L. 81), the legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Some other limitations are mentioned, not material to be here considered. The same power is also granted to all the territories by section 1851, Revised Statutes of the United States.

This territorial act was passed by the legislature with reference to the circumstances set forth in the statement of facts.

It was said by the supreme court of Oklahoma in *Guthrie* v. *The Territory,* 1 Okla. 188 [21 L. R. A. 841], that "these provisional governments grew out of a necessity made by the absence of legal authority. They were aggregations of people associated together for the purpose of mutual benefit and protection. Without any statute law, they became a law unto themselves and adopted the forms of law and government common
[535] among *civilized people, and enforced their authority by the power of public sentiment. They had no legal existence; they were nonentities; they could not bind themselves by contracts or bind anyone else."

The services performed for and the materials furnished these provisional governments under the circumstances stated would certainly be regarded as proper and as beneficial, probably as absolutely necessary, for the well-being of the people living there. The villages which were subsequently incorporated under the law of the territory succeeded to and enjoyed these benefits and passed them on to their successor, the city of Guthrie, the present defendant in error and appellee. These facts give great force and strength to the moral consideration supporting claims of the nature here existing. Though they could not be enforced at law, the question is, whether the territorial legislature was unequal to the task of providing for their payment by the city which has received the benefit as above described.

This territorial act shows that only claims of a municipal character and of a bona fide nature could be allowed. It is also plain that the use of the words "district judge" therein does not mean to distinguish between the judge and the court. There being but one judge of that court the words are seemingly used interchangeably with the district court, and to mean the same as the latter expression.

We regard the power of the territorial legislature to pass this act as indisputable. It comes within the grant to that legislature contained in the act of Congress and in the Revised Statutes above cited.

In *United States* v. *Realty Company,* 163 U. S. 427, 439 [41: 215, 219], the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, while they were not of a legal character, were nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims of the nature described. It is a legislative power, and it was granted to the territorial legislature by the acts already referred to. A city is a municipal *corpora- [536]
tion and a political subdivision of the state, and what the state could do itself it has the power to direct its agent, the municipality, to do.

In *New Orleans* v. *Clark,* 95 U. S. 644 [24: 521], Mr. Justice Field, in delivering the opinion of the court, and speaking of municipal corporations, at page 653 [24: 522], said: "The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured." And on page 654 [24: 523]: "A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such a corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent;" citing *The People* [*Blanding*], v. *Burr,* 13 Cal. 343; *Town of Guilford* v. *Chenango County Supervisors,* 13 N. Y. 143. In the latter case the legislature passed an act directing commissioners to determine and award the amount paid and expended by certain highway commissioners, and directing the board of supervisors of the county to assess the amount thus awarded upon the taxable property of the town and to cause it to be paid in satisfaction of the claim. This was held

to be a valid act, although the claim had been rejected in a suit brought to obtain its payment, and a previous legislature had passed an act directing the claim to be submitted to the electors at a town meeting, and declaring their decision should be final and conclusive, and upon such submission the claim had been rejected. It was said that the legislature of the state had power to levy a tax upon the taxable property of the town and [537] appropriate the *same to the payment of the claim made by an individual against the town even though the claim, to satisfy which the tax was levied, was not recoverable by action against the town; and it was held that the state could recognize claims founded in equity and justice in the larger sense of these terms or in gratitude or charity.

It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for purposes of charity alone. The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or by its predecessors from whom it took such benefits. The legislature might have decided the facts for itself, but instead of that it appointed this tribunal.

In *Read* v. *Plattsmouth*, 107 U. S. 568 [27: 414], the words of Mr. Justice Field in *New Orleans* v. *Clark, supra,* were quoted with approval. In the exercise of this jurisdiction over municipal corporations by the state or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the foundation of the government, and is based upon the power of the state as sovereign to itself recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition.

There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else that the Seventh Amendment to the Constitution of the United States is violated, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law, and the cases already cited show the power of the legislature to provide for payment by taxation of claims of the nature of those involved herein.

The cases of *Bank of Hamilton* v. *Dudley's* [538] *Lessee,* 2 Pet. 492 [7: 496], **American Publishing Company* v. *Fisher,* 166 U. S. 464 [41: 1079], and *Salt Lake City* v. *Tucker,* 166 U. S. 707 [41: 1172], were cases of suits at common law, and *Thompson* v. *Utah,* 170 U. S. 343 [42: 1061], was a criminal case. Those cases therefore do not apply here.

It is also stated that these claims were not incurred by officers of either a *de jure* or *de facto* government, and that hence there was no power in the legislature to compel the city of Guthrie to pay claims which it never agreed to pay either as a corporation *de jure* or *de facto*. But the cases above cited were cases where there was no legal obligation to pay the claims, and the acts in effect compelled their payment. The city here was under a plain moral duty to provide payment for honest and proper claims of this nature, and it seems as if it ought to be entirely ready to pay them. If any claims were without merit or fraudulent, there was opportunity to show such fact before the commission and also before the district court upon the hearing provided for by the act. The defendants in error say that there is by the act no opportunity provided for any investigation of these claims by the district court after the commission has reported the claims to that court, because the act does not give the court power to make any investigation for itself. We do not see that this is material even if true. We are of opinion, however, that the district court has such power. The statute provides in section 4 that the commission shall make a report to the district court, showing the names of the claimants and the amounts allowed by the commission, and also all the claims and the names of persons and amounts disallowed by them, and this report the statute directs shall be made "for the approval or disapproval of the district court." The report need contain nothing but what has just been stated, and it is obvious that on such a report alone the district court would be entirely without means of determining whether to approve or disapprove the decision of the commission in any particular claim. But as the report of the commission is to be made to the district court for its approval or disapproval, it follows as of necessity that the court has power to investigate for itself the facts upon which the claims were founded in order that it may intelligently *approve or [539] disapprove of the decisions of the commission. It is not to be supposed that the provision in the act for making a report to the district court and for its approval or disapproval was a purely formal matter, and that the court might arbitrarily, unreasonably, or improperly approve or disapprove any claim. If not, then the court must have power in the necessary discharge of its duty to approve or disapprove, to ascertain the facts necessary to an intelligent discharge of that duty. These facts may be found by the court without a jury. As the statute does not provide for a report of the facts found by the commission upon which it based the allowance or disallowance of the claims or any of them, the court must itself find them in order to approve or disapprove.

Although the act makes no provision for notice to the parties interested as to the time or manner in which the district court will proceed to investigate the character of the claims, yet in the absence of any such provision the court having the duty to investigate would have power to regulate the time of the hearing and provide for reasonable notice by its rules, so as to prevent surprise. This, in substance, was held in *United States* v. *Ritchie,* 17 How. 525, 533 [15: 236, 238],

where a similar lack of provision for notice in a certain section of the act was referred to and the power of the court to make rules in regard to it was asserted.

Whether the act is to be construed as making the decision of the district court upon the merits of any claim final, it is not now necessary to decide. The district court has refused to exercise any jurisdiction under the act, because it decided the act was invalid. Upon such a judgment we think a writ of error was properly sued out from the territorial supreme court under the ninth section of the act (26 Stat. at L. 85), and under the same section a writ of error from this court to the latter court may properly issue.

The other questions set forth in the brief of counsel for the defendant in error, relating to parties and matters of procedure, we have examined, and regard them as without merit.

We are of opinion that the district court erred in dismissing these proceedings on the
[540] ground of the invalidity of the *act under which they were taken, and that the supreme court of the territory erred in affirming that judgment of dismissal, and we therefore reverse the judgment of the latter court and remand the case with directions to that court to reverse the judgment of the district court, with directions to the district court to proceed to a hearing of the claims upon their merits.

So ordered.

Mr. Justice **Harlan** dissented.

THE CHATTAHOOCHEE.

(See S. C. Reporter's ed. 540-555.)

When schooner is liable for excessive speed in a collision—damages when both parties are in fault.

1. A schooner is liable for excessive speed in a collision with a steamer, when she was sailing at a speed of 7 miles per hour, through a fog, in waters where other vessels were frequently met, and where her foghorn was heard by the steamer but once, or possibly twice, when, if the vessels had been proceeding at the speed required by law, their signals would have been exchanged so many times that the locality and course of each would have been clearly made known to the other, and sufficient time would have been given to the steamer to take proper steps to avoid the schooner.
2. In a libel for a collision between a schooner and a steamship, which resulted in a total loss of the schooner with all her cargo, while the steamship was uninjured, in which the court decides that both vessels were in fault and that the damages should be divided, the libellants, as bailees for the owners of the cargo of the schooner, are entitled to recover of the steamship the entire value of the cargo, but the latter may recoup one half of this amount from one half the damages suffered by the schooner.

The docket title of this case is Abram W. Hendry *et al.*, Appts., v. Ocean Steamship Company.

[No. 27.]

Argued May 3, 4, 1898. Ordered for Reargument January 3, 1899. Reargued March 6, 1899. Decided April 3, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the First Circuit to review a decree of that court affirming the decree of the District Court of the United States for the District of Massachusetts awarding to the libellants the value of the cargo as bailees for its owners, and one half of the amount of the loss of the vessel to said libellants as owners thereof, and ordering that the steamship might recoup from the last amount one half of the total damages to the cargo, in a libel for a collision between the schooner Golden Rule and the steamship Chattahoochee, the libel being brought by the owners of the schooner and cargo against said steamship. *Affirmed.*

See same case below, 33 U. S. App. 510.

Statement by Mr. Justice **Brown:**

*This was a libel for a collision which took [541]
place in the early morning of July 20, 1894, southeast of Nantucket Shoals, between the Canadian schooner Golden Rule and the American steamship Chattahoochee, resulting in the total loss of the schooner and her cargo.

The Golden Rule was a topsail schooner hailing from Liverpool, Nova Scotia, of about 200 tons burden, and rigged with twelve sails, including one double square sail on the foremast. Her length over all was 110 feet. She was bound on a voyage from Porto Rico to Boston with a full cargo of sugar and molasses, and, at the time of the collision, was sailing on her port tack, upon a course north by east, one-half east, with a free and fresh wind five to six points abaft the beam. She was under full sail, except one half of the square sail forward, which was taken in about two hours before the collision. Her speed was the main point in dispute. At the time of the collision the weather was foggy, the wind blowing in moderate breezes from the southwest, and the mate was sounding a mechanical foghorn forward.

The Chattahoochee was an iron screw steamship of 1,887 tons burden, 300 feet in length, and running on a line between Boston and Savannah. She left Boston in the afternoon of the 19th, and when off Cape Cod, her master, owing to the foggy weather, decided to take the outside passage by Nantucket, instead of her regular course through Vineyard sound. The outside course was much clearer of vessels. Before the collision the steamship was eighteen miles off the South Shoal Lightship, on a course southwest half west, proceeding at her full speed of from ten to twelve knots an hour, and blowing her whistle at the statutory intervals after 12:30 o'clock. The *master and the [542]
first officer with the quartermaster were in the pilot-house, and a man was on the lookout forward.

From the above statement it will be seen

that the two vessels were approaching upon courses which converged at an angle of about three points.

The officers of the schooner heard the steamship's whistle from two to four points off the starboard bow, a fact which was duly reported to the officer of the deck. The whistles of the steamship continued to be heard on the starboard bow until she came in sight some four or five lengths off, the schooner keeping her course and speed until the collision.

The master and lookout of the steamship heard the fog signal of the schooner about two minutes before the collision, apparently a point off their port bow. The order was immediately given and obeyed to stop and afterwards to reverse, and the wheel was put hard aport in order to locate the sound. When they first saw the sails of the schooner they bore one and one-half points on the port bow of the steamer. During this time the helm of the steamer was hard aport. Upon seeing the schooner, the steamship, which was then swinging to starboard under her port helm, ordered her engines full speed ahead for the purpose of clearing the schooner. The schooner kept her course and the vessels came together at an angle of four points, the steamship striking the schooner forward of the foremast on the starboard side, sinking her almost immediately. The collision resulted in a total loss of the schooner with all her cargo and property on board. The steamship was uninjured.

The district court was of opinion that both vessels were in fault for immoderate speed, and that the damages should be divided.

Damages were awarded to the libellants, as bailees for the owners of the cargo, to the amount of $17,215.17, and to the libellants, as owners of the vessel and for the value of certain personal effects of the crew, in one half the total amount of their loss, namely, $9,205.45; and it was further ordered that the owners of the steamship might recoup from the said amount of $9,205.45 the sum
[543] of $8,607.58, being one half of the *total damages to the cargo. An execution was ordered against the claimants of the steamship and its stipulators for the sum of $597.87, this being the difference between half the value of the schooner and the personal effects of the crew and half the value of the cargo for which the schooner was thus held responsible.

Upon appeal to the circuit court of appeals, that court affirmed the decree of the district court upon the merits; but modified the same with reference to the distribution between the owners and master of the Golden Rule on the one side and her mate and crew on the other, finding that, as neither the mate nor her crew were responsible for any fault in her navigation, the several sums awarded the mate and crew should have priority over the amounts awarded the owners and master. 33 U. S. App. 510.

Whereupon an application was made to this court by the libellants for a writ of certiorari, which was granted.

Messrs. **Eugene P. Carver** and *Edward E. Blodgett*, for Abram W. Hendry *et al.*, appellants:

The faults of the Chattahoochee other than those found by the court are:

Changing her course under a port helm without knowing the location of the sailing vessel whose fog signal she heard.

The City of New York, 147 U. S. 72, 37 L. ed. 84.

Another cause of the collision was the fact that the steamship did not stop and did not reverse in time.

The Edgar F. Luckenbach, 8 U. S. App. 9, 50 Fed. Rep. 129, 1 C. C. A. 489; *The Midland*, 48 Fed. Rep. 331; *Bunge* v. *The Utopia*, 1 Fed. Rep. 892.

The schooner Golden Rule was without fault.

What is a moderate rate of speed for a sailing vessel in a fog in the place where the collision took place?

The N. Strong [1892] P. 105; *The Elysia*, 4 Asp. M. L. Cas. 540.

In the case of *The Nacoochee*, 137 U. S. 331, 34 L. ed. 688, where the collision was off Cape May, the schooner, with all sail set, was going 4 knots per hour, and the steamship between 6 and 7 knots. The steamship was held alone to blame. In that case all sail was set on board of the schooner.

The Morning Light, 2 Wall. 550, 17 L. ed. 862; *The Beta*, L. R. 9 Prob. Div. 134; *The Zadok*, L. R. 9 Prob. Div. 114; *The Colorado*, 91 U. S. 692, 23 L. ed. 379; *The Martello*, 153 U. S. 64, 38 L. ed. 637.

But in cases of this kind much depends upon the density of the fog, and some things must be left to the judgment and discretion of the master.

The Umbria, 166 U. S. 404, 41 L. ed. 1053.

The speed of the schooner Golden Rule did not contribute to the collision.

The Martello, 39 Fed. Rep. 509; *The City of New York*, 147 U. S. 72, 37 L. ed. 84; *The Ludvig Holberg*, 157 U. S. 60, 39 L. ed. 620; *The Comet*, 9 Blatchf. 323; *The John King*, 1 U. S. App. 64, 49 Fed. Rep. 469, 1 C. C. A. 319.

The burden of proof is upon each vessel to establish fault on the part of the other.

The Victory, 168 U. S. 410, 42 L. ed. 519.

The fault of the schooner was slight in comparison with that of the steamship. Damages should be apportioned between vessels according to the degrees of fault.

12 Law Quarterly Review, 260; 13 Law Quarterly Review, 17, 241.

The rule of equal division of damages where both vessels are to blame has been firmly established in England.

Marsden, Maritime Collision, 3d ed. 154; *The Milan*, Lush. 388; *De Vaux* v. *Salvador*, 4 Ad. & El. 420; *The Stoomvaart Maatschappy Nederland* v. *Peninsular & O. Steam Nav. Co.* L. R. 7 App. Cas. 795.

The United States courts sitting in admiralty have always divided the loss between both vessels in cases of mutual fault.

The Max Morris, 137 U. S. 1, 34 L. ed. 586; *The Mary Ida*, 20 Fed. Rep. 741; *The Victory*, 25 U. S. App. 271, 68 Fed. Rep. 395, 15 C. C. A. 490.

The rule of damages in case of collision where there is mutual fault under the Harter act.

The Delaware, 161 U. S. 459, 40 L. ed. 771; *The Silvia*, 64 Fed. Rep. 607, 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Carib Prince*, 63 Fed. Rep. 266, 35 U. S. App. 390, 68 Fed. Rep. 254, 15 C. C. A. 385; *The Scotland*, 105 U. S. 24, 26 L. ed. 1001.

Messrs. **Arthur H. Russell** and *Charles Theodore Russell*, for the Ocean Steamship Company, appellee:

The two inferior courts agreed in substance in all findings of fact. Their concurrent decisions upon a question of fact are to be followed unless clearly shown to be erroneous.

Compania de Navigacion la Flecha v. *Brauer*, 168 U. S. 104, 42 L. ed. 398; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937; *The Richmond*, 103 U. S. 540, 26 L. ed. 313.

The speed of the schooner at the time and place and under the circumstances was immoderate and contrary to the articles of navigation.

Act March 3, 1885, art. 13; *The Martello*, 153 U. S. 64, 38 L. ed. 637; *The Nacoochee*, 137 U. S. 330, 34 L. ed. 687; *The Colorado*, 91 U. S. 692, 23 L. ed. 379; *The Michigan*, 25 U. S. App. 1, 63 Fed. Rep. 280, 11 C. C. A. 187; *The Umbria*, 166 U. S. 404, 41 L. ed. 1053.

There is no distinction in the application of the rule between a steamship and a sailing vessel.

Lowndes, Collisions at Sea, 73; Spencer, Collisions, § 50; *The Johns Hopkins*, 13 Fed. Rep. 185.

A rate of speed at night, in a dense fog, which is immoderate and excessive for a steamer, is less justifiable in a sailing vessel under the same circumstances; and a speed of 7 miles an hour in a fog in Long Island sound is immoderate.

The Rhode Island, 17 Fed. Rep. 554; *The Louisiana*, 2 Ben. 371; *The Chancellor*, 4 Ben. 153; *The Colorado*, 91 U. S. 692, 23 L. ed. 379; *The Wyanoke*, 40 Fed. Rep. 702; *The Zadok*, L. R. 9 Prob. Div. 114; *The Beta*, L. R. 9 Prob. Div. 134; *The Dordogne*, L. R. 10 Prob. Div. 6; *The N. Strong* [1892] P. 105; *The Virgil*, 2 W. Rob. 201; *The Victoria*, 3 W. Rob. 49; *The Pepperell*, Swabey, Adm. 12.

The absence of the officer from the deck, and the consequent necessity of abandoning the lookout in order to take the wheel while the man at the wheel went below to call the officers, were gross negligence in the management and navigation of the schooner.

Marsden, Maritime Collision, 439; *The Arthur Gordon*, Lush. 270; *The Khedive*, L. R. 5 App. Cas. 876; *The Zadok*, L. R. 9 Prob. Div. 114; *Peck* v. *Sanderson*, 17 How. 178, 15 L. ed. 205; *The Charles L. Jeffrey*, 5 U. S. App. 370, 55 Fed. Rep. 685, 5 C. C. A. 246; *The City of Augusta*, 50 U. S. App. 39, 80 Fed. Rep. 297, 25 C. C. A. 430.

Even flagrant fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision.

The Maria Martin, 12 Wall. 31, 20 L. ed. 251; *The America*, 92 U. S. 432, 23 L. ed. 724; *The Sunnyside*, 91 U. S. 208, 23 L. ed. 302; *The Elizabeth Jones*, 112 U. S. 514, 28 L. ed. 812; *The Boanerges*, 2 Asp. Mar. L. Cas. 239; *The Legatus*, Holt, Adm. 217; *Handayside* v. *Wilson*, 3 Car. & P. 528; *The Vindomora*, L. R. 14 Prob. Div. 172.

The time, the distance, the orders on board the steamship, all indicate attention and quick effort to avoid collision.

The failure to hear the fog horn on the steamer, even if in fact it was blown, as required, is not necessarily negligence.

The Annie Lindsley, 104 U. S. 185, 26 L. ed. 716; *The Negaunee*, 20 Fed. Rep. 918; *The Lorenzo D. Baker*, 24 Fed. Rep. 814; *The Rosetta*, 59 L. T. N. S. 344; *Goslee* v. *Shute*, 18 How. 463, 15 L. ed. 462; *The Nevada*, 106 U. S. 154, 27 L. ed. 149.

The equity of divided damage—that is, of requiring as between two tort-feasors in the admiralty as equal a distribution of the loss as can be decreed—is the settled equity of the English admiralty, and has been adopted in this country by many late decisions.

The Woodrop-Sims, 2 Dodson, Adm. 83; *Hay* v. *Le Neve*, 2 Shaw, Sc. App. Cas. 395; *Cayzer* v. *Carron Co.* L. R. 9 App. Cas. 873; Marsden, Maritime Collision, 136; *The Catharine* v. *Dickinson*, 17 How. 170, 15 L. ed. 233; *The Continental*, 14 Wall. 355, 20 L. ed. 802; *The Washington*, 9 Wall. 513, 19 L. ed. 787; *Atlee* v. *Union Packet Co.* 21 Wall. 389, 22 L. ed. 619; *The Sunnyside*, 91 U. S. 208, 23 L. ed. 302; *The Alabama*, 92 U. S. 695, 23 L. ed. 763; *The Juniata*, 93 U. S. 337, 23 L. ed. 930; *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266; *The Virginia Ehrman*, 97 U. S. 309, 24 L. ed. 890; *The City of Hartford*, 97 U. S. 323, 24 L. ed. 930; *The Connecticut*, 103 U. S. 710, 26 L. ed. 467; *The Potomac*, 105 U. S. 630, 26 L. ed. 1194; *The Sterling*, 106 U. S. 647, 27 L. ed. 98; *The Franconia*, 16 Fed. Rep. 149; *Briggs* v. *Day*, 21 Fed. Rep. 727; *The Troy*, 28 Fed. Rep. 861; *The Britannic*, 39 Fed. Rep. 395.

This equity of equal division of the loss, when caused by mutual fault, is not affected by statute limitation of liability,—at least not until the balance is struck between the two offending vessels.

The North Star, 106 U. S. 17, 27 L. ed. 91; *The Atlas*, 93 U. S. 302, 23 L. ed. 863; *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095; *The Stoomvart Maatschappy Nederland* v. *Peninsular & O. Steam Nav. Co.* L. R. 7 App. Cas. 795.

*Mr. Justice **Brown** delivered the opinion of the court: **[543]**

There can be no doubt whatever of the liability of the steamer, and as she did not appeal, of course she is estopped to deny such liability in this court.

1. Whether the Golden Rule was also liable for excessive speed is a question of more difficulty. She was a topsail schooner, rigged with twelve sails, all of which she was carrying, except one half her double square

sail on the foremast, which had been taken in. She was sailing on her port tack with the wind well abaft the beam, through a fog, which did not admit of the hull of a vessel being seen more than a few hundred feet distant. It appears to have been a surface fog, as the crew of the schooner are confident
[544]they saw the masts *of the steamer some 2,000 feet away. The district court was of opinion that as she was sailing free, with a fresh wind, her speed could not have been less than seven or eight knots an hour. The court of appeals found only that she was making substantially all the speed of which she was capable. Her master admits that she was making from five to six knots; but as her log, which was taken in at 4 o'clock, registered twenty-eight miles for four hours, we think her speed may be safely estimated to have been seven miles an hour. While the commerce in this locality was not as great as it was in Vineyard sound, it was not unlikely that they would encounter other vessels coming down the coast. Was seven miles a moderate rate of speed under the circumstances of this case?

Although the reports of the admiralty courts are extremely fertile of cases turning upon the proper speed of steamers in foggy weather, there is a singular paucity of such as deal with the speed of sailing vessels. Such as there are, however, point to a uniformity of regulation applicable to the two classes. The earliest of these cases is that of *The Virgil* (1843) 2 W. Rob. 201. This was a collision between two sailing vessels in a dark and hazy night, although there does not seem to have been a fog. As it appeared that the Virgil had the wind free, and was sailing under a full press of canvas, she was held in fault for too great speed. Her actual speed is not given. In the case of *The Victoria*, 3 W. Rob. 49, a vessel running before the wind on a dark and cloudy night at the rate of from five to six knots an hour off the English coast, was held to have been in fault for proceeding at that rate of speed.

Upon the other hand, in the case of *The Morning Light*, 2 Wall. 550 [17: 862], a brig running through Buzzards' Bay in a dark and rainy night, was held not to have been in fault for not shortening sail. The court, commenting on the case of the Virgil, observed: "But such a restriction," as was laid down in that case, "can hardly be applied to sailing vessels proceeding on their voyage in an open sea. On the contrary, the general rule is that they may proceed on their voyage although it is dark, observing all the ordinary rules of navigation, and
[545]with *such additional care and precaution as experienced and prudent navigators usually employ under similar circumstances. They should never, under such circumstances, hazard an extraordinary press of sail, and in case of unusual darkness it may be reasonable to require them, when navigating in a narrow pathway where they are liable to meet other vessels, to shorten sail if the wind and weather will permit." The actual speed of the Morning Light is not given, although the wind seems to have been blowing a five to six knot breeze, which would indicate a somewhat lower rate of speed than in this case. In the case of *The Itinerant*, 2 W. Rob. 236, decided in 1844, Dr. Lushington was of opinion that it was the duty of the shipmaster, whether in a dense fog or great darkness, to exercise the greatest vigilance and to put his vessel under command, although such precautions might occasion delay in the prosecution of the voyage. "It may be," said he, "that for such a purpose it would be his duty to take in his studding sails; but such is the constantly varying combination of circumstances arising from locality, wind, tide, number of vessels in the track, and other considerations, that the court cannot venture to lay down any general rule which would absolutely apply in all cases." So, too, in *The Pepperell*, Swabey, Adm. 12, Dr. Lushington held a ship proceeding in the North Sea at the rate of six and one-half knots an hour during a night so dark that vessels could only be seen at a distance of 100 to 200 yards, was in fault if she knew, or ought to have known, that she was crossing a fishing ground. See also *The Lord Saumarez*, 6 Notes of Cases, 600; *The Juliet Erskine*, Id. 633.

These cases were all decided before the new steering and sailing rules, which were first adopted in 1863 by a British Order in Council, and in 1864 by an act of Congress. The twenty-first of these rules, as they appear in the Revised Statutes, section 4233, requires that "every steam vessel shall, when in a fog, go at a moderate speed." No mention is made in this rule of sailing vessels, but the courts, both in England and America, so far as they have spoken upon the subject, have adhered to the rule laid down in the earlier cases above cited—that rates *of [546]
speed which would be considered immoderate for steamers are open to like condemnation in the case of sailing vessels. See discussion in *The Chancellor*, 4 Ben. 153, 160. In *The Thomas Martin*, 3 Blatchf. 517, a schooner was condemned by Mr. Justice Nelson for racing on a night which was not unusually dark, yet was so overcast and cloudy that a vessel without lights could not be seen at a distance exceeding a half mile. The schooner had all her sails set, with a pretty fresh wind, and was running at a rate of speed that, under the circumstances, he thought could not well be justified considering the character of the night.

In the case of *The John Hopkins*, 13 Fed. Rep. 185, it was held by Mr. Justice Harlan and Judge Lowell that, in case of a fog and in a place much frequented by vessels, it was as much the duty of a sailing vessel to go at a moderate rate of speed as it was the duty of a steamer. In this case a brig, sailing with the wind nearly aft and making eight to nine knots through the water, with a current of two knots in her favor, off the coast of Cape Cod, was held to have been in fault for a collision with a steamer in a dense fog. So in *The Wyanoke*, 40 Fed. Rep. 702, it was held by Judge Brown, of the southern district of New York, that a schooner having nearly all her canvas set and running in a dense fog off Cape May at a speed

of six knots an hour, was not going at the moderate speed required by law. In *The Attila*, Cook's Ca. 196, the vice admiralty court at Quebec condemned a sailing vessel for running at a speed of six or seven miles an hour, in a dense fog in the fairway from the Atlantic ocean, between Cape Ray and St. Paul's island into the Gulf and the lower waters of the St. Lawrence river, although there was abundance of evidence that this was the customary rate of speed during a fog in this locality.

In 1879 a new Code was adopted in England, and in 1885 in this country, article 13 of which provides that "every ship, *whether a sailing ship or steamship* shall, in a fog, mist, or falling snow, go at a moderate speed."

In the case of *The Elysia*, 4 Asp. M. L. Cas. 540, it was held by the admiralty court
[547] and by the court of *appeal in England, that a speed of five knots in the case of a sailing ship out in the Atlantic ocean in a fog, is a moderate speed, although at the time she was under all plain sail and going as fast as she could with the wind on her quarter. Lord Justice Brett was of opinion that a moderate speed was not absolutely the same with regard to a steamer as to a sailing vessel. "If you were to say that three knots were a moderate speed for a steamer in which to turn from one point to another when out in the ocean, that does not presume that that would be a moderate speed for a sailing vessel, because a steamer can reduce her speed to a knot and a half. It would, however, be very dangerous for a sailing vessel, under all circumstances, to reduce her speed to anything like three knots, because such a speed would, in certain circumstances, place her entirely out of command."

In the *Zadok*, L. R. 9 Prob. Div. 114, which was a collision between a steamship and a barque in the English channel, it was held to have been the duty of the barque to reduce her speed so far as she could consistently with keeping steerageway, and as it was shown that she was carrying nearly all her canvas and proceeding at a speed of more than four knots an hour, she was held to be in fault and the steamer exonerated. A like ruling was made by the master of rolls, speaking for the court of appeal in *The Beta*, L. R. 9 Prob. Div. 134. The collision took place in a dense fog in the Bristol channel, and it was held that a vessel must not go faster than would enable her to be kept under command.

In the case of *The N. Strong* [1892] P. 105, which was a collision in the English channel, it was held that a sailing vessel which was making about four knots an hour in a fog was not proceeding at a rate of speed beyond what was necessary to keep her well under command.

The cases in the American courts are of the same purport. In *The Rhode Island*, 17 Fed. Rep. 554, it was held by Judge Brown of the southern district of New York, that a speed of seven knots an hour in a foggy evening in Long Island sound was not a moderate rate of speed, although the twenty-first rule did not apply in terms to sailing vessels.

*No absolute rule can be extracted from [548]
these cases. So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. It is not perceived why the considerations which demand a slackening of speed on the part of steamers in foggy weather are not equally persuasive in the case of sailing vessels. The principal reason for such reduction of speed is that it will give vessels time to avoid a collision after coming in sight of each other. If two steam vessels are approaching upon converging courses at a combined rate of speed of thirty miles an hour, and are only able to see each other three or four lengths off, it would be practically impossible to avert a collision; whereas, if each were going at the lowest rate of speed consistent with good steerageway, a collision might easily be avoided by stopping and reversing their engines, or by a quick turn of the wheel and an order to go ahead at full speed. While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter, either by changing their course or by such a rate of speed as will prevent the latter from avoiding them. There is also the contingency that a schooner sailing with the wind free, as in this case, may meet a vessel closehauled, in which case the latter has the right of way, and the former is bound to avoid her. Beyond this, however, a steamer usually relies for her keeping clear of a sailing vessel in a fog upon her ability to stop and reverse her engines; whereas, it is impossible for a sailing vessel to reduce her speed or stop her headway without maneuvers which would be utterly impossible after the two vessels come in sight of each other. Indeed she can do practically nothing beyond putting her helm up or down to "ease the blow" after the danger of collision has become imminent. The very fact that a sailing vessel can do *so little by man- [549]
euvering is a strong reason for so moderating her speed as to furnish effective aid to an approaching steamer charged with the duty of avoiding her.

In this case the Golden Rule, though not pursuing the most frequented path of coastwise commerce, was sailing through waters where other vessels were frequently met, and not far from the usual track of transatlantic steamers. Her foghorn was heard by the steamer but once, or possibly twice, while if the vessels had been proceeding at the speed required by law, their signals would have been exchanged so many times that the locality and course of each would have been clearly made known to the other. In other words, sufficient time would have been given for the steamer to have taken the proper

steps to avoid the schooner. Upon the whole, we are of opinion that the courts below were right in condemning the schooner for immoderate speed.

2. An important question of damages remains to be considered. Libellants, as bailees for the owners of the cargo, proceeded against and were held entitled to recover of the steamship the entire value of the cargo, but the latter was allowed to recoup one half of this amount from one half the amount of damages suffered by the schooner. This appears to have been done upon the authority of *The North Star*, 106 U. S. 17 [27:91], in which it was held that, where a collision occurred through the mutual fault of two vessels, one of which was sunk and the other of which was damaged, the owners of the sunken vessel were not entitled under the limited liability act to an entire exoneration from liability, but that the damage done to both vessels should have been added together in one sum, and equally divided, and a decree should have been pronounced in favor of the vessel which suffered most against the one which suffered least, for half the difference between the amounts of their respective losses. A similar ruling was made in *The Manitoba*, 122 U. S. 97 [30: 1095], and in *The Stoomvaart Maatschappy Nederland* v. *Peninsular & Oriental Steam Nav. Co.* L. R. 7 App. Cas. 795.

But libellants insist in this connection that the act of February 13, 1893, known as
[550] the Harter act, has modified the *previous existing relations between the vessel and her cargo, and has an important bearing upon this branch of the case. By the third section of that act, the owner of a seaworthy vessel (and, in the absence of proof to the contrary, a vessel will be presumed to be seaworthy) is no longer responsible to the cargo for damage or loss resulting from faults or errors in navigation or management. This section is made applicable to "any vessel transporting merchandise or property to or from any port in the United States;" and we know of no reason why a foreign vessel like the Golden Rule, engaged in carrying a cargo from a foreign port to Boston, is not entitled to the benefit of this provision. Had the cargo of the schooner arrived at Boston in a damaged condition, it is clear that the vessel might have pleaded the statute in exoneration of her liability, if the damage had occurred through a fault or error in navigation, such, for instance, as a collision due wholly or partly to her own fault. So, if a vessel and cargo be totally lost by such fault, we know of no reason why the owner of the vessel is not entitled to the benefit of this section, as well as to his exemption under the limited liability act.

The reasons which influenced this court to hold in the case of *The Scotland*, 105 U. S. 24 [26: 1001], that the limited liability act applied to owners of foreign as well as domestic vessels, and to acts done on the high seas, as well as in the waters of the United States, apply with even greater cogency to this act. "In administering justice," said Mr. Justice Bradley, p. 29 [26: 1003], "between parties, it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the law of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. . . . But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law, as presumptively expressing the rules of justice; . . . if it
*be the legislative will that any particular [551]
privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. . . . But the great mass of the laws are, or are intended to be, expressive of the rules of justice, and are applicable alike to all. . . . But there is no demand for such a narrow construction of our statute" (as was given by the English courts to their limited liability act), "at least to that part of it which prescribes the general rule of limited responsibility of shipowners. And public policy, in our view, requires that the rules of maritime law as accepted by the United States should apply to all alike, as far as it can properly be done. If there are any specific provisions of our law which cannot be applied to foreigners, or foreign ships, they are not such as interfere with the operation of the general rule of limited responsibility. That rule and the mode of enforcing it are equally applicable to all. They are not restricted by the terms of the statute to any nationality or domicil. We think they should not be restricted by construction." It will be observed that the language of the Harter act is more specific in its definition of the vessels to which it is applicable, than the limited liability act, which simply uses the words "any vessel," whereas, by the third section of the Harter act, it is confined to "any vessel transporting merchandise or property to or from any port in the United States." Where Congress has thus defined the vessels to which the act shall apply, we have no right to narrow the definition. It may work injustice in particular cases where the exemptions are accorded to vessels of foreign nations which have no corresponding law, but this is not a matter within the purview of the courts. It is not improbable that similar provisions may ultimately be incorporated in the general maritime law. Indeed, the act has been already held by this court applicable to foreign as well as to domestic vessels. (*The Silvia*, 171 U. S. 462 [*ante*, 241].) See also The *Etona*, 64 Fed. Rep. 880; *The Silvia* [35 U. S. App. 395], 68 Fed. Rep. 230.

Assuming, then, that the Harter act applies to foreign vessels, we are next to inquire into its effect upon the division of damages in this case. It was held by this court in the *case of *The Atlas*, 93 U. S. 302 [23: [552]
863], that an innocent owner of a cargo is not bound to pursue both colliding vessels, though both may be in fault, but is entitled to a decree against one alone for the entire amount of his damages. It was held by the

courts below that, while the action by the owner of the cargo would lie against the steamer for the whole amount of damage done, the owners of such steamer were entitled to recoup one half of this amount against one half of the amount awarded to the owners of the schooner for the loss of their vessel, upon the theory that, under the limited liability act, they were liable for one half this amount, not exceeding the value of the schooner. But libellants insist that as the third section of the Harter act declares that the owners of a seaworthy vessel shall not be liable in any amount for damage or loss resulting from a fault or error in navigation, the owners of the schooner are entitled to this exoneration, whether the action be directly against the vessel by the owner of the cargo, or by a third party, who is claiming the rights to which he is entitled, and who for that purpose is standing in his shoes. That the exemptions of the act are not intended for the benefit of the steamship or any other vessel, by whose negligence a collision has occurred, but for the benefit of the carrying vessel alone; and if she be held liable in this indirect manner for a moiety of the damages suffered by the cargo, the act is to that extent disregarded and nullified. That the amount which is paid by recoupment from the just claim of the schooner against the steamship is paid as effectually as it would be by a direct action by the owners of the cargo against the schooner; and while in this case it works an apparent hardship upon the steamer (a hardship more apparent than real, owing to the greater fault of the steamer), it does not in reality extend her liability, but merely prevents her taking advantage of a deduction to which without the act she might have been entitled.

But the majority of the court are of opinion that the principles announced by us in *The North Star*, 106 U. S. 17 [27: 91]; *The Manitoba*, 122 U. S. 97 [30: 1095]; *The Delaware*, 161 U. S. 459 [40: 771]; and *The Irrawaddy*, 171 U.S. 187 [*ante*, 130], are equally applicable here. [553] *The case of the North Star is especially pertinent. That case arose from a collision between two steamships, one of which, the Ella Warley, went to the bottom, while the other was considerably damaged. The suit was tried upon libel and cross-libel, both vessels found in fault, and the damages ordered to be divided. No question arose with regard to the cargo, but the owners of the Ella Warley raised a question as to the amount of their recovery under the limited liability act, which provides (Rev. Stat. § 4283) that "the liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." It seems that, if the vessel be totally lost, the liability of her owner is thereby extinguished. *Norwich Company* v. *Wright*, 13 Wall. 104 [20: 585]. The owners of the Ella Warley sought to apply this rule to a case of mutual fault, and contended that, as their vessel was a total loss, the owners were not liable to the North Star at all, not even to have the balance of damage struck between the two vessels; but that half of their damage must be paid in full without deduction of half the damage sustained by the North Star. But the court held "that where both vessels are in fault, they must bear the damage in equal parts; the one suffering the least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one half of the difference between the respective losses sustained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case the duty of payment fell upon the North Star, the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule. The contrary view is based on the idea that, theoretically (supposing both vessels in fault), the owners of the one are liable to *the owners of the other [554] for one half of the damage sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. . . . These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties."

In delivering the opinion Mr. Justice Bradley cited and disapproved of the case of *Chapman* v. *Royal Netherlands Steam Navigation Co.* (L. R. 4 Prob. Div. 157), which was much relied upon by counsel for the Ella Warley. It is interesting to note that this case was overruled by the House of Lords three months before the opinion in the North Star was delivered, in the case of the *Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Co.* L. R. 7 App. Cas. 795, and the rule laid down in the North Star adopted. The same rule was subsequently applied in *The Manitoba*, 122 U. S. 97 [30: 1095].

The other cases are not directly in point, but their tendency is in the same direction. In that of *The Delaware*, 161 U. S. 459 [40: 771], it was said that the whole object of the Harter act was to modify the relations previously existing between the vessel and her cargo, and that it had no application to a collision between two vessels. In *The Irrawaddy*, 171 U. S. 187 [*ante*, 130], it was held that, if a vessel be stranded by the negligence of her master, the owner had not the right, under the Harter act, to a general av-

erage contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save the vessel, freight, and cargo.

But if the doctrine of the North Star be a sound one, that in cases of mutual fault the owner of a vessel which has been totally lost by collision is not entitled to the benefit of an act limiting his liability to the other vessel [555] until after the balance *of damage has been struck, it would seem to follow that the sunken vessel is not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability has been fixed upon the principle of an equal division of damages. This is in effect extending the doctrine of the Delaware case, wherein the question of liability for the loss of the cargo was not in issue, to one where the vessel suffering the greater injury is also the carrier of a cargo—in other words, if the Harter act was not intended to increase the liability of one vessel toward the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo.

We are therefore of opinion that the court of appeals did not err in deducting half the value of the cargo from half the value of the sunken schooner, and in limiting a recovery to the difference between these values.

The decree is affirmed.

The **Chief Justice** and Mr. Justice **Peckham** dissented.

ELIZA COOPER *et al., Plffs. in Err.,*
v.
EDWARD S. NEWELL and Clarence B. Smith, Executors.

(See S. C. Reporter's ed. 555-573.)

Jurisdiction of state court, when open to inquiry—evidence.

1. When a judgment of a state court comes under cons'deration in a court of the United States sitting in the same state, the question of jurisdiction of the state court to render the judgment is open to inquiry in the United States court.
2. In such case, evidence is admissible to contradict the recital in the judgment that defendant was a citizen and resident of the state, and to show that he was not served with process and that the attorney who appeared for him had no authority to represent him.

[No. 134.]

Argued and Submitted January 12, 13, 1899. Decided April 3, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit certifying a certain question of law to this court for decision in an action brought by Stuart Newell, for whom his executors, Edward S. Newell *et al.*, were substituted, against Eliza Cooper *et al.*, in the United States Circuit Court for the Eastern District of Texas, for the recovery of land in Harris County, Texas, and taken by writ of error to the said Circuit Court of Appeals. *Question answered in the affirmative.*

Statement by Mr. Chief Justice **Fuller:**

*This is a certificate from the circuit court [556] of appeals for the fifth circuit, stating that the "suit was originally brought by Stuart Newell against Eliza Cooper and B. P. Cooper and Fannie Westrope, as defendants, in the circuit court in and for the eastern district of Texas, sitting at Galveston, in the ordinary form of trespass to try title, under the Texas statutes, to recover one hundred and seventy-seven acres of land in Harris county, Texas, described in plaintiff's petition, which said petition was filed on the 5th day of July, 1890. The said Stuart Newell was alleged to be a citizen of New York, and the said defendants all citizens of Texas."

That prior to the trial Stuart Newell died, and the proper persons were duly made parties plaintiff, as well as an additional party defendant, and plaintiffs filed their fifth amended original petition, in which, in addition to the usual averments required to be made by the Texas statutes in an action of trespass to try title, plaintiffs further alleged that defendants *set up title to the land [557] in controversy through a judgment rendered May 21, 1850, in the district court of Brazoria county, Texas, in favor of Peter McGrael and against Stuart Newell, a certified copy of which proceedings was attached to and made a part of said amended petition; and "that said judgment was null and void and was not binding on the said Stuart Newell nor plaintiffs, nor could defendants claim title under said judgment for the following reasons, *viz.:*

"That at the time of the filing of said suit and the rendition of said judgment said Stuart Newell was not a resident of Brazoria county, Texas, nor of the state of Texas, nor was he then within said Brazoria county or the state of Texas; that at no time did he ever reside in Brazoria county, Texas; that on the 2d day of January, 1848, said Stuart Newell, who then resided in Galveston county, Texas, removed from said Galveston county to the city of Philadelphia, in the state of Pennsylvania, and resided in said city of Philadelphia, in the state of Pennsylvania, continuously from said date until the year 1854, when he removed from said city of Philadelphia to the city of New York, in the state of New York, where he continued to reside up to the time of his death, to wit, April 11th, 1891.

"That during the time of his residence in the city of Philadelphia he was a resident citizen of the state of Pennsylvania, and during his residence in the city of New York he was a resident citizen of the state of New York, and has never at any time been a citizen of the state of Texas, nor has he, at any time since the year 1848, when he left Galveston county, been anywhere in the state of Texas, but at all times since said year 1848, up to the time of his death, had resided and been without the limits of the said state of

Texas and within the said city of Philadelphia, state of Pennsylvania, and the said city of New York, in the state of New York; that Stuart Newell was never served with citation, process, or otherwise notified of the existence of said suit of *Peter McGrael* v. *Stuart Newell;* nor was he a party to said suit with his knowledge, consent, or approval; nor did he submit himself to the jurisdiction of the said court; nor did he employ
[558] or *authorize anyone to represent him or enter an appearance in said suit; nor did he know of the existence of said suit in any manner until just prior to the institution of this suit.

"That if any attorney appeared for said Stuart Newell in said suit he did so without any authority, permission, knowledge, or consent of or from the said Stuart Newell, and that such appearance, if any there was, was through collusion with said attorney and plaintiff in said suit to injure and defraud the said Stuart Newell; and it was expressly denied that I. A. or J. A. Swett had any authority or permission from said Stuart Newell to enter an appearance in said cause, nor was such appearance on the part of the said I. A. or J. A. Swett done with the knowledge, consent, or approval of said Stuart Newell; that at the time of the entry of said judgment said Stuart Newell had a meritorious defense to said suit, and was the owner in fee simple to the lands herein sued for by virtue of a deed of conveyance to him from said Peter McGrael, plaintiff in said suit, executed and delivered on August 9th, 1848, and that at no time since said date had said Peter McGrael any title or interest in the lands in controversy. Attached to plaintiffs' said petition was a certified copy of the record in the case of *Peter McGrael* v. *Stuart Newell* in the district court of Brazoria county, Texas, to which was attached the certificate of the clerk that said record contained a full, true, and correct copy of all the proceedings had in said suit, and which record was afterwards put in evidence on the trial by defendant.

"This record consisted of, 1st, a petition in the ordinary form of trespass to try title, in which Peter McGrael was plaintiff and Stuart Newell was defendant, and in which petition it was alleged that Peter McGrael was a resident citizen of the county of Brazoria, state of Texas, and that Stuart Newell was a resident citizen of the county of Brazoria, state of Texas. A number of different tracts of land, one of which was situated in Brazoria county, were described in said petition, among them the land in controversy, which was alleged to be situated, then as now, in Harris county, Texas. Said petition likewise contained a prayer that
[559] Stuart *Newell be cited to appear before the next term of the said district court of said Brazoria county, and that he be condemned to restore to plaintiff the peaceable possession of the said lands, and that he and all other persons be thereafter restrained from disturbing plaintiff in the possession and use thereof, and that defendant be condemned to pay plaintiff five thousand dollars damages for taking possession of said tracts of land, and also be condemned to pay a reasonable rent for the same. Prayer was likewise made for general relief, and that plaintiff be quieted in his title and possession of the said land. This petition was filed on the 20th day of May, 1850, and contained the following indorsement: 'This suit is brought as well to try title as for damages. J. B. Jones, att'y for plaintiff.'

"2d. The following answer, filed May 20, 1850, *viz.:*

"'In the Honorable District Court, May Term, A. D. 1850.

Peter McGrael vs. Stuart Newell.

"'And now comes the defendant, Stuart Newell, and says that the matters and things in plaintiff's petition are not sufficient in law for the plaintiff to have or maintain his said action against this defendant. Wherefore he prays judgment.

(Signed) J. A. Swett,
Att'y for Defendant.

"'And now, at this term of your honorable court, comes the said defendant, Stuart Newell, and defends, etc., and says that he denies all and singular the allegations in said plaintiff's petition contained.

(Signed) J. A. Swett,
Att'y for Defendant.

"'And for further answer in this behalf the said defendant says that he is not guilty in manner and form as the said plaintiff in his said petition hath complained against him; and of this he puts himself upon the country.

(Signed) J. A. Swett,
Att'y for Defendant.'

*"3d. The following order of court: [560]

"'Peter McGrael vs. Stuart Newell. No. 1527.

Monday, May 20, 1850.

"'In this cause both parties being present, by their attorneys, the demurrer of defendant to plaintiff's petition came on, and, being heard by the court, was overruled.'

"4th. The following decree:

"'Peter McGrael vs. Stuart Newell. No. 1527.

Tuesday, May 21, 1850.

"'This day came the parties, by their attorneys, and the demurrer of the defendant being heard, the same was overruled; and thereupon came the following jury of good and lawful men, to wit (here follow names of the jurors), who, after hearing the evidence and argument, thereupon returned the following verdict:

"'We, the jury find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition.

E. Giesecke, Foreman.

"'It is therefore ordered, adjudged, and decreed by the court that the plaintiff do have and recover of and from the defendant

the several tracts of land in plaintiff's petition mentioned and described and all thereof; that the said Stuart Newell be forever barred from having or asserting any claim, right, or title to all or any portion of said tracts of land or any part thereof, and that the said plaintiff be forever quieted in the title and in the possession of all the aforesaid tracts of land. It is further considered by the court that the plaintiff recover of the defendant his costs of this suit, and that execution issue for the same.'

"The defendants answered herein, demurring to the plaintiff's fifth amended original petition upon the ground that it appeared therefrom that the plaintiffs thereby at-
[561]tacked collaterally *and alleged to be void the judgment of the district court of Brazoria county, in the state of Texas, and within the said eastern district thereof, a court of general jurisdiction of the parties and the subject-matter connected with and involved in said judgment, and that said judgment was a domestic judgment, assailable only in a direct proceeding to impeach it, and that no proceeding had ever been taken to review, appeal from, vacate, or qualify said judgment, and that plaintiff's right to do so is now barred by limitation and lost by laches. Defendants also answered by plea of not guilty and the statute of limitation of three, five, and ten years.

"Upon the trial of the case in the circuit court there was evidence offered by the plaintiffs tending to prove that Peter McGrael was the common source of title, and that, as alleged in plaintiffs' petition, the land in controversy had been conveyed by said Peter McGrael to said Stuart Newell in fee simple in 1848, and that said Stuart Newell was not a citizen nor a resident of the state of Texas at the time of the institution of the aforesaid suit of *Peter McGrael* v. *said Stuart Newell* in the district court of Brazoria county, Texas; that he was never served with any process of any character in said suit; that he had no knowledge of the institution of the said suit until many years thereafter; that J. A. Swett was not his attorney in said suit and had never been employed by him to represent him in said suit, and that any appearance made for him by said Swett in said suit was without the knowledge or consent of said Newell; that in said suit the property in controversy had not been taken into the possession of the court by attachment, sequestration, or other process; that said Stuart Newell had never resided in Brazoria county, Texas; that he resided in Texas, in Galveston county, from April, 1838, to November, 1848; that he left Texas in November, 1848, and went to the city of Philadelphia, and resided there until 1853 or 1854, and from that time on up to the date of his death he had resided in the city of New York, in the state of New York, and during said years was first a citizen of the state of Penn-
[562]sylvania, whilst residing *there, and then a citizen of the state of New York whilst residing there.

"The evidence tending to establish the above facts was all objected to by the defendants upon the ground that said judgment in the case of *Peter McGrael* v. *Stuart Newell* was rendered by a domestic court of general jurisdiction, and that said Newell was sued as a citizen of said Brazoria county, and that the record in said suit showed that fact and showed that he was sued therein for the recovery of land, and that he had appeared by his attorney, demurred, pleaded, and answered in the suit, and that his demurrer had been contested before the court and a hearing had on the case before a jury and that judgment was rendered in said suit for the plaintiff, and that said proceeding, judgment, and record import absolute verity, and that want of jurisdiction in said court could not be established outside of said record in a collateral proceeding such as the suit at bar.

"These objections were overruled, the evidence admitted, and defendants excepted thereto.

"The issue of the validity of said judgment in the case of *Peter McGrael* v. *Stuart Newell* was submitted to the jury by the following charge of the court, *viz.:*

"'There are only two questions left to your consideration: First, whether or not the judgment rendered in Brazoria county, May 21, 1850, in favor of Peter McGrael against Stuart Newell was procured without service and without the authorized appearance of Stuart Newell. If the evidence satisfies your mind that Stuart Newell was not a party to the suit in fact—that is, was not served and did not enter his personal appearance, and did not authorize Mr. Swett to appear for him—you are instructed that the judgment is a nullity and the plaintiffs are entitled to recover this land, unless defendants have it by statute of limitations. If you determine from the testimony in this case that Stuart Newell was represented in that suit by Mr. Swett and he was authorized to represent him, in that event you need not consider the plea of limitation, but return a verdict for the defendants. If Mr. Swett was authorized to appear for Stuart Newell in the *litigation, you need not con- [563]
sider the plea of limitation, but return a verdict for the defendants; but if you find from the testimony that Mr. Swett was not authorized to appear for him, then that judgment is a nullity and the title to this property would be in the executors of Stuart Newell, plaintiffs in this case, unless you find under the plea of limitation which I shall instruct you upon in favor of the defendants. If you find for the plaintiffs, the form of your verdict will be, "We, the jury, find for the plaintiffs against the defendants.' If you find for the defendants, the form of your verdict should be, "We, the jury, find for the defendants the land described in the plaintiffs' petition and against the plaintiffs," and in that event you are further directed to state whether or not you find the Brazoria county judgment was a valid or void judgment, and you will also state whether you find the defendants have title to the property by limitation; and, if so, you will add, "We, the jury, find the defendants have the title to the property by reason of the five years' limitation." Those are two special findings, if you find for the defend-

ants. If you find from the evidence in this case that Stuart Newell authorized Mr. Swett to appear for him in that case, the judgment is valid, but if you find he was not authorized to appear for him, then the judgment is a nullity. The burden of proof is upon the plaintiffs to show nullity of the judgment in Brazoria county.'

"To this charge of the court the defendants duly excepted and asked the court to give to the jury the following instructions:

"'The judgment of the district court of Brazoria county, rendered on May 21, 1850, in the case of *Peter McGrael* v. *Stuart Newell*, put the title to the land now sued for in said McGrael, and McGrael's deed to Westrope on March 2, 1860, put the title in Westrope, and defendants are entitled to your verdict, and you will find for them.'

"This instruction the court refused to give, and to this action of the court defendants duly excepted. The jury brought in the following verdict: 'We, the jury, find for the plaintiffs, as against the defendants, the [564] lands described *in plaintiffs' petition;' which verdict was duly received and upon it judgment rendered for plaintiffs.

"The defendants in time filed their bills of exception, and this case was brought to this court by writ of error. Among other assignments of error it was complained that the circuit court had erred in overruling defendants' demurrer to plaintiffs' petition attacking the validity of said judgment in the case of *Peter McGrael* v. *Stuart Newell* and in permitting the introduction of the evidence hereinbefore recited and in charging the jury as hereinbefore recited and in refusing to charge the jury as hereinbefore recited.

"Whereupon, the court desiring the instruction of the honorable Supreme Court of the United States for the proper decision of the questions arising on the record, it is ordered that the following question be certified to the honorable the Supreme Court of the United States, in accordance with the provisions of section 6 of the act entitled 'An Act to Establish Circuit Courts of Appeals and to Define and Regulate in Certain Cases the Jurisdiction of the Circuit Courts of the United States, and for Other Purposes, Approved March 3, 1891,' to wit:

"Was the judgment of the district court of Brazoria county, Texas (said court being a court of general jurisdiction) in the case of *Peter McGrael* v. *Stuart Newell*, subject to collateral attack in the United States circuit court for the eastern district of Texas, sitting in the same territory in which said district court sat, in this suit, between a citizen of the state of New York and a citizen of the state of Texas, by evidence *aliunde* the record of the state court showing that the defendant, Stuart Newell, in said suit in said state court was not a resident of the state of Texas at the time the suit was brought nor a citizen of said state, but a resident citizen of another state, and that he was not cited to appear in said suit, and that he did not have any knowledge of said suit, and that he did not, in fact, appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent."

Mr. **F. Charles Hume** for plaintiff in error.

Mr. **T. D. Cobbs** for defendant in error.

*Mr. Chief Justice **Fuller** delivered the [565] opinion of the court:

The question is whether the judgment entered by the district court of Brazoria county, Texas, in favor of McGrael and against Newell, was open to the attack made upon it in the circuit court of the United States for the eastern district of Texas. The record of the suit in which that judgment was entered showed a petition in the ordinary form of trespass to try title, filed May 20, 1850, alleging McGrael and Newell to be resident citizens of the county of Brazoria, Texas, and describing several different tracts of land, one of which was situated in Brazoria county, and among the others, the tract in controversy, which was alleged to be situated then as now in Harris county, Texas; a demurrer and pleas signed by a person as "att'y for defendant," filed the same day; a verdict and judgment against Newell rendered and entered May 21, 1850. The record does not show that any process was issued on the petition and served on Newell, or any notice given to Newell by publication or otherwise; or affirmatively that the person signing the demurrer and pleas was authorized to do so.

The evidence on the trial of the present case in the circuit court must be taken as establishing that Newell was not a citizen nor a resident of Texas at the time the suit was commenced in the Brazoria county district court; that he was never served with any process in that suit and had no knowledge of its institution until many years thereafter: that the person who signed the pleadings for defendant was not Newell's attorney and had never been employed by him to represent him, and that any appearance made for Newell in the suit was without his knowledge or consent; that in that suit the property in controversy was not taken into the possession of the court by attachment, sequestration, or other process; that Newell had never resided in Brazoria county, Texas, though he had resided in Galveston county prior to November, 1848, *when he went to [566] the city of Philadelphia, and resided there until 1853 or 1854, when he removed to the city of New York, where he resided up to the date of his death in 1891; and that during the period from November, 1848, to 1891 he was first a citizen and resident of Pennsylvania and then a citizen and resident of New York. This evidence was objected to on the ground that the judgment was rendered by a domestic court of general jurisdiction, and that want of jurisdiction cannot be established *aliunde* the record in a collateral proceeding.

In *Thompson* v. *Whitman*, 18 Wall. 457 [21: 897], a leading case in this court, it was

ruled that "neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered;" that "the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist;" and that "want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing."

But while these propositions are conceded, it is insisted that the circuit court of the United States for the eastern district of Texas was bound to treat this judgment rendered by one of the courts of the state of Texas as if it were strictly a domestic judgment drawn in question in one of those courts, and to hold that it therefore could not be assailed collaterally.

We are of opinion that this contention cannot be sustained, and that the courts of the United States sitting in Texas are no more shut out from examining into jurisdiction than if sitting elsewhere, or than the courts of another state. A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. Undoubtedly the judgments of courts of the United States are domestic judgments of the nation, while in the partic-
[567] ular *state in which rendered they are entitled to be regarded as on the same plane in many senses as judgments of the state; and so the judgments of the courts of the several states are not to be treated by each other or by the courts of the United States as in every sense foreign judgments. But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several states as between each other. And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states.

The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a state comes under consideration in a court of the United States, sitting in the same state. *Christmas* v. *Russell*, 5 Wall. 290 [18: 475]; *Galpin* v. *Page*, 18 Wall. 350 [21: 959]; *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565]; *Hart* v. *Sansom*, 110 U. S. 151 [28: 101]; *Goldey* v. *Morning News*, 156 U. S. 518 [39: 517].

In *Pennoyer* v. *Neff*, Mr. Justice Field, after discussing the question how far a judgment rendered against a nonresident, without any service upon him, or his personal appearance, was entitled to any force in the state in which it was rendered, said: "Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them." 95 U. S. 732 [24: 572].

And in *Goldey* v. *Morning News*, where the authorities are extensively cited, Mr. Justice Gray said: "It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except *by actual service [568]
of notice within the jurisdiction upon him or upon someone authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. . . . For example, under the provisions of the Constitution of the United States and the acts of Congress, by which judgments of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. . . . If a judgment is rendered in one state against two partners jointly, after serving notice upon one of them only, under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another state, or in a court of the United States, against the partner who was not served with process. . . . So, a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there. . . . The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the circuit courts of the United States, although sitting in the state in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments." 156 U. S. 521 [39: 518].

It must be remembered that this action was commenced by Newell as a citizen of New York against citizens of Texas, in *the exer- [569]
cise of a right secured to him by the Constitution of the United States, and it would go

far to defeat that right if it should be held that he was cut off in the circuit court from proving that he was not a citizen and resident of Texas when the controverted action was commenced, and that he had not authorized any attorney to appear for him in that action. As any provisions by statute for the rendition of judgment against a person not a citizen or resident of a state, and not served with process or voluntarily appearing to an action against him therein, would not be according to the course of the common law, it must follow that he would be entitled to show that he was not such citizen or resident, and had not been served or appeared by himself or attorney.

Accordingly, it was held in *Needham* v. *Thayer*, 147 Mass. 536, that a defendant in an action brought in Massachusetts on a judgment *in personam* in that state, might set up in defense that he was at the time the original action was brought a nonresident, and neither was served personally with process nor appeared therein.

And so in New York, when a judgment of a court of that state was drawn in question, which had been entered against a nonresident, who was not, during the pendency of the proceedings, within the jurisdiction of the state. *Vilas* v. *Plattsburgh & Montreal Railroad Company*, 123 N. Y. 440 [9 L. R. A. 844]. There the rule that domestic judgments against a party not served, but for whom an attorney appeared without authority, cannot be attacked collaterally, was adhered to; yet the court of appeals declined to apply it to a case where the defendant was a nonresident and not within the jurisdiction during the pendency of the proceedings, such judgments being held to be not strictly domestic but to fall within the principle applicable to judgments of the courts of other states, in respect of which Andrews, J., delivering the opinion of the court said: "It is well settled that in an action brought in our courts on a judgment of a court of a sister state the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an ap-
[570] pearance was entered by an attorney, *that the appearance was unauthorized, and this even where the proof directly contradicts the record."

We do not understand any different view to obtain in Texas. In *Fowler* v. *Morrill*, 8 Tex. 153, it was held that the acceptance of service of process by an attorney is only prima facie evidence of his authority. In *Parker* v. *Spencer*, 61 Tex. 155, the court decided that a judgment did not affect a party who had not been served, but who, on the record, appeared by an attorney not authorized to so appear, and it was said: "And as he had not been made a party to the suit by any of the modes known to the law, he would not be bound by the judgment. But he had the option either to have it vacated by direct proceedings or else to treat it as void in any collateral proceeding where rights might be asserted against him by reason of the same."

In *Bender* v. *Damon*, 72 Tex. 92, which is much in point, Chief Justice Stayton states the case as follows:

"The petition alleges substantially the facts necessary to be alleged in an action of trespass to try title, and the petition was so indorsed. Had it done this and no more, there could have been no ground for controversy in the court below as to its jurisdiction to hear and determine the cause, nor as to the sufficiency of the petition on general demurrer. The appellant, however, sought to remove cloud from his title, which a judgment in his favor in an action of trespass to try title would have accomplished as against the defendants, and to obtain this relief he undertook to show that appellees were claiming under a sheriff's sale and deed under an execution issued from the district court for Navarro county, on a judgment rendered by that court against him and in favor of S. J. T. Johnson, all of which he claimed were invalid.

"Some of the facts which he alleged to show the invalidity of that judgment, execution, and sale, were such as might entitle him, by a proper proceeding, to have had them vacated, but not such as to render them void.

"The petition, however, went further, and alleged facts which, if true, would render the judgment void. It alleged that the plaintiff was a nonresident of this state; that he *never was cited to appear, and did [571]
not appear in person or by attorney in the proceeding in which the judgment in favor of Johnson and against himself was rendered; and that appellees claimed through an execution and sale made under a judgment so rendered. If these averments be true the judgment was void, and no one could acquire rights under it."

We think the circuit court was clearly right in admitting evidence to contradict the recital that Newell was a citizen and resident of Texas, and to show that the attorney had no authority to represent him.

Nor can this judgment be held conclusive on the theory that the suit of *McGrael* v. *Newell* was in the nature of a proceeding *in rem*. The property was not taken into custody by attachment, or otherwise, and the suit depended entirely on the statutes of Texas providing the procedure for the trial of the title to real estate, which contained at that time no particular provision for bringing in nonresidents of the state. There was a statute providing generally that in suits against nonresidents service could be had by publication, and that statute provided that if the plaintiff, or his agent, or attorney, when the suit was instituted, or during its progress, made affidavit before the clerk of the court that defendant was not a resident of the state of Texas, or that he was absent from the state, or that he was a transient person, or that his residence was unknown, then a citation should issue which should be published in a newspaper. Acts Tex. 1848, 106, chap. 95. This statute was applicable to all suits, and so far as actions against nonresidents were personal, judgment on citation by publication would not be conclusive. And the law also required

that where any judgment was rendered on service by publication, the court should make out and incorporate with the records of the case a statement of the facts proved therein on which the judgment was founded. Acts Tex. 1846, 395. It is true that "it was within the power of the legislature of Texas to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons."
[572] *Hamilton* v. *Brown*, *161 U. S. 256, 274 [40: 691, 699]; *Arndt* v. *Griggs*, 134 U. S. 316 [33: 918]. But it would seem that there was no such statute at the time of the commencement of the McGrael suit, and that suit could only be regarded as a personal action and coming within the rule laid down in *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565].

Moreover, the record in *McGrael* v. *Newell* shows that the suit was not brought as against a nonresident of the state, it being alleged in plaintiff's petition that defendant resided in Brazoria county, Texas. So that even if it were held that the statutes of the state, taken together, authorized suits of this character to be brought against nonresidents as proceedings *in rem*, this cannot be asserted as to this suit; and it affirmatively appeared that no citation by publication could have been had. The citation prayed for was to be addressed to the proper officer of Brazoria county, to be served on defendant as a resident of that county; no citation by publication was asked for, and no record of the facts on which the case was tried was kept as required by statute, and the whole case was tried as a case against a resident of Brazoria county appearing by attorney. The statute at that time provided that "any party to a suit, his agent or attorney, may waive the necessity of the issuance or the service of any writ or process required to be served on him in the suit, and accept such service thereof; provided, that such waiver or acceptance shall be made in writing, signed by such party, his agent or attorney, and filed among the papers of the suit, as a record." Acts Tex. 1846, 367. The record here showed no such acceptance or waiver of service.

Treated as a personal action, brought as against a resident, when the facts appeared that defendant was not a resident of the state of Texas and was not served in that state, and had not appeared by attorney, then the judgment ceased to be binding. The result is the same if the suit were regarded as brought under a statute making provision for the bringing of suits to settle the title to lands in Texas, since that proceeding would have been purely statutory, and not according to the course of the common law, and the record did not show that it was instituted in the manner required by the stat-
[573] ute, or appearance *had or waived as required, or that the jurisdiction of the court in fact so attached as to authorize the court to render the judgment. *Galpin* v. *Page*, 18 Wall. 350 [21: 959].

It follows that the question propounded must be *answered in the affirmative.*

CHARLES E. POPE, Receiver of Chicago & South Atlantic Railroad Company, *Appt.*,

v.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY.

(See S. C. Reporter's ed. 573-582.)

When decree of circuit court of appeals is final—ancillary suit depends upon jurisdiction of main suit—order appointing receiver.

1. The decree of the circuit court of appeals is final by the act of March 3, 1891, when the jurisdiction of the circuit court in which the suit was commenced depended entirely on diverse citizenship.
2. A suit brought by a receiver appointed by a Federal court, to accomplish the ends sought by the suit in which the appointment was made, is ancillary so far as the jurisdiction of the Federal court is concerned; and where the jurisdiction of the main suit depends on diverse citizenship, and the decree of the circuit court of appeals is therefore final therein, the judgment and decree of the ancillary litigation are also final.
3. The mere order of a Federal court appointing a receiver does not enable the receiver to invoke Federal jurisdiction, independently of the ground of jurisdiction of the suit in which the order was entered.

[No. 303.]

Submitted January 30, 1899. Decided April 3, 1899.

APPEAL from a decree of the United States Circuit Court of Appeals for the Seventh Circuit reversing a money decree of the Circuit Court of the United States for the District of Indiana in favor of Charles E. Pope, receiver of the Chicago & South Atlantic Railroad Company in a suit in equity brought by him against the Louisville, New Albany, & Chicago Railway Company, defendant, to recover certain property and property rights, held and claimed by defendant. The decree of reversal by the Circuit Court of Appeals gives instructions to dismiss the suit. On motion to dismiss the appeal. *Dismissed.*

See same case below, 53 U. S. App. 332; also same case, 169 U. S. 737, 42 L. ed. 1216.

Statement by Mr. Chief Justice **Fuller:**

Ball and Pettit filed their bill in the circuit court of the United States for the northern district of Illinois alleging that Ball was a citizen of Indiana and that Pettit was a citizen of Wisconsin, and that defendants were citizens of Indiana and Illinois, which suit was discontinued as to Ball, leaving Pettit, a citizen of Wisconsin, the sole complainant. Pope was appointed, in substitution for one Fish, receiver of the *Chicago & [574]
South Atlantic Railroad Company of Illinois, the order containing, among other things, the following:

"And it is further ordered that the defendant, the said Chicago & South Atlantic Railroad Company, or whoever may have possession thereof, do assign, transfer, and deliver

over to such receiver under the direction of Henry W. Bishop, a master in chancery of this court, all the property, real and personal, wheresoever found in this district, and all contracts for the purchase of land, and all other equitable interests, things in action, and other effects which belonged to, or were held in trust for, said defendant railroad company, or in which it had any beneficial interest, including the stock books of said railroad company, in the same condition they were at the time of exhibiting the said bill of complaint in this cause, except as far as necessarily changed in the proper management of said road, or in which it now has any such interest, and that said defendant, Chicago & South Atlantic Railroad Company, deliver over, in like manner all books, vouchers, bills, notes, contracts, and other evidences relating thereto, and also the stock books of said railroad company.

"And it is further ordered that the said receiver have full power and authority to inquire after, receive and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its officers, and such other persons as he may deem necessary on oath before said master from time to time."

Afterwards a further order was entered, *nunc pro tunc*, as follows:

"And now comes the receiver, Charles E. Pope, of said Chicago & South Atlantic Railroad Company, and on his application it is ordered and directed that said receiver have full power and authority to bring and prosecute any and all necessary suits for the collection of any claims, choses in action, and enforcement of any and every kind and nature, and to defend all suits and actions touching the rights or interests of the property or effects of any kind in his possession or under his control as receiver. This order to be entered now as of the date of his appointment and qualification as receiver."

[575] *Soon after, Pettit filed his bill in the circuit court of the United States for the district of Indiana, averring that he was a citizen of the state of Wisconsin, against "the said Chicago & South Atlantic Railroad Company, a corporation organized under the laws of the state of Indiana and state of Illinois, by the consolidation of an Illinois corporation of the same name of defendant herein, and an Indiana corporation known as 'the Chicago & South Atlantic Railroad Company of Indiana.'" Pope was appointed receiver on that bill, the order being similar in its terms to that entered in the circuit court for the northern district of Illinois. After such appointment, and on July 12, 1881, Pope, as receiver, filed his bill of complaint in the circuit court for the district of Indiana, seeking to recover certain property and property rights held and claimed by certain of the defendants which appellant claimed belonged to the Chicago & South Atlantic Railroad Company and to the ownership of or right to which he had succeeded as such receiver.

The amended bill on which the cause was heard stated that "your orator, Charles E. Pope, who is receiver of the Chicago & South Atlantic Railroad Company, and who is a citizen of the state of Illinois, brings this his amended bill of complaint—leave therefor having been granted by this honorable court—against" certain companies and individuals, severally citizens of the states of Indiana, Ohio, New York, and Kentucky; that he was appointed receiver of the Atlantic Company by the circuit court of the United States for the northern district of Illinois, and also receiver by the circuit court of Indiana; and that he was authorized by the express orders of both courts, appointing him receiver, "to bring all suits necessary and proper to be brought to recover possession of said estate and effects and to enforce all claims," etc.

The cause went to hearing, and a money decree was rendered by the circuit court in favor of Pope, receiver, against appellee, which appellee was adjudged by that decree to pay. An appeal having been prosecuted to the circuit court of appeals for the seventh circuit, a motion was made to dismiss the appeal for want of jurisdiction, and the motion overruled. *On final hearing the decree of [576] the circuit court was reversed by the circuit court of appeals, with instructions to dismiss the amended bill. The opinion of the circuit court of appeals was filed June 12, 1897. 53 U. S. App. 332. Thereafter a petition for a rehearing was filed and denied. Subsequently Pope, receiver, applied to this court for a writ of certiorari, which application was denied March 7, 1898. 169 U. S. 737 [42: 1216]. On March 23 Pope moved the circuit court of appeals for leave to file a second petition for rehearing, and the motion was overruled. Pope then applied to the circuit court of appeals for an appeal to this court which was granted, and the appeal having been docketed, this motion to dismiss was made and duly submitted.

Messrs. **Henry W. Blodgett, G. W. Kretzinger,** and **E. C. Field,** for appellee, in favor of motion to dismiss:

This suit is ancillary to the Pettit suits.

White v. *Ewing,* 159 U. S. 36, 40 L. ed. 67; *Freeman* v. *Howe,* 24 How. 450, 16 L. ed. 749; *Krippendorf* v. *Hyde,* 110 U. S. 276, 28 L. ed. 145; *Dewey* v. *West Fairmont Gas Coal Co.* 123 U. S. 329, 31 L. ed. 179; *Re Tyler,* 149 U. S. 164, 37 L. ed. 689; *Root* v. *Woolworth,* 150 U. S. 401, 37 L. ed. 1123; *Rouse* v. *Letcher,* 156 U. S. 47, 39 L. ed. 341; *Davis* v. *Gray,* 16 Wall. 216, 21 L. ed. 452; *Carey* v. *Houston & T. C. R. Co.* 161 U. S. 115, 40 L. ed. 638; *Gregory* v. *Van Ee,* 160 U. S. 643, 40 L. ed. 566; *Pacific R. Co.* v. *Missouri P. R. Co.* 111 U. S. 522, 28 L. ed. 504; *Borgmeyer* v. *Idler,* 159 U. S. 413, 40 L. ed. 201; *Smith* v. *Rackliffe,* 59 U. S. App. 427, 87 Fed. Rep. 964, 31 C. C. A. 328; *Brisenden* v. *Chamberlain,* 53 Fed. Rep. 310; *Davies* v. *Lathrop,* 12 Fed. Rep. 353.

As to jurisdiction resting upon Federal questions.

Press Pub. Co. v. *Monroe,* 164 U. S. 105, 41 L. ed. 367; *Ex parte Jones,* 164 U. S. 693, 41 L. ed. 601.

Mr. **John S. Miller,** for appellant, in opposition to motion:

This appeal lies as of right under cl. 3, § 6, of the judiciary act of March 3, 1891.

Wallace v. *Lawrence*, 1 Wash. 503; *Jackson, De Forest*, v. *Ramsay*, 3 Cow. 75, 15 Am. Dec. 242; *Stimpson* v. *Baltimore & S. R. Co.* 10 How. 329, 13 L. ed. 441; *Welch* v. *Dutton*, 79 Ill. 468; *Gibson* v. *Chouteau*, 13 Wall. 100, 20 L. ed. 536.

The equitable title to real interests, as well as the title to personal property and equitable interests, passes to the receiver, and in suits in equity by the receiver no assignment is necessary. The order of the court is the effective thing.

Mann v. *Pentz*, 2 Sandf. Ch. 257; *Iddings* v. *Bruen*, 4 Sandf. Ch. 417; *Albany City Bank* v. *Schermerhorn*, Clarke, Ch. 298; *Porter* v. *Williams*, 9 N. Y. 142, 59 Am. Dec. 519; *Atty. Gen.* v. *Atlantic Mut. L. Ins. Co.* 100 N. Y. 282.

The jurisdiction in this case was not dependent entirely on diverse citizenship.

Cohen v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Martin* v. *Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867.

This suit by a receiver of a Federal court is a case arising under the laws of the United States.

Stuart v. *Boulware*, 133 U. S. 78, 33 L. ed. 568; *Union Bank* v. *Kansas City Bank*, 136 U. S. 223, 34 L. ed. 341; *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593, 36 L. ed. 829; *Buck* v. *Colbath*, 3 Wall. 334, 18 L. ed. 257; *Feibelman* v. *Packard*, 109 U. S. 421, 27 L. ed. 984; *Bock* v. *Perkins*, 139 U. S. 628, 35 L. ed. 314; *Keihl* v. *South Bend*, 44 U. S. App. 687, 76 Fed. Rep. 921, 22 C. C. A. 618, 36 L. R. A. 228; *Jewett* v. *Whitcomb*, 69 Fed. Rep. 417; *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209; *Morgan's L. & T. R. & S. S. Co.* v. *Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Benjamin* v. *New Orleans*, 169 U. S. 161, 42 L. ed. 700.

The orders appointing complainant receiver and authorizing him to bring this suit "were entered, and all action of the court in the premises taken, by virtue of judicial power possessed and exercised under the Constitution and laws of the United States."

Texas & P. R. Co. v. *Cox*, 145 U. S. 593, 36 L. ed. 829; *White* v. *Ewing*, 31 U. S. App. 178, 66 Fed. Rep. 2, 13 C. C. A. 276, 159 U. S. 36, 40 L. ed. 67; *Price* v. *Abbott*, 17 Fed. Rep. 506; *Armstrong* v. *Trautman*, 36 Fed. Rep. 275.

The complainant, receiver herein, is as much an officer of the court under and by virtue of the Constitution and laws of the United States as are the receivers of national banks.

Texas & P. R. Co. v. *Cox*, 145 U. S. 593, 36 L. ed. 829; *McNulta* v. *Lochridge*, 141 U. S. 327, 35 L. ed. 796; *Tennessee* v. *Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511.

[576] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

If the decree of the circuit court of appeals was made final by the act of March 3, 1891, this appeal must be dismissed; and it was so made final if the jurisdiction of the circuit court depended entirely on diverse citizenship.

The circuit courts of the United States have original jurisdiction of suits of a civil nature, at law or in equity, by reason of the citizenship of the parties, in cases between citizens of different states, or between citizens of a state and aliens; and, by reason of the cause of action, "in cases arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," as, for instance, suits arising under the patent or copyright laws of the United States. *Press Publishing Company* v. *Monroe*, 164 U. S. 105 [41: 367].

Diversity of citizenship confers jurisdiction, irrespective of the cause of action. But if the cause of action arises under *the Con- [577]
stitution, or laws, or treaties, of the United States, then the jurisdiction of the circuit court may be maintained irrespective of citizenship.

The circuit court undoubtedly had jurisdiction of this suit on the ground of diversity of citizenship, not only because that fact existed in respect of complainant and defendants, but because the suit was ancillary to those in which the receiver was appointed. When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation are also final. *Rouse* v. *Letcher*, 156 U. S. 47 [39: 341]; *Gregory* v. *Van Ee*, 160 U. S. 643 [40: 566]; *Carey* v. *Houston & T. C. Railway Company*, 161 U. S. 115 [40: 638]. It is true that *Rouse* v. *Letcher* and *Gregory* v. *Van Ee* were proceedings on intervention, but *Carey* v. *Houston & T. C. Railway Company* arose on an original bill in the nature of a bill of review. In that case we took occasion to quote from the opinion of Mr. Justice Miller in *Milwaukee & Minnesota R. Company* v. *Milwaukee & St. Paul R. Company*, 2 Wall. 609 [17: 886], in which the distinction is pointed out between supplemental and ancillary, and independent and original, proceedings, in the sense of the rules of equity pleading, and such proceedings "in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the state courts." *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Pacific Railway Co.* v. *Missouri Pacific Railway Co.* 111 U. S. 505 [28: 498], and other cases were cited; the bill held to be ancillary to the suit the decree in which was attacked; and the

rule laid down in *Rouse* v. *Letcher* and *Gregory* v. *Van Ee* applied.

The suits in which this receiver was ap-
[578]pointed were in the *nature of creditors' bills alleging an indebtedness due from the Atlantic Company; the insolvency of that company; that certain corporations had in their possession assets of the Atlantic Company; and praying for the appointment of a receiver; the marshaling of assets; the winding up of the Atlantic Company, and the application of its assets to the payment of its debts. The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the circuit court of appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the circuit court of appeals therein.

And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked. *Colorado Central Consol. Min. Company* v. *Turck*, 150 U. S. 138 [37: 1030]; *Ex parte Jones*, 164 U. S. 693 [41: 602]; *Third Street & S. Railway Company* v. *Lewis*, 173 U. S. 457 [*ante*, 766].

Some further observations may be usefully added, although what has been said necessarily disposes of the motion.

The receiver based his right of recovery on the alleged seizure by one of the defendant companies of certain rights of way, and grading done thereon by the Atlantic Company under two specified contracts, which seizure and appropriation were alleged to have been fraudulently and forcibly made; and it was averred that appellee, the Louisville, New Albany, & Chicago Railroad Company, acquired title thereto and possession thereof through its consolidation with another of the defendant companies, which had acquired its title and possession through the foreclosure of a mortgage given by the company which had made the seizure. The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere
[579]order of a Federal *court, sitting in chancery appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the circuit court of appeals in proceedings taken by him. The validity of the order of appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made.

The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States.

In *Bausman* v. *Dixon*, 173 U. S. 113 [*ante*, 633], we have ruled that a judgment against a receiver appointed by a circuit court of the United States, rendered in due course in a state court, does not *per se* involve the denial of the validity of an authority exercised under the United States, or of a right or immunity specially set up and claimed under a statute of the United States. That was an action to recover damages for injuries sustained by reason of the receiver's negligence in operating a railroad company of the state of Washington, though the receiver was the officer of the circuit court, and we said: "It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived
*from that order, which he asserted was [580]
abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order." That was indeed a writ of error to a state court, but the reasoning is applicable here. Pope was appointed receiver by an interlocutory order of the circuit court in the exercise of its general equity powers. He did not occupy the position of a receiver of a corporation created under Federal law as in *Texas & Pacific R. Company* v. *Cox*, 145 U. S. 593 [36: 829] or of a marshal of the United States as in *Feibelman* v. *Packard*, 109 U. S. 421 [27: 984]; or of a receiver of a national bank, as in *Kennedy* v. *Gibson*, 8 Wall. 498 [19: 476]. Nor did his cause of action originate or depend on the order of appointment, or assignments made to him by the Atlantic Company pursuant to that order. Nor was any right claimed by him by virtue of his order of appointment or of his deeds of assignment denied or alleged to have been denied. The decrees of the circuit court and of the circuit court of appeals dealt solely with the alleged rights of the Atlantic Company as against certain Indiana corporations. It is impossible to hold that these orders of appointment were equivalent to laws of the United States within the meaning of the Constitution.

We agree with counsel for appellee that *Provident Savings L. Society* v. *Ford*, 114 U. S. 635 [29: 261], is in point in this aspect of the case. There it was ruled that "the fact that a judgment was recovered in a

court of the United States does not, in a suit upon that judgment, raise a question under the laws of the United States within the meaning of the act of March 3, 1875." That was a writ of error to the supreme court of the state of New York to review a judgment of that court denying a motion for the removal of the cause to the United States circuit court. Mr. Justice Bradley delivered the opinion, and, after pointing out that the alleged grounds of removal were insufficient, remarked: "It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a cor-
[581] poration *of the United States; and hence that such a suit is removable under the act of March 3, 1875. It is observable that the removal of the cause was not claimed on any such broad ground as this; but, so far as the character of the case was concerned, only on the ground that the defendant had a defense under Rev. Stat. § 739, specifying what the defense was; and we have already shown that that ground of removal, as stated in the petition, was insufficient. But conceding that the defendant is now entitled to take its position on the broader ground referred to, is it tenable and sufficient for the purpose? What is a judgment, but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities, it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised then it is conceded it would be a case arising under the laws of the United States. . . . Without pursuing the subject further, we conclude with expressing our opinion that this last ground of removal, like those already considered, was insufficient."

In *Cooke* v. *Avery*, 147 U. S. 380 [37: 212], jurisdiction was sustained on the ground that the plaintiff's title was derived through the enforcement of a lien, the validity of which depended on the laws of the United
[582] States and the rules of the circuit *court, and their construction and application were directly involved.

Appeal dismissed.

Mr. Justice **Brown** took no part in the consideration and disposition of this motion.

GUARANTEE COMPANY OF NORTH AMERICA, *Petitioner*,
v.
MECHANICS' SAVINGS BANK & TRUST COMPANY, for the Use of J. J. Pryor, Assignee.

(See S. C. Reporter's ed. 582-586.)

Decree, when not final.

A decree which determines that none of the defenses of a guaranty company are good in law, and that it is liable on its bonds for such sum as may thereafter be found due after crediting the amounts that may be realized from certain assets, is not final for the purposes of an appeal.

[No. 224.]

Argued March 16, 1899. Decided April 3, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree of that court affirming a decree of the Circuit Court of the United States for the Middle District of Tennessee in an action brought by the Mechanics' Savings Bank & Trust Company for the use of J. J. Pryor, Assignee, against the Guarantee Company of North America upon bonds executed by that company conditioned for the faithful performance of the duties of cashier and also of teller and collector of the said Savings Bank by one Schardt. The decree of the Circuit Court granted the relief prayed for by the plaintiff, and fixed the liability of the defendant at $32,310, and decreed that all collections on assets or collaterals turned over by Schardt to the bank should be applied on said amounts. Decree of the Circuit Court of Appeals is reversed for want of jurisdiction, and the cause is remanded, with directions to dismiss the appeal prosecuted to that court, and for such further proceedings in the Circuit Court as may be consistent with law.

See same case below, 68 Fed. Rep. 459, and 54 U. S. App. 108.

The facts are stated in the opinion.

Messrs. **William L. Granbery** and *Albert D. Marks* for petitioner.

Mr. **Edward H. East** for respondent.

*Mr. Justice **Harlan** delivered the opinion of the court: [582]

The plaintiff in this suit—originally brought in the chancery court at Nashville, Tennessee, and subsequently removed into the circuit court of the United States for the middle district of Tennessee—is the Mechanics' Savings Bank & Trust Company, a Tennessee corporation suing to the use of James J. Pryor, assignee, under a general assignment of all the assets, rights, and credits of that company in trust for the benefit of creditors.

The principal defendant is the Guarantee Company of North America, a corporation created under the laws of the Dominion of Canada.

From January 16, 1888, to January 1,

[583]1893, Schardt was *teller and collector and from the latter date until his death was cashier of the plaintiff company.

The object of the present suit is to have an accounting and a decree as to the amount due the plaintiff on two bonds executed by the Guarantee Company of North America to the Mechanics' Savings Bank & Trust Company; one, insuring the latter corporation against such pecuniary loss as it might sustain on account of the fraudulent acts of Schardt as teller and collector; the other, insuring the same corporation against pecuniary loss by reason of fraudulent acts by him in his office as cashier.

The bill alleges that while acting as teller and collector of the plaintiff company Schardt fraudulently embezzled of its moneys the sum of $78,956.11, of which $50,856.77 was embezzled during the year ending January 1, 1893; and that during the period covered by the bond insuring his fidelity as cashier he fraudulently appropriated of the plaintiff's moneys the sum of $22,817.30.

The bill also alleged that a few days before his death Schardt assigned to the plaintiff company, as additional indemnity for the losses he had brought upon it, certain policies on his life amounting to $80,000; that upon those policies $20,000 had been collected, and the residue was in dispute; and that Schardt did not give any direction as to which of the bonds insuring his fidelity the insurance moneys when collected should be applied.

The Guarantee Company in its answer insisted that by reason of the violation of the terms and conditions upon which the bonds in question were issued it was not liable to the plaintiff in any sum.

By the decree in the circuit court it was adjudged that the amount embezzled by Schardt during the years 1890 and 1891 had been paid out of the assets and collections transferred by him to the bank just before his death; that his embezzlements from and after September 1, 1890, and up to January 1, 1893, amounted, principal and interest, to $52,736.17, while his embezzlements during his term as cashier amounted, principal and interest, to $23,128.69; and that the total [584]amount, principal *and interest, of all his embezzlements while occupying the two positions of teller and cashier, was $107,223.36.

The decree continued:

"It appearing that Schardt had assigned to the bank to indemnify it against loss, two lots of land assigned to J. B. Richardson and life insurance policies amounting to $80,000, some of which policies have been paid to the assignee without suit, and others are now in litigation in this court, or pending on appeal or writ of error to the appellate court of this circuit, held at Cincinnati, the court adjudges upon inspection of said guaranty bonds, their terms and various conditions, and the proof submitted, that the bank has complied with the same and all its undertakings thereunder, substantially; and that said Schardt embezzled and fraudulently appropriated the moneys of the bank while he filled said two positions, to the amounts named; and that interest should be calculated upon said sums from the end of his respective terms.

"The court, after considering the various and numerous defenses set up by defendant company, why a recovery should not be had upon either of said bonds, or both, in favor of complainant, is pleased to disallow each and all of said defenses, and to order, adjudge, and decree that complainant have its decree or judgment against the defendant, the Guarantee Company, upon each of said bonds with interest from the time the same should have been paid according to the terms of said bonds, and for the costs.

"That complainant have judgment on the teller's and collector's bond for the sum of ten thousand dollars principal and the further sum of seven hundred and seventy dollars, being interest at six per cent from 9th of April, 1894, to July 1, 1895; and that complainant have judgment on the cashier's bond against defendant Guarantee Company for the sum of twenty thousand dollars principal and the further sum of $1,540.00 interest thereon from April 9, 1894, to July 1, 1895, making in the aggregate of principal and interest on both bonds the sum of thirty-two thousand three hundred and ten dollars ($32,310.00) with interest thereon until paid, and the costs of this suit.

*"And the court orders and decrees that the [585] liability of the defendant, the Guarantee Company, is secondary to that of John Schardt's estate; and that the bank or its assignee shall account for all collections realized on assets or collaterals turned over to the bank by said Schardt to reimburse it against his shortage, which it has collected, or with due diligence may collect hereafter; and for his fitness, and for convenience, H. M. Doak is appointed master commissioner to report the same to the next term of this court; and the court orders that the same be applied to the shortage of said Schardt in the order in which the same occurred, and in the meantime no execution will issue against defendants for the same, but only for the costs; and the court orders that this cause may be continued upon the docket of this court, for the purpose only of making any orders necessary to apply all collections from the assets of Schardt, held as collateral, in exoneration, to that extent, of the defendant company and of substituting the defendant to the rights of the bank, in case the recovery herein is collected or paid and any of said assets remain above the amount necessary to satisfy the shortage. But the case is retained for no other purpose, and the decree against defendant company is final as fixing its liability on the bonds to make good the shortage, whatever that may be. This decree is entered in lieu of one entered at a former day of the term and the decree formerly entered is thereby vacated." 68 Fed. Rep. 459.

Upon appeal prosecuted by the Guarantee Company to the circuit court of appeals the decree was affirmed. 54 U. S. App. 108. The case is here upon writ of certiorari.

The circuit court of appeals was without jurisdiction to review the decree of the circuit court because that decree was not a final

one. 26 Stat. at L. 826, 828, chap. 517, § 6. The circuit court disallowed all of the defenses made by the Guarantee Company and adjudged that upon the showing made that company was primarily liable to the extent of the penalty of each bond, with interest. But the liability of the defendant company was held to be secondary to that of Schardt's estate which was in course of administration,
[586] and *the amount for which it could be held finally liable on execution was left to be ascertained by a master commissioner who was directed to take into account "all collections realized on assets or collaterals turned over to the bank by Schardt to reimburse it against his shortage," or which the bank "with due diligence may collect hereafter;" and the case was retained for the purpose of fixing the amount of this ultimate liability to make good Schardt's shortage, "whatever that may be." In effect, the circuit court only determined that none of the defenses were good in law, and that the Guarantee Company was liable on its bonds for such sum as might thereafter be found to be due after crediting the amounts that might be realized from the assets turned over to the plaintiff bank by Schardt. Notwithstanding the company's defenses were adjudged to be bad in law, it remained for the circuit court by proper orders to accomplish the object of the suit, namely, to ascertain the amount for which the plaintiff was entitled to judgment and execution. When that amount is judicially ascertained and fixed by a final decree, the adjudication of the cause will be completed for all the purposes of an appeal; and if the decree be affirmed the circuit court will then have nothing to do but to carry it into execution. *North Carolina Railroad Co.* v. *Swasey*, 23 Wall. 405, 409 [23: 136, 137]; *Green* v. *Fisk*, 103 U. S. 518, 519 [26: 486]; *Dainese* v. *Kendall*, 119 U. S. 53, 54, [30: 305, 306]; *Lodge* v. *Twell*, 135 U. S. 232, 235 [34: 153, 155].

The decree of the Circuit Court of Appeals affirming the judgment of the Circuit Court is reversed for want of jurisdiction in the former court, and the cause is remanded with directions to dismiss the appeal prosecuted to that court, and for such further proceedings in the Circuit Court as may be consistent with law. *Reversed.*

---

[587] DULUTH & IRON RANGE RAILROAD COMPANY, *Plff. in Err.*,

v.

JOSEPH ROY.

(See S. C. Reporter's ed. 587–591.)

Relief to be granted to a party injured by the inadvertent issuing of a patent for public land to another, when his claim is pending in the General Land Office.

One who, being qualified, settled upon public land with the bona fide intention of acquiring the same, and, when the plat of the survey of the township was filed, went to the land office to enter the land under the homestead laws, and on the denial of his offer instituted a contest which was pending in the General Land Office when the patent was issued to another by inadvertence and mistake, is entitled to relief against the title claimed under such patent.

[No. 221.]

Submitted March 10, 1899. Decided April 3, 1899.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court affirming a judgment of the District Court of the Eleventh Judicial District of the state of Minnesota in favor of the plaintiff, Joseph Roy, quieting the title to a certain quarter section of land, and forever barring the defendants and all those claiming by or through them of any right, title, lien, or interest in or to the said land or any part thereof. *Affirmed.*

See same case below, 69 Minn. 574, 72 N. W. 794.

Statement by Mr. Justice **McKenna:**

This is an action to quiet title to the northwest quarter of section number three, in township number sixty-one, north of range number fifteen west of the fourth P. M., state of Minnesota.

It was brought in the district court of the eleventh judicial district of the state against the plaintiff in error and one John Megins. One Moses D. Kenyon was afterwards made a party.

The pleadings consisted of the complaint, separate answers of the defendants, and replies of the plaintiff (defendant in error), which respectively set up the titles, interests, and claims of the parties. As there is no point made on them, they are omitted.

The case was tried by the court without a jury and full findings of fact made, and judgment rendered in favor of the plaintiff (defendant in error), adjudging and decreeing him to be the equitable owner of the lands in controversy, and that the defendants "and all persons claiming by or through or under them be and they are hereby forever barred and precluded from having or claiming any right, title, lien, or interest in or to the said lands or any part thereof adverse to the plaintiff and parties claiming under him."

From this judgment an appeal was taken to the supreme court, by which it was affirmed. ([69 Minn. 547] 72 N. W. 794.)

To the judgment of affirmance this writ of error is directed.

*The findings of the court established the following: [588]

The lands were patented to the state of Minnesota by the United States as swamp and overflowed lands, and the plaintiff in error is the grantee of the state. The defendant in error claims under the homestead laws. At the time of the passage of the act of 1860, under which the patent was issued, the lands were not swamp, wet, or overflowed, or unfit for cultivation, but were and now are "high, dry, and fit for cultivation," except four or five acres in the northwest corner. In May, 1883, the defendant in error, then being qualified to do so, settled

upon the lands with the bona fide intention of acquiring the same under the laws of the United States, established his residence thereon, and has ever since continued to be in the actual, exclusive, and notorious possession, maintaining his home there, and cultivating and improving the same. When defendant in error commenced his residence on the lands the plat of the survey of the township in which they were located had not been filed, but was filed subsequently, and after it was filed, to wit, on the 2d of July, 1883, he went to the land office with the intention of entering the lands under the homestead laws, and made a request to do so, but the land officers informed him that there was a mistake in the survey, and that in all probability a new survey would be ordered; that numerous protests had been made against the survey which were sufficient to raise the question of its accuracy; that it was unnecessary for him to protest or file on the land, and advised him to wait until such protests were determined.

He was a foreigner, did not know the English language, nor was he familiar with the laws, rules, and regulations relating to the disposition of the public lands, and relied upon the representations of the officers, and acted upon their advice.

On the 5th of August, 1884, he discovered that the state was claiming the lands as swamp lands; thereupon he duly made application to enter the same under the homestead laws, and tendered the fees to the local land officer. No adverse claim other than that of the state had arisen or was made to said lands, but his offer of entry was
[589] rejected on the ground *that the same had inured to the state under the act of March 12, 1860, and that his application to enter the lands had not been made within three months after the filing of the township plat in the land office.

On the 6th of August, 1884, he duly filed contest, duly appealed from the rejection of his claim, which appeal and the affidavits attached were transmitted to the Commissioner of the General Land Office, and were by him received and filed September 1, 1884.

On the 23d of January, 1885, and while the appeal and contest were pending, the lands, through mistake and inadvertence, were patented to the state of Minnesota. The defendants took conveyance of the lands with notice of the right, claim, and interest of the plaintiff (defendant in error).

The assignments of error attack the conclusions of the state courts as erroneous, and specify as reasons (*a*) that the legal title to the lands was in plaintiff in error, and that there was no finding that there was a mistake of law or fraud on the part of the General Land Office of the United States or of any officers of the United States; (*b*) the finding that the patent to the state of Minnesota was issued through a mistake or inadvertence does not constitute a ground for adjudging defendant in error the equitable owner of the lands; (*c*) the defendant in error is not the real party in interest and never had the legal or equitable title to the land, the United States being the only party which could attack the patent to the state of Minnesota or invoke the action of the courts to determine its validity.

Messrs. **J. M. Wilson**, and *Davis, Hollister, & Hicks*, for plaintiff in error:

It was incumbent on the complainant below to establish that he himself was entitled to a patent for the premises. It is not sufficient to show that the patentee ought not to have received a patent.

Bohall v. *Dilla*, 114 U. S. 47, 29 L. ed. 61; *Sparks* v. *Pierce*, 115 U. S. 408, 29 L. ed. 428; *Lee* v. *Johnson*, 116 U. S. 48, 29 L. ed. 570.

The complainant has not, under the circumstances stated in the findings, established any privity with the original source of title, and has therefore no standing as an equitable owner, and is not entitled to maintain this suit.

Cooper v. *Roberts*, 18 How. 173, 15 L. ed. 338; *Spencer* v. *Lapsley*, 20 How. 264, 15 L. ed. 902; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. ed. 82; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 29 L. ed. 346; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482; *Hartman* v. *Warren*, 40 U. S. App. 245, 76 Fed. Rep. 157, 22 C. C. A. 30.

The patent, if issued under the swamp act, was an adjudication of fact within the exclusive jurisdiction of the Land Department, and cannot be impeached or reviewed by this court.

Johnson v. *Towsley*, 13 Wall. 72, 20 L. ed. 485; *Warren* v. *Van Brunt*, 19 Wall. 646, 22 L. ed. 219; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *French* v. *Fyan*, 93 U. S. 169, 23 L. ed. 812; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 806; *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929; *Quinby* v. *Conlan*, 104 U. S. 420, 26 L. ed. 800; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636, 26 L. ed. 875; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226; *Baldwin* v. *Stark*, 107 U. S. 463, 27 L. ed. 526; *United States* v. *Minor*, 114 U. S. 233, 29 L. ed. 110; *Lee* v. *Johnson*, 116 U. S. 48, 29 L. ed. 570; *Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039; *Knight* v. *United States Land Asso.* 142 U. S. 161, 35 L. ed. 974; *United States* v. *California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 39 L. ed. 931.

The particular mistake must be pointed out and designated by the finding of the Land Department, in order that it may appear whether what is claimed to be a mistake in the construction of law is really such.

Johnson v. *Towsley*, 13 Wall. 72, 20 L. ed. 485; *Marquez* v. *Frisbie*, 101 U. S. 473. 25 L. ed. 800; *Quinby* v. *Conlan*, 104 U. S. 420, 26 L. ed. 800.

Messrs. **J. M. Vale**, and *John Brennan*, for defendant in error:

Privity between the plaintiff and the United States sufficient to sustain this suit is found in the laws enacted by Congress governing the disposition of the public domain,

and in compliance or tender of compliance with such laws on the part of defendant in error as far as was in his power through the wrongful act of the land officers.

The rights of defendant in error have never been finally passed upon by the officers of the Land Department.

The question at issue is the superior right of the defendant in error over any right of the patentee or those claiming under the patent.

The mistake and inadvertence found, and which actually exists, is that of issuing a patent under any law or without law, to the state of Minnesota in the presence of the superior right of defendant in error.

The remedy sought to be enforced in this action has been held by this court in numerous cases to be the proper one, upon such an issue as that existing between the parties to this suit.

Silver v. *Ladd*, 7 Wall. 219, 19 L. ed. 138; *Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485.

Defendants in error cite, in support of their contentions herein:—

Barnard v. *Ashley*, 18 How. 43, 15 L. ed. 285; *Minnesota* v. *Bachelder*, 1 Wall. 115, 17 L. ed. 552; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *Samson* v. *Smiley*, 13 Wall. 91, 20 L. ed. 489; *Morrison* v. *Stalnaker*, 104 U. S. 213, 26 L. ed. 741; *Lindsay* v. *Hawes*, 2 Black, 554, 17 L. ed. 265; *Cunningham* v. *Ashley*, 14 How. 377, 14 L. ed. 462; *Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026; *Moore* v. *Robbins*, 96 U. S. 535, 24 L. ed. 850; *Lytle* v. *Arkansas*, 9 How. 334, 13 L. ed. 161; *Lansdale* v. *Daniels*, 100 U. S. 113, 25 L. ed. 587.

[589] *Mr. Justice **McKenna**, after stating the facts, delivered the opinion of the court:

Do the facts entitle the defendant in error to the relief which was awarded him by the state courts?

[590] *It is now too well established to need argument to support or a citation of authorities, that when a patent is obtained from the United States by fraud, mistake, or imposition, the question thence arising becomes one of private right, and the courts in a proper proceeding and in execution of justice will devest or control the title thereby acquired, either by compelling a conveyance to the plaintiff or by quieting his title as against the defendants, and enjoining them from asserting theirs. And in two late cases (*Germania Iron Co.* v. *United States*, 165 U. S. 379 [41: 754]; *Williams* v. *United States*, 138 U. S. 514 [34: 1026]), it was decided that this power extends to cases in which the patent was issued by inadvertence and mistake, the grounds relied on in the case at bar.

The plaintiff in error, however, contends that defendant in error cannot invoke this doctrine because he is not in privity with the United States; that he has not proved or offered to prove to it, or established, or alleged even in this case, the ultimate facts upon which alone his claim could be recognized or its validity established. In other words, that he has not made or has not offered to make final proof.

This contention is attempted to be supported by the principles announced in *Bohall* v. *Dilla*, 114 U. S. 47 [29: 61]; *Sparks* v. *Pierce*, 115 U. S. 408 [29: 428]; *Lee* v. *Johnson*, 116 U. S. 48 [29: 570]. The principles are that to enable one to attack a patent from the government he must show that he himself was entitled to it. It is not sufficient for him to show that there may have been error in adjudging the title to the patentee. He must show that by the law properly administered the title should have been awarded to him.

We do not question these principles, but they only mean that the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim. It does not mean that at the moment of time the patent issued it should have been awarded to him. The acts performed by him may or may not have reached that completeness; may not have reached it, and yet justify relief, as in *Ard* v. *Brandon*, 156 U. S. 537 [39: 524], and in *Morrison* v. *Stalnaker*, 104 U. S. 213 [26: 741]. And because of the well-established *principle that where an individ- [591] ual in the prosecution of a right has done that which the law requires him to do, and he has failed to attain his right by the misconduct or neglect of a public officer, the law will protect him. *Lytle* v. *The State of Arkansas*, 9 How. 333 [13: 160].

It would be arbitrary to apply the principle to some acts and not to others—might destroy it utterly to require the performance of all. But we are indisposed to extend the argument, because we regard *Ard* v. *Brandon* as decisive.

In that case the claimant against the patent, being qualified and entitled, offered to make final proof, and from the denial of the offer prosecuted appeals successively to the Commissioner of the General Land Office and the Secretary of the Interior, and each decided against him. In this case defendant in error, also being qualified and entitled, offered to enter the land, which offer was denied, and against the claim of the state of Minnesota he instituted a contest, which was pending in the General Land Office, when the patent was issued by inadvertence and mistake, and his right thereby defeated. We do not regard this difference in the cases substantial.

But it is urged defendant in error may not be able to make final proof, and that the Land Department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings by the court show full qualification in the defendant in error and we cannot presume that the Land Department will find against the fact, which the state courts have found, that the lands "were not at the time of the passage of the act of March 12th, 1860, nor were they ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation."

In *Ard* v. *Brandon* relief was adjudged against title derived under patents—one

from the state of land certified to it by the United States and one directly from the United States. Equally is the defendant in error entitled to relief against the title claimed by plaintiff in error.

Judgment affirmed.

---

[592] HENDERSON BRIDGE COMPANY and the Louisville & Nashville Railroad Company, *Plffs. in Err.*,

v.

CITY OF HENDERSON.

(See S. C. Reporter's ed. 592-624.)

Review of state judgment—extent of the jurisdiction of the city of Henderson, Kentucky, for the purposes of taxation—boundary of Kentucky upon the Ohio river—taking of private property for public use without just compensation—nonwaiver of right to collect taxes—right of city to tax for municipal purposes—impairment of contract—provision in city charter forbidding taxation of certain lots—power to tax not impaired because a bridge is used for interstate commerce and erected with permission of Congress.

1. This court has jurisdiction to review the state judgment in this case to ascertain whether it deprives defendants of any right, privilege, or immunity set up by them under the Federal Constitution.
2. The city of Henderson has authority to tax so much of the Henderson Bridge Company's property as is permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river.
3. The boundary of Kentucky extends to low-water mark on the Indiana shore of the Ohio river.
4. The taxation by the city of Henderson, of a bridge belonging to said company and its appurtenances within the fixed boundary of the city, between low-water mark on the two sides of the Ohio river, is not a taking of private property for public use without just compensation in violation of the Federal Constitution.
5. The stipulation in the grant to the bridge company, that the grant should not be construed as waiving the rights of the city to collect taxes on the bridge and its appurtenances, saves to the city a right to impose such taxes as the law then or thereafter shall authorize it to impose.
6. The said bridge property within the limits of said city enjoys such benefits from the city government that, consistently with the United States Constitution, it may be subjected to municipal taxes.
7. The ordinances under which the bridge was taxed do not impair the obligation of the contract between the bridge company and the Louisville & Nashville Railroad Company.
8. The provision in the city's charter, forbidding the taxation of lands not divided into lots of 5 acres or less, does not apply to a bridge erected over the Ohio river within the city's limits.
9. The power of Kentucky to tax such bridge is not lessened because it was erected under the authority or by consent of Congress; nor is it exempt from taxation because it is used for interstate commerce.

[No. 32.]

Argued May 6, 9, 1898. Decided April 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming a judgment of the Circuit Court of Henderson County, Kentucky, which established the right of the City of Henderson, the plaintiff, to tax the property of the Henderson Bridge Company, situate between the low-water mark on the Kentucky side of the Ohio river and the low-water mark on the Indiana side of said river and the approach thereto situated in said city, and adjudged that the plaintiff had a lien on such property for the amount of certain unpaid taxes. Judgment of the Court of Appeals *affirmed.*

See same case below, 36 S. W. 561.

The facts are stated in the opinion.

Messrs. **William Lindsay, Malcolm Yeaman,** *John W. Lockett,* and *H. W. Bruce* for plaintiffs in error.

Messrs. **James W. Clay** and *J. F. Clay* for defendant in error.

*Mr. Justice **Harlan** delivered the opinion of the court: [593]

This case arises out of the taxation by the city of Henderson, a municipal corporation of Kentucky, of a railroad bridge (with its approaches, piers, etc.,) extending from a point within that city on the Kentucky shore across the Ohio river to low-water mark on the Indiana shore.

The property subjected to taxation belongs to the Henderson Bridge Company, a corporation of Kentucky, but is under the care, management, and control of the Louisville & Nashville Railroad Company, also a corporation of that commonwealth.

Those corporations insist that the final judgment of the court of appeals of Kentucky, here for review, affirming a judgment rendered in the circuit court of Henderson county, is in derogation of rights secured to them by the Constitution of the United States. The grounds upon which this contention rests will appear from the statement presently to be made of the history of the litigation between the city of Henderson and the corporations named in respect of taxes assessed upon the bridge property in question.

The city contends, not only that the assessment of taxes upon this property was in all respects valid, but that the matters here in dispute, including the questions of constitutional law raised by the bridge and railroad companies, have been conclusively determined in prior litigation between the parties.

The facts which it seems necessary to state in order to bring out clearly and fully the various questions raised by the pleadings and discussed by counsel are as follows:

The Henderson Bridge Company was in-

corporated by an act of the general assembly [594] of the commonwealth of Kentucky *approved February 9, 1872, with authority to construct "a bridge across the Ohio river, extending from some convenient point within the corporate limits of the city of Henderson to some convenient point on the Indiana side of said river, opposite the city of Henderson." Acts Ky. 1871-2, vol. 1, p. 314.

The city's boundary as defined by its charter granted February 11, 1867, extended "to low-water mark on the Ohio river on the Indiana shore," and it had the power (with certain exceptions not material to be noticed here) to levy and collect taxes at a prescribed rate upon all property within its limits made taxable by law for state purposes.

In 1882 an ordinance was passed by the common council of the city granting to the Henderson Bridge Company the right "to construct on or over the center of Fourth street in the city of Henderson, and of the line thereof extended to low-water mark on the Indiana side of the Ohio river, such approaches, avenues, piers, trestles, abutments, toll-houses, and other appurtenances necessary in the erection of and for the business of a bridge over the Ohio river, from a point in the city of Henderson to some convenient point on the Indiana side of said river, and for such purposes the use of said Fourth street is hereby granted, subject to the terms and conditions hereinafter expressed;" also, the right "to use the space between Water street in said city and low-water mark in the Ohio river, extending one hundred feet below the center of Fourth street extended and three hundred feet above the center of said street extended to the Ohio river for the purpose required by said company." The company was also permitted to "erect, or authorize or cause to be erected, grain elevators within said space above high-water mark, and may construct therefrom to the river such apparatus and machinery as may be necessary to convey grain from boats to such elevators, and may have the use of said space for the landing of boats laden with freight for such elevators and construct floating docks or use wharf boats within such space for the accommodation of such boats and the conduct of the business of such bridge and of [595] the said elevators free of *wharfage, subject to the terms and conditions hereinafter expressed."

The fourth section of that ordinance declared that it should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city."

The fifth section provided that before any of the rights or privileges so granted should inure to the benefit of or vest in the bridge company the latter should by proper authority append to a certified copy of the ordinance their acceptance of and agreement to abide by and faithfully keep its terms and conditions, such acceptance and agreement to be acknowledged by the proper authority of the company as provided in the case of a deed under the laws of Kentucky, and delivered to the clerk of the Henderson city council.

The bridge company duly accepted the ordinance with its terms and conditions, agreed to abide by and faithfully keep the same, and its acceptance was acknowledged and delivered to the city council.

In 1884 an agreement in writing was entered into between the bridge company and the Louisville & Nashville Railroad Company reciting that the former was about to proceed with the erection of a bridge over the Ohio river at or near Henderson, and of a railroad connecting the Henderson division of the Louisville & Nashville Railroad Company at Henderson with the South East & St. Louis Railway in or near Evansville, Indiana; that certain railroads, including the Louisville & Nashville Railroad Company, had by agreement guaranteed to the bridge company an income from traffic amounting to two hundred thousand dollars per annum; and that it was deemed for the interest of all parties, and had been requested by the bondholders under the mortgage placed on the bridge, that the Louisville & Nashville Railroad Company should assume the control, management, and care of the track of said railroad so to be constructed, and should effect the usual repairs to such bridge caused by *ordinary wear and tear, and pay taxes [596] imposed on said track and the bridge on compensation being made therefor by the bridge company. By that agreement the bridge company undertook to pay the railroad company absolutely and in each year during the continuance of the agreement, in equal quarter-yearly payments, the sum of ten thousand dollars per annum, which amount or such parts thereof as were required the railroad company agreed to apply to the maintenance of the track and roadbed of said railroad in good condition and repair, and towards the usual and ordinary repairs of the bridge; and also to pay all taxes imposed on said track or bridge structure and each of them.

On the 8th day of December, 1887, the city by petition filed in the circuit court of Henderson county, Kentucky—that mode of collecting taxes being authorized by the local law—brought suit against the Henderson Bridge Company to recover the sum of $44,-824 as the amount of taxes with penalties thereon due from the bridge company under ordinances passed by the city in 1885, 1886, and 1887, levying and assessing taxes for certain purposes. The petition referred to the above ordinance authorizing the construction of the bridge, and among other averments in it were the following:

"The defendant commenced the construction of said bridge in the year 1883 and completed same in the month of July, 1885, and at a cost of about $2,000,000, and on the — day of July, 1885, the first train ran over said bridge. The approach to said bridge is constructed over Fourth street, near the principal portion of said city, commencing at the west line of Main street and extending to the main structure of said bridge at Water street (though, plaintiff claims,

not in accordance with the terms of said ordinance). The rights and privileges granted by the plaintiff to the defendant were of great value, and the plaintiff was influenced and induced to so grant them by the belief in the right on the part of the plaintiff to tax said bridge as other property is taxed within the city limits. By the building of said bridge through the rights and privileges so granted by the plaintiff the system of roads north of the Ohio River
[597]has been connected with the *Louisville & Nashville Railroad south of the river, and the said bridge company's property has become so valuable that its bonds to the amount of about $2,000,000 are worth a premium of 8½ per cent."

The assessment against the bridge company on account of the bridge and its approaches was upon a valuation of $600,000 in 1885 and $1,000,000 in each of the years 1886 and 1887. In its petition the city claimed a lien upon the bridge from the beginning of its approach at Main street in the city of Henderson to low-water mark on the Indiana side of the Ohio river for said taxes and the penalties thereon.

The bridge company in its answer denied the material allegations of the petition and alleged—

That the city had no authority to levy taxes for the purposes indicated in the ordinances referred to;

That the declaration in the ordinance granting the right to construct the bridge within the city's limits meant and was intended to mean nothing more than that the city did not waive any right to tax then possessed by it;

That the bridge was built only for the purpose of laying a single railroad track on which to move locomotives and cars between Kentucky and Indiana over the Ohio river;

That except as to that part of the bridge commencing at the west line of Main street in the city of Henderson and extending to the main structure at Water street, the bridge company derived no assistance or protection from the city, and that part between the Kentucky and Indiana shores upon stone piers and pillars resting upon the bed of the Ohio river was not subject to taxation by the city;

That the bridge was located and constructed in conformity with the two acts of the Congress of the United States, the one entitled "An Act to Authorize the Construction of Bridges across the Ohio River and to Prescribe the Dimensions of the Same," approved December 17th, 1872, and the other entitled "An Act Supplementary to an Act Approved December 17th, 1872," entitled "An Act to Authorize the Construction of Bridges across the Ohio River and to Prescribe the Dimensions of the Same," approved February 14, 1883, 17 Stat. at L. 398, chap. 4; 22 Stat. at L. 414, chap. 44.

[598] *That the whole of said bridge between the Kentucky shore and the Indiana shore, 1,968 feet in length, was over the water of the Ohio river, except the piers or pillars that support it;

That the Ohio river was a navigable stream within the entire control and jurisdiction of Congress and the courts of the United States, and that assumption of control by the city of that part of the bridge for purposes of taxation or for any purpose except for executing writs from its police authorities, would be in violation of the Constitution of the United States, the laws of Congress and the rights of the defendants; and,

That, as the bridge derived no profit, protection, or advantage from the government of the city, to subject it to city taxation would be to take private property for public use without just compensation, in violation of the Constitution of the United States as well as of the Constitution and laws of Kentucky and of the defendant's rights in the premises.

The answer of the bridge company further alleged—

That the Louisville & Nashville Railroad Company was a necessary party to that suit;

That when it constructed its bridge it was the settled law of Kentucky, as shown by the judgment of the court of appeals of Kentucky in *Louisville Bridge Company* v. *City of Louisville*, 81 Ky. 189, that the part of the bridge erected over and across the Ohio river was not liable to municipal taxation;

That relying upon such being the law of Kentucky the defendant and the Louisville & Nashville Railroad Company entered into the above agreement of February 27, 1884; and.

That to grant to the plaintiff the relief prayed for or any part thereof would be a direct impairment of the contract between the bridge company and the railroad company.

The railroad company having been made a party, adopted the answer of the bridge company.

The state circuit court adjudged that, the bridge being in an incomplete condition on the 10th day of January, 1885, the city was not entitled to tax it for that year. But as to the years 1886 and 1887, it was adjudged that the bridge and the approach thereto were subject to taxation for all the purposes
*and for the amounts claimed in the city's [599]
petition; and that the city had a lien upon the bridge structure, masonry piers, and the approach thereto situated within its boundary extending to low-water mark on the Indiana side of the Ohio river, for the taxes assessed for the years 1886 and 1887 with interest and costs expended. The bridge company was directed to pay said sums, with interest and costs, to the plaintiff on or before a named day.

In a brief opinion of the state circuit court it was said that the taxable boundary of the city was coextensive with its statutory boundary. Referring to the case of the *Louisville Bridge Company* v. *City of Louisville*, 81 Ky. 189, the court held that that case decided nothing more than that the legislature did not intend that the bridge *there* in question should be subject to taxation. It was further said: "Several cases are relied on where the courts of appeals have relieved parties from the payment of

taxes on agricultural lands when the city limits had been extended without the owner's consent. The rule, if one has been established by those cases, should not be extended to cases where property has been voluntarily brought within such boundaries. The party thus bringing in his property should be treated as one who sanctioned the extension of a city so as to include his agricultural lands. All that can be deduced from these cases is that in each extension of a town or city the court will hear the complaints of any taxpayer and grant or not grant him relief, as the merits of his particular case may demand. In this case the defendants voluntarily placed their property within the legally established limits of the city and should pay the taxes assessed on other property holders of the city after 1885."

The bridge company and the railroad company prosecuted an appeal to the court of appeals of Kentucky, and the city was granted a cross-appeal from so much of the judgment as disallowed its claim of taxes for 1885.

In the court of appeals of Kentucky the judgment was affirmed. In its opinion it is apparently conceded that the city could not under its charter tax the bridge structure over the river for ordinary municipal pur-
[600] poses, that is, "for the support *of its government proper." But it was said that if the city was created a taxing district it could do so. Referring to the contract or terms upon which the bridge company acquired the right to construct its bridge within its limits, and particularly to the clause declaring that the ordinance should not be construed as waiving the right of the city to tax the bridge and its appurtenances within the corporate limits of the city, the court said:

"The appellant contends it was only meant to reserve the right to tax such property of the appellant as was theretofore subject to taxation by the city government, and, as that part of the bridge situated on the water of the Ohio river was not, for the reason above indicated, subject to taxation, the reservation relates to that part of the bridge, etc., that the appellee had the right to tax under the law. It is evident that the contract was well considered and prudently drafted by men skilled in that kind of work, and it is not presumed that they engaged in a mere *nudum pactum*, but they meant to set forth a business transaction. Now, that business transaction was evidently this: The appellant desired rights and privileges that it did not possess and which it could not possess without the consent of the appellee. So it said to the appellee, Grant these privileges and you may tax what? Only the approach to said bridge? No; because the appellee already had the right to tax that, and it had made no concessions that could possibly be construed as waiving that right. What right, then, was granted? Why, the right to tax the 'bridge itself.' The bridge, as distinguished from its abutments and approaches, is that part that is over the water. Now, the appellee, according to the *Louisville Bridge Case*, in its municipal capacity had no right to tax that part of the bridge over the water. Why, then, say that it did not waive the right to tax it? To waive a right there must be a claim of right to waive. Well, it is said, as the appellee had no right to tax the bridge, there was in fact no right to waive. As an abstract proposition of the right to tax the bridge on the water (according to said case), this contention is true; but it is equally true that the appellee had the right, if asserted and *agreed to, to claim that the bridge should be [601]
taxed in consideration of the privileges granted. This claim of right, it must be presumed, was asserted and agreed to and expressed in the contract by the term 'not waiving the right.' If the contract does not mean this, then it means nothing. It is not supposed that the contracting parties only meant to reserve a right that they already had and about which there was no possible ground of dispute; but when it is considered that the right to tax the bridge to the Indiana shore might be legitimately obtained by contract, and that the appellee granted to the appellant rights and privileges essential to its enterprise, designed to make money and is making a large per cent, it is entirely reasonable to suppose that the appellees would contract for the right to thus tax the appellant in consideration of granting these essential rights and privileges, by which the appellant acquired the right to construct and operate so profitable a business enterprise. So it seems much more reasonable to suppose that the contracting parties intended to do this reasonable thing, to wit, to receive some consideration for the grant of privileges rather than indulge in a mere *nudum pactum*. The appellant, at least for the purpose of collecting taxes, should be considered as a part of a railroad; consequently, falls within the principle announced in *Elizabethtown & Paducah R. R. Co.* v. *Trustees of Elizabethtown*, 12 Bush, 239." [90 Ky. 498], 14 S. W. 493.

Chief Justice Holt delivered a separate opinion, in which he said: "The legislature by authorizing the imposition and collection of the railroad and school taxes upon the real estate within the city limits created a taxing district. The power to collect these taxes was therefore conferred upon the appellee as such a district, and the appellant's property, being within it, is liable for them. As to the municipal taxes proper, the appellant's property is within the corporate limits, and, in my opinion, receives such benefits from the municipal government as render it both legally and justly liable for them." [90 Ky. 498], 14 S. W. 493.

The bridge company and the railroad company sued out a writ of error from this court, but the writ was dismissed *upon the [602]
ground that although a Federal question may have been raised in the state court, the judgment of the latter court rested upon grounds broad enough to sustain the decision without reference to any such question. Mr. Justice Blatchford, delivering the opinion of the court, said: "The opinion of the state court is based wholly upon the ground that

the proper interpretation of the ordinance of February, 1882, was that the bridge company voluntarily agreed that the bridge should be liable to taxation. This does not involve a Federal question, and is broad enough to dispose of the case without reference to any Federal question. This court cannot review the construction which was given to the ordinance as a contract by the state court. There is nothing in the suggestion that the taxation of the bridge is a regulation of commerce among the states, or is the taxation of any agency of the Federal government. The case of *Louisville Bridge Co.* v. *City of Louisville*, 81 Ky. 189, was not decided until May, 1883, more than a year after the ordinance of the city of Henderson was accepted by the bridge company, in February, 1882. The contract of February, 1884, between the bridge company and the railroad company, was made more than two years after the ordinance of February, 1882, came into existence. Neither the opinion of the court of appeals in the present case, nor that of Chief Justice Holt, nor that of the circuit court of the state, puts the decision upon any Federal question; and on this writ of error to the state court, we are bound by its interpretation of the contract contained in the ordinance, in view of the Constitution and laws of Kentucky, and cannot review that question." *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 689 [35: 900, 904].

By an act of the general assembly of Kentucky, approved April 9, 1888, the charter of the city of Henderson was repealed, and the city reincorporated with the following boundaries: "Beginning at a stone on the west side of the Madisonville road; thence north 48° 35′ east, five thousand six hundred and forty-one feet to a stone near the White bridge on the Henderson and Zion Gravel Road; thence in a straight line north 11° 35′
[603] west to the dividing line of the *ten-acre lots Nos. 4 and 5; thence with the dividing line of said lots north 71° west to low-water mark on the Ohio river on the Indiana shore; thence down the river with the meanders thereof at low-water margin to a point opposite the south line of Hancock street; thence across said river south 59° east along the south line of said Hancock street in a straight line to the beginning." Ky. Acts 1887–8, vol. 2, p. 937. That act, as did the original charter of the city, gave the common council power, within the limits of the city, to levy and collect taxes at a prescribed rate upon all property in the city subject to taxation under the revenue laws of the state for state purposes, with certain exceptions which need not be stated.

The common council, by an ordinance passed in 1888 and providing for the annual tax levies for that year, imposed an *ad valorem* tax "on all property within the limits of the city of Henderson subject to taxation under the present revenue laws of the state of Kentucky for state purposes, to be paid by the owners of said property, respectively; provided, however, that no land embraced within the city limits and outside of the ten-acre lots as originally laid off shall be assessed and taxed by the council, unless the same is divided and laid off into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes." Similar ordinances were passed providing the annual tax levies for the fiscal years 1889 and 1890. As appears from the ordinances, these taxes were laid for the purpose of raising money sufficient to pay interest on the city's bonded indebtedness, defray the ordinary expenses of the city government, and meet the annual expenses of the public schools of the city.

Under the above ordinances, the city caused the bridge in question to be assessed by the city assessor for taxation to low-water mark on the Indiana side of the Ohio river, as other property in the city, for the years 1888, 1889, and 1890, at a valuation of one million dollars for each of those years.

The present suit was instituted by the city against the bridge company and the Louisville & Nashville Railroad *Company to [604]
recover the amount of taxes for the years 1888, 1889, and 1890 alleged to be due under the above assessments. It is not disputed that those assessments embraced the bridge and its piers between low-water mark on the Kentucky side of the Ohio river and low-water mark on the Indiana shore.

During the progress of the cause the plaintiff dismissed its suit so far as it related to taxes for the year 1890 without prejudice to any future action by it to recover those taxes.

The bridge company filed its answer, in which—after stating some grounds of defense which did not specifically rest on the Constitution or laws of the United States—it was averred—

That when it accepted its charter it was the settled law of Kentucky and had been for more than forty years, as declared in many cases by its highest court, that real estate within the boundaries of a town or city could not be taxed for municipal purposes unless it was capable of being profitably used and converted into town property and also received benefits, both actual and presumed, from the municipal government seeking to tax such property;

That the defendant constructed its bridge on the faith of the law of the commonwealth as thus long established, and that the law thus established became a part of the contract between Kentucky and the defendant growing out of the granting and acceptance of its charter;

That it was also the settled law of Kentucky when the bridge in question was constructed that in the case of bridges across the Ohio river from a point in a city or town whose boundary extended to a low-water mark on the northern shore of the Ohio river a city or town had no power or authority under a charter duly enacted authorizing the taxation of property by the municipal government within its corporate boundary to tax such bridge beyond low-water mark on the Kentucky or southern side of said river;

That a city boundary fixed at low-water mark on the Indiana shore was not, in the meaning and intent of the legislative act so

fixing it, intended to define the taxable [605] boundary *of the city, but only to confer upon the city jurisdiction for police purposes upon the waters of the river to the Indiana shore, and that it was further settled by the court in the case of *Louisville Bridge Company* v. *City of Louisville*, 81 Ky. 189, that such an act, if intended to confer a taxing power over property erected in said stream beyond the low-water mark on the Kentucky side, was in violation of that provision of the Constitution of this state which prohibits the taking of private property for public purposes without just compensation, and of the like provision of the Constitution of the United States, and would, to the extent it conferred on the city such power, be absolutely null and void, and that the city could not tax said property for waterworks, school or railroad purposes, nor for any municipal purposes whatever;

That the defendant, relying upon the law as thus established, went forward and built its bridge to low-water mark on the Indiana shore of the Ohio river, and the legislative acts and city ordinances pleaded by plaintiff as authority for the collection of the tax upon that part of the bridge beyond low-water mark of the Ohio river on the Kentucky shore have all been passed since the law of Kentucky was settled as above stated, and are null and void as contrary to that provision of the Constitution of the United States forbidding any state to pass a law impairing the obligation of contracts, and as contrary to those constitutional provisions, state and Federal, that prohibit the taking of private property for public uses without just compensation;

That the above legislative acts and ordinances constitute the only authority the plaintiff has for the assessment of defendant's property or the levy and collection of the taxes thereon sued for herein, and the said act of April 9, 1888, which constituted the only authority the city of Henderson has to levy or collect taxes for any purposes or upon any property, and the alleged city ordinances of May, 1888, and of April 24, 1889, and of May 24, 1890, were each and all passed and ordained subsequent to the acceptance by the defendant of its charter of incorporation and its expenditure of the large sums of money aforesaid in the con- [606] struction of its bridge, and to the *extent that the said act or the said ordinances or either of them do or may authorize any portion of defendant's bridge structure situated north of low-water mark on the Kentucky shore to be taxed are null and void because repugnant to the Constitution of the United States;

That the defendant has at all times been willing to pay taxes for the purposes set out in the petition on that portion of its bridge which is in fact and in the sense of the legislative acts referred to within the boundary of the city of Henderson, to wit, from the beginning of the approach on the west side of Main street to low-water mark of the Kentucky shore; and,

That the taxable boundary of the plaintiff on the Ohio river is the low-water mark on the Kentucky shore.

The answer of the bridge company further averred: "The territory on both sides of the Ohio river was, prior to the year 1784, a part of the state of Virginia, in which year she ceded to the United States the territory north and west of said river. On the 18th of December, 1789, the Congress of the United States passed the 'Compact with Virginia,' which authorized the establishment of the state of Kentucky, and which compact defined the rights of the said state in and to the Ohio river. By the eleventh section of that compact it is provided 'that the use and navigation of the river Ohio, so far as the territory of the proposed state (Kentucky) or the territory which shall remain within the limits of this commonwealth (Virginia) lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction of this commonwealth and the proposed state on the river aforesaid shall be concurrent only with the states which may possess the opposite shores of said river;' that by said compact, formed and ratified between the United States and the states of Virginia and Kentucky, the bed of the Ohio river, so far as it is permanently under water, is the common property of the people of the United States; that it forms a great interstate highway of commerce, in which a great part of the country has a direct interest, and cannot be made the subject of taxation by the state of Kentucky nor any municipal government created by said state, and is by the Constitution and *laws of the United States under the ex- [607] clusive control of the government of the United States; that said stream is a navigable stream from its source to its mouth, and the defendant's bridge sought to be taxed by this proceeding is located and built under the permission and authority of and as required by an act of the Congress of the United States entitled 'An Act to Authorize the Construction of Bridges across the Ohio River and Prescribe the Dimensions of the Same,' approved December 17, 1872, and another act of said Congress entitled 'An Act Supplementary to an Act approved December 17, 1872, entitled "An Act to Authorize the Construction of Bridges across the Ohio River and Prescribe the Dimensions of Same, approved February 14th, 1883," ' and the defendant submits that the plaintiff has no jurisdiction over said stream to tax any property placed therein by authority of Congress, and for plaintiff to assume to tax said bridge thus situated would be violative of the Constitution of the United States, the laws of Congress, and of the defendant's rights in the premises."

The bridge company defended the action upon the further ground that the relief asked by the city could not be granted without directly impairing the obligation of the contract between it and the railroad company; which contract, it was insisted, was to be interpreted in the light of the law of Kentucky as it was when such contract was made and without reference to subsequent

legislative acts and ordinances inconsistent with its provisions.

The railroad company adopted the answer of the bridge company—averring, among other things, that to grant the plaintiff the relief prayed for or any part thereof would be a direct impairment of the obligation of the contract between the railroad company and the bridge company and a violation of the tenth section of the first article of the Constitution of the United States.

The city filed a reply, in which the material allegations of the answers were controverted. It accompanied its reply with a transcript of the proceedings in the above suit between it and the bridge and railroad companies brought in 1887 to recover the taxes assessed for the years 1885, 1886, and
[608] 1887, *including the proceedings in this court on the appeal prosecuted by those companies. The reply concludes: "The plaintiff says that the right of plaintiff to assess and collect the taxes sued for against the defendant the Henderson Bridge Company, its jurisdiction thereon, and all questions raised by the pleadings in this case, except as to the passage of the ordinances alleged, are now *res judicata*, and plaintiff pleads and relies upon same as a bar to defendants' pleas herein, and prays as in its petition."

Judgment was rendered in favor of the city for the taxes (with interest and penalties) for the years 1888 and 1889: and it was adjudged that for the amounts found due the city "has a lien upon the bridge structure, masonry, and piers (mentioned in the petition) and the approach thereto situated within the boundary of the state of Kentucky and extending to low-water mark on the Indiana side of the Ohio river." That judgment having been affirmed by the court of appeals of Kentucky, the present writ of error was sued out.

1. If the state court had sustained the city's plea of *res judicata* upon some ground that did not necessarily involve the determination of a Federal right it might be that the present case would come within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a state will not pass upon a Federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such Federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the court of appeals of Kentucky in this case we find that that court expressly waived any decision upon the plea of *res judicata* for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defense, namely, that the Constitution of the United States forbade the assessment of that part of
[609] the *bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river. This court therefore has jurisdiction to review the final judgment of the state court for the purpose of ascertaining whether it deprived the defendant of any right, privilege, or immunity specially set up by them under that instrument.

2. Whether the city of Henderson had authority to tax so much of the property of the bridge company as was permanently between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio river depends primarily upon the question whether the boundary of Kentucky extended to low-water mark on the Indiana shore. That question has been settled by judicial decisions. But it may be well to restate here the grounds of those decisions.

Pursuant to a resolution of Congress passed in 1780, recommending to the several states asserting title to waste and unappropriated lands "in the western country" that a liberal cession be made by them to the United States of a portion of their respective claims for the common benefit of the Union, the commonwealth of Virginia, by an act passed January 2d, 1781, surrendered to the United States all her right, title, and claim "to the lands northwest of the river Ohio," subject to certain conditions, one of which was that the ceded territory should be laid out into states. 10 Hening's Stat. 564. The United States having accepted that cession substantially according to the conditions named, Virginia by an act passed December 20, 1783, authorized her delegates in Congress to convey to the United States all her right, title, and claim, "as well of soil as jurisdiction," to the territory or tract of country within the limits of the Virginia charter situated "to the northwest of the river Ohio." 11 Hening's Stat. 326. Such a deed was executed in 1784 by Thomas Jefferson, Samuel Handy, Arthur Lee, and James Monroe, representing Virginia—the deed describing the territory conveyed as "situate, lying, and being to the northwest of the river Ohio." On the 13th day of July, 1787, *Con- [610]
gress passed an ordinance for the government of the territory of the United States "northwest of the river Ohio." That ordinance provided, among other things, that "no tax shall be imposed on land the property of the United States," and that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 Stat. at L. 51, *note*, chap. 8. Virginia, by an act passed in 1788, and which referred to the above ordinance, declared that "the aforerecited article of compact between the original states and the people and states in the territory northwest of the Ohio river, be and the same is hereby ratified and confirmed, anything to the contrary in the deed of cession of the said territory by this commonwealth to the United States notwithstanding." 12 Hening's Stat. 780. On the 18th day of December, 1789, the general assembly of Virginia passed the act entitled "An Act

Concerning the Erection of the district of Kentucky into an Independent State." That act provided for a convention in Kentucky to consider and determine whether that district should be formed into an independent state. Its eleventh, fourteenth, fifteenth, and eighteenth sections were in these words: "§ 11. That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river." "§ 14. That if the said convention shall approve of the erection of the said district into an independent state on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the
[611] authority of this *commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed state, and the said articles become a solemn compact, mutually binding on the parties, and unalterable by either without the consent of the other. § 15. *Provided, however,* That, prior to the first day of November, one thousand seven hundred and ninety-one, the general government of the United States shall assent to the erection of the said district into an independent state, shall release this commonwealth from all its Federal obligations arising from the said district as being part thereof, and shall agree that the proposed state shall immediately after the day to be fixed as aforesaid, posterior to the first day of November, one thousand seven hundred and ninety-one or at some convenient time future thereto, be admitted into the Federal Union." "§ 18. This act shall be transmitted by the Executive to the representatives of this commonwealth in Congress, who are hereby instructed to use their endeavors to obtain from Congress a speedy act to the effect above specified." 13 Hening's Stat. 17. This was followed by an act of Congress approved February 4, 1791, which referred to the above Virginia act of December 18, 1789, and expressed the consent of Congress that the said district of Kentucky, "within the jurisdiction of the commonwealth of Virginia, and according to its actual boundaries on the 18th day of December, 1789;" should, on the 1st day of June, 1792, be formed into a new state, separate from and independent of the commonwealth of Virginia. 1 Stat. at L. 189, chap. 4.

Early in the history of Kentucky some doubts were expressed as to the location of the western and northwestern boundaries of that commonwealth, and to quiet those doubts its legislature passed the following act, which was approved January 27, 1810: "Whereas doubts are suggested whether the counties calling for the river Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which *Be it enacted by the General Assembly,* That each county of this commonwealth, calling *for the river [612]
Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the main land opposite thereto, within this state, and the several county tribunals shall hold jurisdiction accordingly." Ky. Sess. Laws 1810, p. 100.

Next in order of time and as determining the boundary line of Kentucky is the judgment of this court in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 379, 380 [5: 113, 114] (1820) which case involved the question of the western and northwestern boundaries of that commonwealth. This court adjudged, upon a review of the legislative acts and public documents bearing upon the question—Chief Justice Marshall delivering its opinion—that although a certain peninsula or island on the western or northwestern bank of the Ohio, separated from the mainland by only a narrow channel or bayou which was not filled with water except when the river rose above its banks, was not within Kentucky as originally established, the boundary of that commonwealth did extend to low-water mark on the western and northwestern banks of the Ohio. "When a great river," said the chief justice, "is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state [Virginia] is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary." "Whenever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

The question of boundary was again before this court in *Indiana* v. *Kentucky*, 136 U. S. 479, 505, 519 [34: 329, 331, 336]. That was a controversy between Kentucky and Indiana as to the boundary lines of the two states at a particular point on the Ohio river. Mr. Justice Field, delivering the unanimous judgment *of the court, after referring [613]
to all the documentary evidence relating to the question and to the decision in *Handly's Lessee* v. *Anthony*, above cited, said: "As thus seen, the territory ceded by the state of Virginia to the United States, out of which the state of Indiana was formed, lay northwest of the Ohio river. The first inquiry therefore is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, how far did the jurisdiction of Kentucky extend on the other side of the river." Referring to the channel of the Ohio river as it was when Kentucky was admitted into the Union, this court stated its conclusion to be that "the

jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel."

The same view of the question of boundary was taken by the court of appeals of Kentucky in *Fleming* v. *Kenney*, 4 J. J. Marsh. 155, 158, *Church* v. *Chambers*, 3 Dana, 274, 278, *McFarland* v. *McKnight*, 6 B. Mon. 500, 510, and *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394, 396, and by the general court of Virginia in *Commonwealth* v. *Garner*, 3 Gratt. 655, 667.

Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river.

Such being the case, it necessarily follows that the jurisdiction of that commonwealth for all the purposes for which any state possesses jurisdiction within its territorial limits is coextensive with its established boundaries, subject, of course, to the fundamental condition that its jurisdiction must not be exerted so as to intrench upon the authority of the National government or to impair rights secured or protected by the National Constitution.

3. But the plaintiffs in error insist that although the jurisdiction of Kentucky may extend to low-water mark on the opposite shore of the Ohio river, the city of Henderson cannot assess for taxation any part of the property of the bridge company between
[614] low-water mark on the Kentucky shore *and low-water mark on the Indiana shore without violating the Constitution of the United States in particulars to be adverted to presently.

In considering this objection so far as it rested on Federal grounds, we shall assume that the action of the city of Henderson was authorized by the terms of its charter and was in no respect forbidden by any principle of local law. Upon these points we accept the decision of the highest court of Kentucky as conclusive. We accept also as binding upon this court the declaration of the state court that Kentucky intended by its legislation to confer upon the city of Henderson a power of taxation for local purposes coextensive with its statutory boundary. But we may add, as pertinent in the consideration of the Federal questions presented, that if the commonwealth of Kentucky could tax for state purposes the bridge property so far as it was between low-water mark on the Kentucky shore and low-water mark on the Indiana shore, it could confer upon one of its municipal corporations the power to tax the same property for local purposes. So that a judgment declaring the taxation of such property by the city of Henderson for local purposes, under the authority of the state, to be forbidden by the Constitution of the United States, would in effect declare that like taxation by the state for state purposes would be forbidden by that instrument.

It is said that the bridge property outside of low-water mark on the Kentucky shore is so far beyond the reach of municipal protection by the authorities of the city of Henderson that it cannot be said to receive any benefits whatever from the municipal government, and that to impose taxes for the benefit of the city upon such property is a taking of private property for public use without just compensation, and therefore inconsistent with the due process of law ordained by the Fourteenth Amendment of the Constitution of the United States. *Chicago, Burlington & Q. R'd Co.* v. *Chicago*, 166 U. S. 226, 241 [41: 979, 986]. It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation.

But in order to bring taxation imposed by a state or under *its authority within the [615]
scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. In the case before us the state court rejected the idea that the bridge property in question was entirely beyond municipal protection and could not receive any of the benefits derived from the municipal government of the city of Henderson. We cannot adjudge that view to be so clearly untenable as to entitle the defendants to invoke the principle that private property cannot be taken for public use without just compensation.

On the contrary the property which it is contended was illegally taxed is all within the territorial limits of Kentucky, within the statutory boundary of the city of Henderson, and within reach of the police protection afforded by that city for the benefit and safety of all persons and property within its limits; not perhaps as much or as distinctly so as that part of the bridge on the Kentucky bank south of low-water mark on that shore; but this difference does not constitute a reason why the city may not regard the bridge and its appurtenances within its statutory boundaries as an entirety for purposes of taxation, nor afford any proper ground for holding that the constitutional right to compensation for private property taken for public use has been violated. The court of appeals of Kentucky in its opinion in this case said: "Applying the just and equitable rule of making burdens and benefits of government reciprocal, we think the whole bridge structure within the corporate limits of the city of Henderson is liable for municipal taxes, for neither the benefits to the bridge company *are lessened nor its cor- [616]
responding duty to bear its full share of the

burden is impaired or affected by the fact that a portion of the bridge is over water." We are unwilling to hold that the state court in so adjudging has prescribed any rule of taxation inconsistent with the supreme law of the land.

In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government. The court of appeals of Kentucky, speaking by Chief Justice Marshall, in *Cheaney* v. *Hooser*, 9 B. Mon. 330, 345, after observing that there must necessarily be vested in the legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: "There must be a palpable and flagrant departure from equality in the burden as imposed upon the persons or property bound to contribute, or it must be palpable that persons or their property are subjected to a local burden for the benefit of others or for purposes in which they have no interest, and to which they are therefore not justly bound to contribute. The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it."

Proceeding upon the ground distinctly affirmed by the highest court of Kentucky that the city of Henderson was authorized by the state to exert its power of taxation as to all property within its statutory boundary, and assuming it to be conclusively established by judicial decisions that the boundary and jurisdiction of Kentucky extend to low-water mark on the Indiana side of the Ohio river, we adjudge that the taxation by the city as property of the bridge and its ap-
[617] purtenances *within the fixed boundary of the city, between low-water mark on the two sides of the Ohio river, was not a taking of private property for public use without just compensation in violation of the Constitution of the United States.

4. Another contention of the defendants is that the acceptance by the bridge company of its charter and the construction of the bridge under it created a contract between that company and the state, whereby the bridge structure north of low-water mark on the Kentucky shore of the river was exempted from taxation for any local purpose; and that the tax ordinances of the city of Henderson, on which the taxation in question is based, impair the obligation of that contract, and for that reason are repugnant to the Constitution of the United States.

Did the bridge company acquire by contract an exemption from local taxation in respect of its bridge situated between low-water mark on the two shores of the Ohio river? We think not. The charter of the city of Henderson shows that its boundary extended to low-water mark on the Indiana shore of that river, and that the common council was invested with authority to levy and collect taxes at a prescribed rate upon all property "within the limits of the city" which was taxable by law for state purposes, with certain specified exceptions that have no relation to the particular question just stated. So that the grant made in 1882 to the bridge company was made subject to the taxing power thus possessed by the municipal authorities of the city of Henderson. And that there was no purpose on the part of the city to waive any right it possessed to tax property for municipal purposes is made clear by the express stipulation that the grant to the bridge company should not be construed "as waiving the right of the city of Henderson to levy and collect taxes on the approaches to said bridge, or any building erected by said bridge company within the corporate limits of said city, the bridge itself and all appurtenances thereto within the limits of said city." This stipulation properly interpreted not only saved any right the city then had to impose taxes, but any right that might subsequently be lawfully conferred upon it. An exemption *from [618]
taxation cannot arise from mere implication, but only from words clearly and unmistakably granting such an immunity.

But let it be assumed, for the purposes of the present case, that the stipulation only embraced such right of taxation as the city had at the time it granted authority to construct the bridge within its limits. In that view, the defendants insist that interpreting the charter of the city and the grant to the bridge company in the light of the law of Kentucky, as established at the date of that grant by repeated decisions of its highest court, property such as this bridge situated between low-water mark on the two shores of the Ohio river, although within the statutory boundary of the city, was not within the limits of the city for purposes of municipal taxation; for, it is contended, the bridge structure so taxed, did not and could not receive from the municipal government any benefits, actual or presumed. The cases in the court of appeals of Kentucky, decided before the bridge company accepted its charter, upon which defendants rely in support of this contention are *Cheaney* v. *Hooser*, 9 B. Mon. 330 (1848), *Covington* v. *Southgate*, 15 B. Mon. 498 (1854), *Marshall* v. *Donovan*, 10 Bush, 681, 692 (1874), and *Courtney* v. *Louisville*, 12 Bush, 419 (1876). These cases related to the taxation by municipal corporations of lands which, it was alleged, were so situated as not to receive any benefit whatever from the government of such corporations. The general principle to be deduced from them is that the taxation of lands for local purposes which do not receive any benefit, actual or presumed, from the municipal government imposing the taxation, is a taking of private property for pub-

lic use without compensation, and therefore in violation of the constitutional provision on that subject. So that if the charter of the bridge company was accepted with reference to the law of Kentucky as it was then judicially declared by its highest court—as may well be assumed—the utmost that can be asserted is that the company had a contract with the state which prohibited it or any municipal corporation acting under its authority from subjecting such of the bridge property to local taxation as could not re-
[619] ceive any *benefit, actual or presumed, from the government of that corporation.

In those cases the court wisely refrained from laying down any general rule that would control every controversy that might arise touching the application of the constitutional provision prohibiting—as did the Constitution of Kentucky as well as that of the United States—the taking of private property for public use without just compensation. So far as those adjudications are concerned, it is competent for the court to inquire in every case as it arises whether particular property taxed for local purposes is so situated that it cannot receive any benefit, actual or presumed, from the government of the municipal corporation imposing such taxation. The argument of the learned counsel assumes it to be incontrovertible that the bridge property here taxed cannot receive any such benefit from the government of the city of Henderson. As already indicated, this court does not accept that view, and is of opinion that the bridge property within the statutory limits of that city, and looked at in its entirety, may be regarded as so situated with reference to the city that it enjoys and must continue to enjoy as long as the bridge exists such benefits from the government of the city that, consistently with the Constitution of the United States, and consistently with the rule heretofore adverted to for determining the validity of legislative enactments, it may be subjected to municipal taxes under any system established by the state for the assessment of property for taxation. In this view there is no ground upon which to base the contention that the ordinance of the city imposing the taxation in question impairs the obligation of any contract between the bridge company and the state arising from the acceptance by that company of its charter and the construction of the bridge under it.

What has been said disposes of the contention that to sustain the validity of the ordinances under which the bridge was taxed would impair the obligation of the contract between the bridge company and the Louisville & Nashville Railroad Company. It is
[620] scarcely necessary to observe that no*contract between the bridge company and the railroad company could stand in the way of the city exerting, as between it and the bridge company, any power of taxation it legally possessed. If the taxation in question did not impair the obligation of any contract between the city and the bridge company—and we have held that it did not—it results that the railroad company cannot complain of such taxation. The agreement between the bridge company and the railroad company was necessarily subject to the exercise by the city of any authority it had or might have touching the taxation of the bridge for local purposes.

5. The assignments of error embrace the contention that the judgment below denies to the bridge company the equal protection of the laws, "in that its property has been subjected to taxation from which all other land not divided into lots has been exempted, although the only reasons for exemption apply with much greater force to the property of the plaintiff in error than to the property which enjoys the exemption."

This contention is based upon the proviso in the city's charter declaring that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes." Ky. Acts 1887-88, vol. 2, p. 991.

We are of opinion that this proviso has no reference to bridges, their approaches, piers, etc., but refers only to lands capable of being cultivated or used and divided into lots upon which buildings may be erected or over which streets or other highways may be constructed. This is the better interpretation of both the old and the new charter of the city. Besides, the construction placed by the state court upon the charter of the city in respect of its power to tax the bridge property necessarily leads to the conclusion that the provision forbidding the taxation of lands not divided into lots of five acres or less does not apply to a bridge erected over the Ohio river within the city's limits. In this view there is no basis for the*suggestion [621]
of a denial of the equal protection of the laws, particularly as it is not contended that the city applies to the assessment of the bridge and its approaches for taxation any rule that is not applied to all property within its limits. As in the case of the property of others, the bridge and its approaches are required to be taxed upon their value.

6. Another contention of the plaintiffs in error is that the assertion of the right of the commonwealth of Kentucky or of any municipal corporation acting under its authority to tax bridge structures permanently located with the consent of Congress in or over the bed of the Ohio river is the assertion of authority over that stream inconsistent with the congressional and legislative compact concerning its use, and inconsistent with the concurrent jurisdiction over the river of the states on either side of it. Indeed, the defendants insist that if the power to tax the bridge structure north of low-water mark on the Kentucky side and south of low-water mark on the Indiana side of the Ohio river exists at all, it rests in Congress and could not be exercised even by the concurrent action of two states, much less by the independent action of one.

The present case does not require any decision by this court as to the extent and character of the jurisdiction which may be exer-

cised over the Ohio river by the states whose boundaries come to low-water mark on its shore opposite to Kentucky. The only question for determination is whether the taxation under the authority of Kentucky of this bridge within its jurisdiction involves any encroachment upon Federal authority, or any infringement of rights secured to the defendants by the Constitution of the United States.

Touching the first branch of this question, it is to be observed that Kentucky was admitted into the Union with its "actual boundaries" as they existed on the 18th day of December, 1789, that is, with its northern and western boundary extending to low-water mark on the opposite side of the Ohio river. That state came into the Union equal in all respects with the states that had accepted the National Constitution and with every power that belonged to any existing state, and therefore its power of taxation
[622] was in no respect *limited or restrained, except as its exercise was expressly or impliedly limited or restrained by that instrument. But what clause of that instrument declares that a state may not tax for state purposes any property within its territorial limits which is owned and operated by one of its own private corporations? In *McCulloch* v. *Maryland*, 4 Wheat. 316, 429 [4: 579, 582], it was said by the Chief Justice to be obvious that the power of taxation was an incident of sovereignty, was coextensive with that to which it was an incident, and that "all subjects over which the sovereign power of a state extends are objects of taxation." The subject of taxation in this case is a bridge structure within the territorial limits of Kentucky. It is therefore property over which the state may exert its authority, provided it does not encroach upon Federal power or entrench upon rights secured by the Constitution of the United States. It is none the less property although the state does not own the soil in the bed of the river upon which the piers of the bridge rest. Whatever jurisdiction the state of Indiana may properly exercise over the Ohio river, it cannot tax this bridge structure south of low-water mark on that river, for the obvious reason that it is beyond the limits of that state and permanently within the limits of Kentucky.

Nor do we perceive that the power of Kentucky to tax this bridge structure as property is any the less by reason of the fact that it was erected in and over the Ohio river under the authority or with the consent of Congress. The taxation of the bridge by Kentucky is in no proper sense inconsistent with the power of Congress to regulate the use of the river as one of the navigable waters of the United States. This taxation does not interfere in any degree with the free use of the river by the people of all the states, nor with any jurisdiction that the state of Indiana may properly exercise over that stream.

Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce exempt it from taxation by the state within whose limits it is permanently located. The state cannot by its laws impose direct burdens upon the conduct of interstate commerce carried on over the *bridge. But, as the deci- [623]
sions of this court show, it may subject to taxation property permanently located within its territorial limits and employed in such commerce by individuals and by private corporations. In *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 212 [38: 962, 967, 4 Inters. Com. Rep. 649], it was said: "As matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself." See also *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 689 [35: 900, 904]; *Pittsburgh, C. C. & St. L. Railway Co.* v. *Board of Public Works*, 172 U. S. 32 [*ante*, 354]. In *Thomson* v. *Union Pacific Railroad Co.* 9 Wall. 579 [19: 792], the question was as to the liabilities and rights of a railroad company in respect to taxation under state legislation. It was contended in that case that the road having been constructed under the direction and authority of Congress for the purposes and uses of the United States, and being a part of a system of roads thus constructed, was exempt from taxation under state authority; that the road was an instrument of the general government and as such not subject to taxation by the state. That contention was overruled, this court saying: "We are not aware of any case in which the real estate, or other property of a corporation, not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, from just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government." "There is a clear distinction between the means employed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means." In the same case the court said that "no one questions that the power to tax all property, business, and persons within their respective limits is original in the states, and has never been surrendered," although that power cannot be so used "as to defeat or hinder the operations of the national government." The *same principles [624]
have been maintained in other cases in this court. If a state may tax the property of one of its corporations, engaged in the service of the United States, such property being within its limits, there is no sound reason why the bridge property in question, although erected with the consent of Congress over one of the navigable waters of the United States, should be withdrawn from the taxing power of the state which created the corporation owning it and within whose limits it is permanently located.

The judgment of the Court of Appeals is *affirmed*.

HENDERSON BRIDGE COMPANY *et al.*, *Plffs. in Err.*,
v.
CITY OF HENDERSON.

(See S. C. Reporter's ed. 624.)

Henderson Bridge Company et al. v. *City of Henderson*, No. 32, *ante*, p. 823, followed.

[No. 31.]

Argued May 6, 9, 1898. Decided April 3, 1899.

ERROR to the court of appeals of Kentucky.

The facts are stated in the opinion.

See same case below, 36 S. W. 1132, mem.

Messrs. **William Lindsay, Malcolm Yeaman,** *John W. Lockett*, and *H. W. Bruce*, for plaintiffs in error.

Messrs. **James W. Clay** and *J. F. Clay* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This was an action by the city of Henderson to recover taxes (with interest and penalties) assessed by it upon the property of the Henderson Bridge Company within the limits of that city for the years 1890, 1891, 1892, and 1893. The case presents substantially the same questions that are disposed of in the opinion just delivered in case No. 32 between the same parties for taxes for the years 1888 and 1889.

For the reasons stated in that opinion the judgment of the Court of Appeals of Kentucky in the present case must be *affirmed*.

It is so ordered.

SECURITY TRUST COMPANY, Assignee, etc., *Plff. in Err.*,
v.
FRANK H. DODD *et al.*

(See S. C. Reporter's ed. 624–636.)

Effect of an assignment for the benefit of creditors in one state upon attaching creditors of property in another—Minnesota statute in regard to assignments.

1. An assignment executed in Minnesota pursuant to the general assignment law of that state, by a corporation there resident, is not available to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.
2. The Minnesota statute upon the subject of assignments, which limits the distribution of the insolvent debtor's property to such of his creditors as shall file releases of their demands, is in substance and effect an insolvent law, and is operative as to property in another state only so far as the courts of that state choose to respect it.

[No. 188.]

Argued and Submitted January 23, 1899. Decided April 11, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying certain questions of law to this court for instruction in a suit brought by the Security Trust Company as assignee of the D. D. Merrill Company, a corporation organized under the laws of the state of Minnesota, against Dodd, Mead, & Company, a partnership resident in New York, for the conversion of certain personal property situate in Massachusetts, and claimed by the plaintiff to have come into its possession by virtue of assignment by the said Merrill Company executed in Minnesota. The suit was first brought in the District Court of Minnesota for the Second Judicial District, and duly removed to the Circuit Court of the United States for the District of Minnesota, and to which a writ of error was issued from the United States Circuit Court of Appeals for the Eighth Circuit, at the suit of the Security Trust Company. Second question answered in the negative, which answer disposed of the first question without an answer.

Statement by Mr. Justice **Brown:**

*This was an action originally instituted **[625]**
in the district court for the second judicial district of Minnesota, by the Security Trust Company, as assignee of the D. D. Merrill Company, a corporation organized under the laws of Minnesota, against the firm of Dodd, Mead, & Company, a partnership resident in New York, to recover the value of certain stereotyped and electrotyped plates for printing books, upon the ground that the defendants had unlawfully converted the same to their own use. The suit was duly removed from the state court to the circuit court of the United States for the district of Minnesota, and was there tried. Upon such trial the following facts appeared:

The D. D. Merrill Company having become insolvent and unable to pay its debts in the usual course of business, on September 23, 1893, executed to the Security Trust Company, the plaintiff in error, an assignment under and pursuant to the provisions of chapter 148 of the laws of 1881 of the state of Minnesota, which assignment was properly filed in the office of the clerk of the district court. The trust company accepted the same, qualified as assignee, took possession of such of the property as was found in Minnesota, and disposed of the same for the benefit of creditors, the firm of Dodd, Mead, & Company having full knowledge of the execution and filing of such assignment.

*At the date of this assignment, the D. D. **[626]**
Merrill Company was indebted to Dodd, Mead, & Company of New York in the sum of $1,249.98, and also to Alfred Mudge & Sons, a Boston copartnership, in the sum of $126.80, which they duly assigned and transferred to Dodd, Mead, & Company, making the total indebtedness to them $1,376.78.

Prior to the assignment, the D. D. Merrill Company was the owner of the personal property for the value of which this suit was brought. This property was in the custody and possession of Alfred Mudge & Sons at Boston, Massachusetts, until the same was

attached by the sheriff of Suffolk county, as hereinafter stated.

The firm of Alfred Mudge & Sons was, prior to March 8, 1894, informed of the assignment by the Merrill Company, and at about the date of such assignment a notice was served upon them by George E. Merrill to the effect that he, Merrill, took possession of the property in their custody for and in behalf of the Security Trust Company, assignee aforesaid.

On March 8, 1894, Dodd, Mead, & Company commenced an action against the D. D. Merrill Company in the superior court of the county of Suffolk, upon their indebtedness, caused a writ of attachment to be issued, and the property in possession of Mudge & Sons seized upon such writ. A summons was served by publication in the manner prescribed by the Massachusetts statutes, although there was no personal service upon the Merrill Company. The Security Trust Company, its assignee, was informed of the bringing and pendency of this suit and the seizure of the property, prior to the entering of a judgment in said action, which judgment was duly rendered August 6, 1894, execution issued, and on September 27, 1894, the attached property was sold at public auction to Dodd, Mead, & Company, the execution creditors, for the sum of $1,000.

Upon this state of facts, the circuit court of appeals certified to this court the following questions:

"First. Did the execution and delivery of the aforesaid deed of assignment by the D. D. Merrill Company to the Security Trust Company and the acceptance of the same by [627]*the latter company and its qualification as assignee thereunder, vest said assignee with the title to the personal property aforesaid, then located in the state of Massachusetts, and in the custody and possession of said Alfred Mudge & Sons?

"Second. Did the execution and delivery of said assignment and the acceptance thereof by the assignee and its qualification thereunder, in the manner aforesaid, together with the notice of such assignment which was given, as aforesaid, to Alfred Mudge & Sons prior to March 8, 1894, vest the Security Trust Company with such a title to the personal property aforesaid on said March 8, 1894, that it could not on said day be lawfully seized by attachment under process issued by the superior court of Suffolk county, Massachusetts, in a suit instituted therein by creditors of the D. D. Merrill Company, who were residents and citizens of the state of New York, and who had notice of the assignment but had not proved their claim against the assigned estate nor filed a release of their claim?"

Mr. **Edmund S. Durment,** for plaintiff in error:

The assignment is effectual to convey the personal property of the assignor in every place.

Hawkins v. *Ireland,* 64 Minn. 345; *Covey* v. *Cutler,* 55 Minn. 18; *Stahl* v. *Mitchell,* 41 Minn. 327.

The Massachusetts decisions clearly declare the validity of this assignment in Massachusetts.

Frank v. *Bobbitt,* 155 Mass. 114; *Train* v. *Kendall,* 137 Mass. 366; *May* v. *Wannemacher,* 111 Mass. 206; *Martin* v. *Potter,* 11 Gray, 37, 71 Am. Dec. 689; *Sawyer* v. *Levy,* 162 Mass. 190.

By the common law in Massachusetts and the decisions of the Federal courts, the condition requiring releases is simply a method of giving preferences, and does not render the assignment invalid.

2 Story, Eq. Jur. § 1036; *King* v. *Watson,* 3 Price, 6; *Mather* v. *Nesbit,* 13 Fed. Rep. 872; *Brashear* v. *West,* 7 Pet. 608, 8 L. ed. 801; *Denny* v. *Bennett,* 128 U. S. 489, 32 L. ed. 491; *Thomas* v. *Jenks,* 5 Rawle, 221; *Halsey* v. *Fairbanks,* 4 Mason, 206; *Hatch* v. *Smith,* 5 Mass. 42; *Nostrand* v. *Atwood,* 19 Pick. 281; *Andrews* v. *Ludlow,* 5 Pick. 28; *Schuler* v. *Israel,* 27 Fed. Rep. 851; *Livermore* v. *Jenckes,* 21 How. 144, 16 L. ed. 59; *Black* v. *Zacharie,* 3 How. 509, 11 L. ed. 702; *Halsted* v. *Straus,* 32 Fed. Rep. 279.

Messrs. **James E. Markham,** *Albert R. Moore,* and *George W. Markham,* for defendants in error:

An assignment which depends for its force and validity upon the laws of another state will not be recognized or enforced as against attaching creditors or bona fide purchasers.

Blake v. *Williams,* 6 Pick. 286, 17 Am. Dec. 372; *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353; *Osborn* v. *Adams,* 18 Pick. 247; *Ingraham* v. *Geyer,* 13 Mass. 146, 7 Am. Dec. 132; *Pierce* v. *O'Brien,* 129 Mass. 314, 37 Am. Rep. 360; *Frank* v. *Bobbitt,* 155 Mass. 112; Story, Confl. Laws (8th ed.) § 411; Burrill, Assignments, 4th ed. § 303; High, Receivers, 241; *Harrison* v. *Sterry,* 5 Cranch, 289, 3 L. ed. 104; *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. ed. 606; *Gilman* v. *Lockwood,* 4 Wall. 409, 18 L. ed. 432; *Denny* v. *Bennett,* 128 U. S. 498, 32 L. ed. 495; *Upton* v. *Hubbard,* 28 Conn. 274, 73 Am. Dec. 670; *Paine* v. *Lester,* 44 Conn. 196, 26 Am. Rep. 442; *Johnson* v. *Hunt,* 23 Wend. 87; *Abraham* v. *Plestoro,* 3 Wend. 538, 20 Am. Dec. 738; *Willitts* v. *Waite,* 25 N. Y. 587; *Kelly* v. *Crapo,* 45 N. Y. 86, 6 Am. Rep. 35; *Warner* v. *Jaffray,* 96 N. Y. 248, 48 Am. Rep. 616; *Barth* v. *Backus,* 140 N. Y. 230, 23 L. R. A. 47; *Catlin* v. *Wilcox Silver Plate Co.* 123 Ind. 477, 8 L. R. A. 62; *McClure* v. *Campbell,* 71 Wis. 350; *Rhawm* v. *Pearce,* 110 Ill. 359, 51 Am. Rep. 691; *Townsend* v. *Coxe,* 151 Ill. 62; *Milne* v. *Moreton,* 6 Binn. 353, 6 Am. Dec. 466; *Manhattan Co.* v. *Maryland Steel Co.* 1 Ohio Dec. 286; *Moore* v. *Church,* 70 Iowa, 208, 59 Am. Rep. 439; *Franzen* v. *Hutchinson,* 94 Iowa, 95; *Dalton* v. *Currier,* 40 N. H. 237; *Hunt* v. *Columbian Ins. Co.* 55 Me. 290, 92 Am. Dec. 592; *Ward* v. *Morrison,* 25 Vt. 598; *Weider* v. *Maddox,* 66 Tex. 372, 59 Am. Rep. 617; *Walter* v. *Whitlock,* 9 Fla. 86, 76 Am. Dec. 607; *Life Asso. of America* v. *Levy,* 33 La. Ann. 1203.

The courts of Massachusetts have repeatedly held that an assignment in trust for the benefit of creditors, whether statutory or by common law, the only consideration for which is the acceptance of the trust by the assignee, is invalid against an attachment, ex-

cept so far as assented to by creditors for whose benefit it was made. Such is the declared policy of courts of that state.

Edwards v. *Mitchell*, 1 Gray, 239; *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353; *Ward* v. *Lamson*, 6 Pick. 358; *Russell* v. *Woodward*, 10 Pick. 408; *Fall River Iron Works Co.* v. *Croade*, 15 Pick. 11; *Bradford* v. *Tappan*, 11 Pick. 76; *Ingraham* v. *Geyer*, 13 Mass. 146, 7 Am. Dec. 132; *May* v. *Wannemacher*, 111 Mass. 202; *Pierce* v. *O'Brien*, 129 Mass. 314, 37 Am. Rep. 360; *Faulkner* v. *Hyman*, 142 Mass. 53.

As to creditors who have not assented to the assignment prior to an attachment, the rights of the attaching creditors are superior.

Bradford v. *Tappan*, 11 Pick. 76; *Pierce* v. *O'Brien*, 129 Mass. 315, 37 Am. Rep. 360.

The courts of Massachusetts, in passing upon the conflicting claims of attaching creditors and assignees claiming under a foreign assignment, must extend the same rights and remedies to nonresident attaching creditors as they would were such creditors residents of Massachusetts.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Green* v. *Van Buskirk*, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L. ed. 109; *Barth* v. *Backus*, 140 N. Y. 230, 23 L. R. A. 47; *Lemmon* v. *People*, 20 N. Y. 608; *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Martin* v. *Potter*, 34 Vt. 87; *Upton* v. *Hubbard*, 28 Conn. 275, 73 Am. Dec. 670; *Newland* v. *Reilly*, 85 Mich. 151; *Kidder* v. *Tufts*, 48 N. H. 121; *Sturtevant* v. *Armsby Co.* 66 N. H. 557; *Ward* v. *McKenzie*, 33 Tex. 297, 7 Am. Rep. 261; *Cofrode* v. *Gartner*, 79 Mich. 332, 7 L. R. A. 511; *Philson* v. *Barnes*, 50 Pa. 230; *Morgan* v. *Neville*, 74 Pa. 52; *Lewis* v. *Bush*, 30 Minn. 244; *Sheldon* v. *Blauvelt*, 29 S. C. 453, 1 L. R. A. 685; *Catlin* v. *Wilcox*, *Silver Plate Co.* 123 Ind. 477, 8 L. R. A. 62; *Ward* v. *Maryland*, 12 Wall. 163, 20 L. ed. 260; *Paul* v. *Virginia*, 8 Wall. 177, 19 L. ed. 359; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Missouri* v. *Lewis*, 101 U. S. 22, 25 L. ed. 989; *Barbier* v. *Connolly*, 113 U. S. 31, 28 L. ed. 924.

[627] *Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question whether an assignee of an insolvent Minnesota corporation can maintain an action in the courts of Minnesota for the conversion of property formerly belonging to the insolvent corporation, which certain New York creditors had attached in Massachusetts, and sold upon execution against such corporation. The question was also raised upon the argument how far an assignment, executed in Minnesota, pursuant to the general assignment law of that state, by a corporation there resident, is
[628] available *to pass personal property situated in Massachusetts as against parties resident in New York, who, subsequent to the assignment, had seized such property upon an attachment against the insolvent corporation.

The assignment was executed under a statute of Minnesota, the material provisions of which are hereinafter set forth. The instrument makes it the duty of the assignee "to pay and discharge, in the order and precedence provided by law, all the debts and liabilities now due or to become due from said party of the first part, together with all interest due and to become due thereon, to all its creditors who shall file releases of their debts and claims against said party of the first part, according to chapter 148 of the General Laws of the state of Minnesota for the year 1881, and the several laws amendatory and supplementary thereof, and if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend to the payment of said debts and liabilities and interest, proportionately on their respective amounts, according to law and the statute in such case made and provided; and if, after the payment of all the costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said debts of the party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then, Third, repay such surplus to the party of the first part, its successors and assigns."

The operation of voluntary or common-law assignments upon property situated in other states has been the subject of frequent discussion in the courts, and there is a general consensus of opinion to the effect that such assignments will be respected, except so far as they come in conflict with the rights of local creditors, or with the laws or public policy of the state in which the assignment is sought to be enforced. The cases in this court are not numerous, but they are all consonant with the above general principle. (*Black* v. *Zacharie*, 3 How. 483 [11: 690]; *Livermore* v. *Jenckes*, 21 How. 126 [16: 55]; *Green* v. *Van Buskirk*, 5 Wall. 307 [18: 599]; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664 [23: 1003]; **Cole* v. *Cunningham*, 133 U. S. 107 [33: 538]; *Barnett* v. *Kinney*, 147 U. S. 476 [37: 248]). [629]

But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated. *Harrison* v. *Sterry*, 5 Cranch, 289, 302 [3: 104, 107]; *Ogden* v. *Saunders*, 12 Wheat. 213 [6: 606]; *Booth* v. *Clark*, 17 How. 322 [15: 164]; *Blake* v. *Williams*, 6 Pick. 286 [17 Am. Dec. 372]; *Osborn* v. *Adams*, 18 Pick. 245; *Zipcey* v. *Thompson*, 1 Gray, 243; *Abraham* v. *Plestoro*, 3 Wend. 538 [20 Am. Rep. 738], overruling *Holmes* v. *Remsen*, 4 Johns. Ch. 460 [8 Am. Dec. 581]; *Johnson* v. *Hunt*,

23 Wend. 87; *Hoyt* v. *Thompson*, 5 N. Y. 322; *Willitts* v. *Waite*, 25 N. Y. 577; *Kelly* v. *Crapo*, 45 N. Y. 86 [6 Am. Rep. 35]; *Barth* v. *Backus*, 140 N. Y. 230 [23 L. R. A. 47]; *Weider* v. *Maddox*, 66 Tex. 372 [59 Am. Rep. 617]; *Rhawn* v. *Pearce*, 110 Ill. 350 [51 Am. Rep. 691]; *Catlin* v. *Wilcox Silver-Plate Co.* 123 Ind. 477 [8 L. R. A. 62]. As was said by Mr. Justice McLean in *Oakey* v. *Bennett*, 11 How. 33, 44 [13: 593, 597]: "A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment." Similar language is used by Mr. Justice Story in his Conflict of Laws, § 414.

The statute of Minnesota, under which this assignment was made, provides in its
[630] first section that any insolvent debtor *"may make an assignment of all his unexempt property for the equal benefit of all his bona fide creditors, who shall file releases of their demands against such debtor, as herein provided." That such assignments shall be acknowledged and filed, and if made within ten days after the assignor's property has been garnished or levied upon, shall operate to vacate such garnishment or levy at the option of the assignee, with certain exceptions. The second section provides for putting an insolvent debtor into involuntary bankruptcy on petition of his creditors, upon his committing certain acts of insolvency, and for the appointment by the court of a receiver with power to take possession of all his property, not exempt, and distribute it among his creditors. Under either section only those creditors receive a benefit from the act who file releases to the debtor of all their demands against him. This statute was held not to conflict with the Federal Constitution in *Denny* v. *Bennett*, 128 U. S. 489 [32: 491].

The construction given to this act by the supreme court of Minnesota has not been altogether uniform. In *Wendell* v. *Lebon*, 30 Minn. 234, the act was held to be constitutional. It was said that "the act in its essential features is a bankrupt law;" but it was intimated that it included all the debtor's property wherever situated; "and while other jurisdictions might, on grounds of policy, give preference to domestic attaching creditors over foreign assignees or receivers in bankruptcy, yet, subject to this exception, they would, on principles of comity, recognize the rights of such assignees or receivers to the possession of the property of the insolvent debtor."

In *Re Mann*, 32 Minn. 60, the act was, in effect, again pronounced "a bankrupt law, providing for voluntary bankruptcy by the debtor's assignment;" and in this respect differing from a previous assignment law. See also *Simon* v. *Mann*, 33 Minn. 412, 414.

In *Jenks* v. *Ludden*, 34 Minn. 482, it was held that the courts of that state had no right to enjoin the defendant, who was a citizen of Minnesota, from enforcing an attachment lien on certain real property in Wisconsin owned by the insolvent debtors, although the execution of the assignment might, under *the Minnesota statute, have dissolved [631]
such an attachment in that state; and that, even if they had the power to do so, they ought not to exercise their discretion in that case, where the only effect might be to enable nonresident creditors to step in and appropriate the attached property. The court repeated the doctrine of the former case, that the act was a bankrupt act; the assignee being in effect an officer of the court, and the assigned property being *in custodia legis*, and administered by the court or under its direction. The court added: "We may also take it as settled that the question whether property situated in Wisconsin is subject to attachment or levy by creditors, notwithstanding any assignment made in another state, is to be determined exclusively by the laws of Wisconsin." To same effect, see *Daniels* v. *Palmer*, 35 Minn. 347; *Warner* v. *Jaffray*, 96 N. Y. 248 [48 Am. Rep. 616].

Upon the other hand, in *Covey* v. *Cutler*, 55 Minn. 18, an insolvent debtor who had made an assignment under this statute had a certain amount of salt in Wisconsin, which the defendants had attached in a Wisconsin court. The salt was sold upon the judgment, bid in by them, and the assignee in Minnesota brought an action to recover the value of the salt. Defendants answered, claiming that the assignee never took possession of the salt, and that the Minnesota assignment was ineffectual to transfer the title to property in Wisconsin as against attaching creditors there. Plaintiff was held entitled to judgment upon the ground that a voluntary conveyance of personal property, valid by the law of the place, passed title wherever the property may be situated, and that such transfers, upon principles of comity, would be recognized as effectual in other states when not opposed to public policy or repugnant to their laws. It is difficult to reconcile this with the previous cases, or with that of *Green* v. *Van Buskirk*, 7 Wall. 139 [19: 109]. The assignment was apparently treated as a voluntary or common-law assignment. This ruling was repeated in *Hawkins* v. *Ireland*, 64 Minn. 339, in which an assignment under this statute was said not to be involuntary but voluntary, and that a court of equity had the power to, and would, restrain one of its own citizens, of whom it had jurisdiction, *from [632]
prosecuting an action in a foreign state or jurisdiction, whenever the facts of the case made it necessary to do so, to enable the court to do justice and prevent one of its citizens from taking an inequitable advantage of another. This accords with *Dehon* v. *Foster*, 4 Allen, 545, and *Cunningham* v. *Butler*, 142 Mass. 47 [56 Am. Rep. 657]; *S. C., sub nom. Cole* v. *Cunningham*, 133 U. S. 107 [33: 538].

The earlier opinions of the supreme court of Minnesota, to the effect that the statute in question was a bankrupt act, were followed by the supreme court of Wisconsin in *McClure* v. *Campbell*, 71 Wis. 350, in which it was held that the assignment could have no legal operation out of the state in which the proceedings were had, and that the decision of the supreme court of Minnesota that the act of 1881 was a bankrupt act was binding. The contest was between the assignee of the insolvent debtor and a creditor who had attached the property of the insolvent in Wisconsin. The court held that the plaintiff, the assignee, took no title to such property, and was not entitled to its proceeds. In delivering the opinion the court said: "We think the question is not affected by the fact that the property, when seized, was in possession of the assignee, or that the attaching creditor is a resident of the state in which the insolvency or bankruptcy proceedings were had. . . . While some of them" (the cases) "may, under especial circumstances, extend the rule of comity to such a case, and thus give an extraterritorial effect to somewhat similar assignments, we are satisfied that the great weight of authorities is the other way. The rule in this country is, we think, that assignments by operation of law in bankruptcy or insolvency proceedings, in which debts may be compulsorily discharged without full payment thereof, can have no local operation out of the state in which such proceedings were had."

In *Franzen* v. *Hutchinson* [94 Iowa, 95], 62 N. W. 698, the supreme court of Iowa had this statute of Minnesota under consideration, and held that as the creditors received no benefit under the assignment, unless they first filed a release of all claims other than
[633] such as might be paid under the*assignment, it would not be enforced in Iowa. It was said that the assignment, which was that of an insurance company, was invalid, and that in an action by the assignee for premiums collected by the defendants, who were agents of the company, the latter could offset claims for unearned premiums held by policy holders at the time of the assignment and by them assigned to defendants after the assignment to plaintiffs.

Notwithstanding the two later cases in Minnesota above cited, we are satisfied that the supreme court of that state did not intend to overrule the prior decisions to the effect that the act was substantially a bankrupt or insolvent law. It is true that in these cases a broader effect was given to this act with respect to property in other states than is ordinarily given to statutory assignments, though voluntary in form. But the court was speaking of its power over its own citizens, who had sought to obtain an advantage over the general creditors of the insolvent by seizing his property in another state. There was no intimation that the prior cases were intended to be overruled, nor did the decisions of the later cases require that they should be.

So far as the courts of other states have passed upon the question, they have generally held that any state law upon the subject of assignments, which limits the distribution of the debtor's property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another state, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency. The provision of the statute in question, requiring a release from the creditors in order to participate in the distribution of the estate, operates as a discharge of the insolvent from his debts to such creditors—a discharge as complete as is possible under a bankrupt law. An assignment containing a provision of this kind would have been in many, perhaps, in most, of the states void at common law. *Grover* v. *Wakeman*, 11 Wend. 187 [25 Am. Dec. 624]; *Ingraham** v. *Wheeler*, 6 Conn. 277; [634]
Atkinson v. *Jordan*, 5 Ohio, 293; Burrill on Assignments, 232 to 256. As was said in *Conkling* v. *Carson*, 11 Ill. 508: "A debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to provide for a preference by assigning his effects; but he is not permitted to say to any of his creditors that they shall not participate in his present estate, unless they release all right to satisfy the residue of their debts out of his future acquisitions." In *Brashear* v. *West*, 7 Pet. 608 [8: 801], an assignment containing a provision of this kind was upheld with apparent reluctance solely upon the ground that in Pennsylvania, where the assignment was made, it had been treated as valid. If the assignment contain this feature, the fact that it is executed voluntarily and not *in invitum* is not a controlling circumstance. In some states a foreign assignee under a statutory assignment, good by the law of the state where made, may be permitted to come into such state and take possession of the property of the assignor there found, and to withdraw it from the jurisdiction of that state in the absence of any objection thereto by the local creditors of the assignor; but in such case the assignee takes the property subject to the equity of attaching creditors, and to the remedies provided by the law of the state where such property is found.

A somewhat similar statute of Wisconsin was held to be an insolvent law in *Barth* v. *Backus*, 140 N. Y. 230 [23 L. R. A. 47], and an assignment under such statute treated as ineffectual to transfer the title of the insolvent to property in New York, as against an attaching creditor there, though such creditor was a resident of Wisconsin. A like construction was given to the same statute of Wisconsin in *Townsend* v. *Coxe*, 151 Ill. 62. It was said of this statute (and the same may be said of the statute under consideration), "It is manifest from these provisions that a creditor of an insolvent debtor in Wisconsin, who makes a voluntary assignment, valid

under the laws of that state, can only avoid a final discharge of the debtor from all liability on his debt, by declining to participate in any way in the assignment proceedings. He is therefore compelled to consent to a dis-
[635]charge as to so much of his debt *as is not paid by dividends in the insolvent proceedings or take the hopeless chance of recovering out of the assets of the assigned estate remaining after all claims allowed have been paid." To the same effect are *Upton* v. *Hubbard*, 28 Conn. 274 [73 Am. Dec. 670]; *Paine* v. *Lester*, 44 Conn. 196 [26 Am. Rep. 442]; *Weider* v. *Maddox*, 66 Tex. 372 [59 Am. Rep. 617]; *Catlin* v. *Wilcox Silver-Plate Co.* 123 Ind. 477 [8 L. R. A. 62]; *Boese* v. *King*, 78 N. Y. 471.

In *Taylor* v. *Columbian Insurance Co.* 14 Allen, 353, it is broadly stated that "when, upon the insolvency of a debtor, the law of the state in which he resides assumes to take his property out of his control, and to assign it by judicial proceedings, without his consent, to trustees for distribution among his creditors, such an assignment will not be allowed by the courts of another state to prevail against any remedy which the laws of the latter afford to its own citizens against property within its jurisdiction." But the weight of authority is, as already stated, that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent or upon the voluntary application of the insolvent himself. The assignee is still the agent of the law, and derives from it his authority. *Upton* v. *Hubbard*, 28 Conn. 274 [73 Am. Dec. 670].

While it may be true that the assignment in question is good as between the assignor and the assignee, and as to assenting creditors, to pass title to property both within and without the state, and, in the absence of objections by nonassenting creditors, may authorize the assignee to take possession of the assignor's property wherever found, it cannot be supported as to creditors who have not assented, and who are at liberty to pursue their remedies against such property of the assignor as they may find in other states. *Bradford* v. *Tappan*, 11 Pick. 76; *Willitts* v. *Waite*, 25 N. Y. 577; *Catlin* v. *Wilcox Silver-Plate Co.* 123 Ind. 477 [8 L. R. A. 62], and cases above cited.

We are therefore of opinion that the statute of Minnesota was in substance and effect an insolvent law; was operative as to property in Massachusetts only so far as the courts of that state chose to respect it, and
[636]that so far as the plaintiff, *as assignee of the D. D. Merrill Company, took title to such property, he took it subservient to the defendants' attachment. It results that the property of the D. D. Merrill Company found in Massachusetts was liable to attachment there by these defendants, and that the courts of Minnesota are bound to respect the title so acquired by them.

The second question must therefore be answered in the negative, and as this disposes of the case no answer to the first question is necessary.

CITIZENS' SAVINGS BANK OF OWENSBORO, *Plff. in Err.*,
v.
CITY OF OWENSBORO and A. M. C. Simmons, Tax Collector.

(See S. C. Reporter's ed. 636–662.)

Federal question, when considered—impairing obligation of contracts—Hewitt act, of Kentucky, not an irrevocable contract—repeal of immunity from taxation—taxing law of Kentucky.

1. This court will not consider a Federal question which was not presented to the state court or necessarily involved in its decision.
2. In determining whether, in a given case, a contract exists, protected from impairment by the Federal Constitution, this court forms an independent judgment, and will not adopt a state decision in conflict with the settled decisions of this court.
3. The law of Kentucky called the Hewitt act, fixing the rate of taxation of state banks and their shares, and its acceptance by a bank, did not constitute an irrevocable contract, as, at the time the act was passed, there was a general statute of the state reserving the right to repeal or alter or amend all charters of corporations, and it was expressly made a part of the Hewitt act.
4. The mere grant for a designated time of an immunity from taxation does not take such immunity out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect.
5. Where there is no irrevocable contract protecting a bank from taxation, the taxing law of Kentucky does not violate the contract clause of the Federal Constitution.

[No. 669.]

Argued February 27, 28, 1899. Decided April 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decree of that court affirming the decree of the state trial court sustaining demurrers, dissolving an injunction, and dismissing a suit commenced by the Citizens' Savings Bank of Owensboro to enjoin the City of Owensboro and its tax collector from enforcing certain taxes. *Affirmed.*

See same case below, 19 Ky. L. Rep. 248, 39 S. W. 1030.

The facts are stated in the opinion.

Messrs. **W. T. Ellis** and *J. A. Dean* for plaintiff in error.

Messrs. **Chapeze Wathen** and **J. D. Atchison** for defendants in error.

*Mr. Justice **White** delivered the opinion [637]
of the court:

The plaintiff in error, the Citizens' Savings Bank of Owensboro, Kentucky, was created, by an act of the general assembly of the state of Kentucky, approved May 12, 1884, with authority to do a general banking

business. The legislative charter provided that the corporation should exist for a period of thirty years from the date of the act, and in section 7 it was provided that on the first day of January in each year the bank should pay "into the state treasury, for the benefit of revenue proper, fifty cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full of all tax and bonus thereon of every kind."

At the time this charter was granted there existed on the statute books of Kentucky a law enacted February 14, 1856, providing as follows:

"Sec. 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

. . . .

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporations to be granted hereafter; and that this act shall take effect from its passage."

It would seem that from the date of its creation until the year 1886 the bank was called upon to pay only the taxes provided in the seventh section of its charter. In 1886 (Session Acts of Kentucky 1885-6, pp. 144 to 147; Id. 201) the legislature of Kentucky
[638] adopted what is designated in the *briefs of counsel as the Hewitt act, containing the following provisions as to the taxation of banks:

"Sec. 1. That shares of stock in state and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to 10 per cent of their capital stock, which shall be in full of all tax, state, county, and municipal.

. . . .

"Sec. 4. That each of said banks, institutions, and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the state of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks.

"Sec. 5. The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the next general assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

"Sec. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the General Statutes.

"Sec. 7. If any bank, state or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to *make the [639]
consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations and undivided profits, shall be assessed as directed by section 2 of this act, and the taxes—state, county, and municipal—shall be imposed, levied, and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

The Citizens' Savings Bank accepted the Hewitt act in the mode provided, and thereafter paid the tax specified therein.

In 1891 Kentucky adopted a new Constitution, which contained the following:

"Sec. 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises."

The state of Kentucky, in 1892, enacted a law providing, among other things, for the assessment and taxation by the state, counties, and municipalities, of banking and other corporations. This law was in absolute conflict with the Hewitt act, and by special provision as well as by necessary legal intendment operated, if the Constitution had not already done so, to repeal the system of bank taxation established by the Hewitt act. Without detailing the scheme of taxation created by the law of 1892, it suffices to say that it organized a state board whose duty it was to ascertain and fix the value of what was termed the franchises of banks and other corporations, referred to in the law, and upon the amount so fixed the general state tax was levied. It was besides made *the duty of the board to certify its [640]
valuation of the property or franchises to the proper county or municipality in which the corporation was located, so that the sum of this assessment might become the basis upon which the local taxes should be laid.

The city of Owensboro, where the Citizens' Savings Bank was located, established by ordinances the rate of municipal taxes for the years 1893 and 1894, and the sum so fixed was assessed upon the valuation of the franchises or property of the bank which had been certified by the state board in claimed conformity to the statute of 1892. The bank refused to pay these taxes, and a levy was made by the tax collector upon some of its property, and garnishment process was also issued against several of its debtors. Thereupon this suit was commenced by a petition, on behalf of the bank, to enjoin the city of Owensboro and its tax collector from enforcing the taxes in question.

The averments of the petition, and of the amendments thereto—for it was twice amended—assailed the validity of the tax on several grounds, all of which are substantially included in the following summary:

First. That the board of state valuation had no power under the Constitution and laws of the state to make an assessment for local taxation, and, if it had such power, had not exercised it lawfully, because the method of valuation pursued by it was so arbitrary as to cause its action to be void. Second. That no notice of the assessment had been given the officials, as required by the state law. Third. That the taxes violated the equality clause of the state Constitution, because, by the method adopted in making the assessment, the property of the bank had been valued by a rule which caused it to be assessed at proportionately one third more than the sum assessed against other property in the city of Owensboro, and by one half more than the valuation at which the property of other taxpayers throughout the state was assessed. Fourth. That the taxes violated the state law and Constitution, because based upon an assessment made by the state board, and not on an assessment made by the city, and that they were likewise illegal, because the levy
[641] of the tax predicated *upon the assessment, by the state board, was *dehors* the powers of the city of Owensboro under the state laws. Fifth. That the taxes moreover violated the equality clause of the state Constitution, because, as there were certain national banks doing business in the city of Owensboro, against whom the franchise tax provided by the state law could not be enforced without a violation of the law of the United States, therefore these banks could not be taxed for the franchise tax, and not to tax them, whilst taxing the petitioner, would bring about inequality of taxation, and hence be a violation of the state Constitution. Sixth. The taxes were expressly and particularly attacked on the ground that the Hewitt act, and the acceptance of the terms thereof, constituted an irrevocable contract, between the state and the bank, exempting it from all taxation other than as specified in the Hewitt act, and therefore that the revenue act of 1892 and the levy of the taxes in question by the city of Owensboro violated the contract rights of the bank, which were protected from impairment by the Constitution of the United States.

In further support of this ground the petition charged that at the time the Hewitt act was passed the bank had an irrevocable contract arising from section 7 of its charter limiting taxation to the sum there specified, which right the bank had surrendered in consequence of the contract embodied in the Hewitt act. It was averred that this surrender of its contract right to enjoy the limited taxation, conferred by its charter, was a valid consideration moving between the bank and the state, operating to cause the Hewitt act to become a contract upon adequate consideration.

A preliminary injunction restraining the collection of the taxes was allowed. The city of Owensboro demurred to the petition and to the various amendments thereof, and, reserving its demurrers, answered traversing the averments of the original petition and the amendments thereto. Motions were made to dissolve the injunction. On these motions testimony was taken and the case was heard on the motions to dissolve, and on the demurrers. The trial court dissolved the injunction, sustained the demurrers, and dismissed the suit. On appeal to *the court of appeals [642]
of Kentucky the decree of the trial court was affirmed. [19 Ky. L. Rep. 248], 39 S. W. 1030.

The opinion of the Kentucky court of appeals contained, not only the reasons applicable to the case we are now considering, but also such as were by it considered relevant to several other cases which, it would seem, were either heard by that court at the same time or were deemed by the court to present so many cognate questions as to enable it to embrace the several cases in one opinion. In so far as it related to this cause, the opinion fully examined and disposed of the question of contract and the issues consequent thereon. An application on behalf of the appellant was thereafter filed, styled "Petition for extension of opinion and reversal." This application, whilst declaring that the appellant could not assent to the conclusion of the court on the question of the existence of an irrevocable contract, protected from impairment by the Constitution of the United States, asked no rehearing on that subject. The grounds for rehearing, which were elaborately pressed, related solely to certain questions of law which it was argued the record presented, and which it was claimed depended on the state law and Constitution. There was no contention that these issues involved the Constitution or laws of the United States.

All the assignments of error but the eighth and ninth relate to errors charged to have been committed by the court below in holding that there was no contract protected from impairment by the Constitution of the United States. The eighth assignment asserts that there was error in allowing a penalty for the nonpayment of the taxes, because such penalty was by the state law imposed only upon corporations and not on other taxpayers, and therefore the state law violated the Fourteenth Amendment to the Constitution of the United States. The ninth assignment charges that there was error in

holding the taxes to be valid because the property or franchise of the bank, on which the tax was levied, was assessed at its full value, whilst other taxpayers in the state were assessed at not more than seventy per cent of the value of their property, thus creating an inequality of taxation, equivalent
[643] to a denial of *the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

We at the outset dispose of the eighth and ninth assignments just referred to. The questions which they raise are not properly here for consideration. They are not presented by the record nor do they result by necessary intendment therefrom. Indeed, they were excluded from the cause, as Federal questions, by the implications resulting from the pleadings. Whilst it was charged that the penalties were unlawful, there was no allegation that their enforcement would violate any Federal right. On the contrary, the petition and the amendments to it clearly placed the objection to the penalties on the ground that their enforcement would violate the state law and the state Constitution. The distinction between the state right thus asserted and the Federal right was clearly made when the only Federal issue which was relied on, the impairment of the obligation of the contract, was alleged, for then it was plainly stated to depend upon a violation of the Constitution of the United States. Even after the opinion of the court of appeals was announced there was not a suggestion made in the petition for rehearing that a single Federal question was considered by the parties as arising except the one which the court had fully decided, and as to which it was expressly declared a rehearing was not prayed. The assignments of error in question therefore simply attempt to inject into the record a Federal question not lawfully therein found, never called to the attention of the state court by pleading or otherwise, and not necessarily arising for consideration in reviewing the judgment of the state court to which the writ of error is directed. But after a decision by the court of last resort of a state the attempt to raise a Federal question for the first time is too late. *Miller* v. *Texas*, 153 U. S. 535 [38: 812]; *Loeber* v. *Schroeder*, 149 U. S. 580 [37: 856]. It is also clear that where it is disclosed that an asserted Federal question was not presented to the state court or called in any way to its attention, and where it is not necessarily involved in the decision of the state court, such question will not be considered by this court. *Louisville & N. R. Co.* v. *Louisville*, 166 U. S. 709 [41: 1173]; *Oxley Stave Co.* v. *Butler Coun-*
[644] *ty*, 166 U. S. 648 [41: 1149]; **Kipley* v. *Illinois*, 170 U. S. 182 [42: 998]; *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58 [ante, 364]; *Capital Bank* v. *Cadiz Bank*, 172 U. S. 425 [ante, 502]. We therefore decline to review the errors alleged in the eighth and ninth assignments, and passing their consideration are brought to the real Federal controversy which arises on the record—that is the question of irrevocable contract.

The claim is that the Hewitt act and its acceptance by the banks constituted an irrevocable contract, although at the time that act was passed there was a general statute of Kentucky reserving the right to repeal, alter, or amend "all charters or grants of or to corporations or amendments thereof and all statutes" passed subsequent thereto, and although this general statute was expressly made a part of the Hewitt act by the sixth section thereof. The wording of the sixth section accomplishing this result is: "This act shall be subject to the provisions of section 8, chapter 68, of the General Statutes," the provision thus referred to being the general law of 1856, reserving the power to repeal, alter, or amend as above. When the proposition relied upon is plainly stated and its import clearly apprehended, no reasoning is required to demonstrate its unsoundness. In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter, or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter, or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable. In a case like the one now considered where not only was there a general statute reserving the power, but where such general law was made by unambiguous *language one of the provisions of [645]
the contract, of course the legislative power to repeal or amend is more patently obvious to the extent that that which is plainly expressed is always more evident than that which is to be deduced by a legal implication. In *Tomlinson* v. *Jessup*, 15 Wall. 454 [21: 204], in speaking of a contract exemption from taxation arising from a charter, and of the right to repeal the same springing from a general law, reserving the power to alter or amend, which existed at the time the charter was conferred, the court, through Mr. Justice Field, said (p. 459 [21: 206]):

"Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state."

In *Maine C. Railroad Co.* v. *Maine*, 96 U. S. 499, 510 [24: 836, 841], the question was as to the liability to taxation of a consolidated corporation which came into existence while a general statute was in force, provid-

ing that any act of incorporation subsequently passed might be amended, altered, or repealed at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there was in the act of incorporation an express limitation or provision to the contrary. The court said: "There was no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company, upon the legislative power of amendment and alteration, and, of course, there was none upon the extent or mode of taxation which might be subsequently adopted. By the reservation in the law of 1831, which is to be considered as if embodied in that act, the state retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges, and immunities. The
[646] existence of *the corporation and its franchises and immunities, derived directly from the state, were thus under its control."

In *Louisville Water Company* v. *Clark*, 143 U. S. 1, 12 [36: 55, 58], the corporation claimed that it had acquired under an act of the legislature of the state of Kentucky an exemption from taxation which could not be withdrawn by subsequent legislation without its consent. As the act granting the exemption was passed subsequent to the adoption by the general assembly of Kentucky of the act of 1856 (the general law which was in being when the Hewitt act was adopted, and which was expressly made a part of the alleged contract), it was held that the exemption from taxation could be repealed without impairing the obligation of the contract. The court, through Mr. Justice Harlan, said: "In short, the immunity from taxation granted by the act of 1882, was accompanied with the condition—expressed in the act of 1856 and made part of every subsequent statute, when not otherwise expressly declared—that, by amendment or repeal of the former act, such immunity could be withdrawn. Any other interpretation of the act of 1856 would render it inoperative for the purposes for which, manifestly, it was enacted."

Again, in the *City of Covington* v. *Kentucky*, 173 U. S. 231 [*ante*, 679], considering the same subject in a case which involved the application of the power reserved by the state of Kentucky, in the act of 1856, to repeal, alter, or amend all grants or contracts made subsequent to that act, the court said, through Mr. Justice Harlan:

"There was in that act (that is, the one making the grant) no 'plainly expressed' intent never to amend or repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they were situated, should be forever exempt from state, county, and city taxes. But such a provision falls short of the plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose *at the time the act of 1886 **[647]**
was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interest required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

The conclusions stated in these cases are but the expression of many other adjudged causes. *Atlantic & G. Railroad Company* v. *Georgia*, 98 U. S. 359, 365 [25: 185, 188]; *Hoge* v. *Richmond & D. Railroad Company*, 99 U. S. 348, 353 [25: 303, 304]; *Sinking Fund Cases*, 99 U. S. 700, 720 [25: 496, 502]; *Greenwood* v. *Union Freight R. Company*, 105 U. S. 13, 21 [26: 961, 965]; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476 [27: 408, 412]; *Louisville Gas Company* v. *Citizens' Gas Company*, 115 U. S. 683, 696 [29: 510, 515]; *Gibbs* v. *Consolidated Gas Company*, 130 U. S. 396, 408 [32: 979, 984]; *Sioux City Street Railway Co.* v. *Sioux City*, 138 U. S. 98, 108 [34: 898, 902].

Undoubtedly in the *Bank Tax Cases*, 97 Ky. 597, the court of appeals of Kentucky decided that the Hewitt law created an irrevocable contract, and that the general assembly of that state could not repeal, alter, or amend it without impairing the obligations of the contract, despite the existence of the act of 1856, and despite the circumstance that that act was in express terms incorporated in and made part of the Hewitt law. But the reasoning by which the court reached this conclusion is directly in conflict with the settled line of decisions of this court just referred to, and the case has been specifically overruled by the opinion announced by the Kentucky court of appeals in the cause now under review. It is not and cannot be asserted that the *Bank Tax Cases* were decided before the contract evidenced by the Hewitt law was accepted, hence it cannot be urged that such *decision **[648]**
entered into the consideration of the parties in forming the contract. It is not pretended that the bank, whose rights are here contested, was either a party or privy to the *Bank Tax Cases*. And even if such were the case, we must not be understood as intimating that the construction of the Hewitt act, which was announced in the *Bank Tax Cases*, would be binding in controversies as to other taxes between those who were parties or privies to those cases. On this subject we expressly abstain from now intimating an opinion. In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment. As we conclude that the decision

in the *Bank Tax Cases* above cited, upon the question of contract, was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions.

It was earnestly argued that conceding the general rule to be that a reserved power to repeal, alter, or amend enters into and forms a part of all subsequent legislative enactments, nevertheless this case should not be controlled thereby, first, because of peculiar conditions which it is asserted existed at the time the Hewitt law was enacted, and, second, because of the terms of the act of 1856 by which the power to repeal, alter, or amend was reserved. The conditions relied upon and stated in argument as removing this case from the operation of the general principle are as follows: When the Hewitt law was enacted there existed much uncertainty as to the power of the state of Kentucky to tax banks within its borders. There were banks claiming to be only subject to limited taxation because of charters enacted prior to the act of 1856. Again, there were other banks asserting a like right because of charters adopted since 1856, but which, it was said, were not dominated by that act. In consequence of these pretensions on behalf of state banks which were then undetermined, the national banks, organized in the state, were insisting that they were subject only to the rate of taxation to which the most favored state bank was liable, because it was urged that to tax such banks at a higher rate
[649] would be a discrimination in favor of these banks and against the national banks, which was forbidden by the law of the United States. To add to this complexity, it is said, the varying rate of local taxation was operating inequality among banks, and driving banking capital from the localities where the tax was highest, thus producing a public detriment. To assuage these difficulties and conflicts, to secure as to all banks, state and national, a uniform and higher rate of state taxation than that existing as to other property, it is asserted that the Hewitt law tendered to all banks a contract giving freedom from local burdens if a higher state tax was voluntarily paid. This must have been contemplated to be irrevocable, for otherwise the very object of the law could not have been accomplished. Conceding, *arguendo*, to the fullest degree the situation to have been as described, the conclusion sought to be deduced from it is wholly unsound, since it disregards the fact that the contract proposed and which was actually entered into contained an express reservation of the right to repeal, alter, or amend. Indeed, the contention, when analyzed, amounts to this, that the plain letter of the contract should be disregarded upon the theory that the parties intended to make a different contract from that which they actually entered into. The distinction between the potentiality of a particular state of facts, for the purpose of preventing the implication of the reserved power to alter, amend, or repeal, and the impotency of such facts to overcome the express and unambiguous provisions of the contract, at once demonstrates the confusion of thought involved in the contention. It was upon the distinction existing between the implication of the power to amend, alter, or repeal, and its express statement in a contract, that the case of *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352], proceeded, and that case is therefore wholly inapposite to the controversy here presented.

The argument predicated on what is said to be the peculiar language of the act of 1856 is this: That act, whilst reserving the right to amend or repeal "all charters and grants of or to corporations, or amendments thereof, and all other statutes," accompanied this reserved right with the restriction that it *should not be exercised where "a contrary [650]
intent be therein plainly expressed (in the act creating the right), provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." The bank, it is asserted, had under its charter a right to be taxed only to a limited amount; and this, it is claimed, constituted a contract which was surrendered on the theory that the Hewitt law was irrevocable, and if it were not so, then there was no surrender of the right under the charter, and therefore it now exists. This contention, however, but states in another form the claims which we have already disposed of. The charter was conferred on the bank subsequent to the act of 1856, and the limit of taxation stated in the charter was therefore subordinated to that act and subject to the exercise of the power of amendment or repeal. True it is in *Franklin County Court* v. *Deposit Bank of Frankfort* (June, 1888, 87 Ky. 382) the court of appeals of Kentucky decided that a grant, after the act of 1856, of an exemption from taxation for a designated time, signified such a plain manifestation of the will of the legislature that the grant should not be subject to alteration or amendment, that the right so conferred was therefore not submitted to the paramount power of repeal or amendment reserved by the act of 1856. This decision, however, was rendered long after the enactment of the charter of the bank, whose rights are now before us, and has been expressly overruled by the court of appeals in the case which we are reviewing. The docrine settled by the adjudications of this court is this: That the mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect. The doctrine on which the argument depends is that any grant for a designated time is by implication taken out of the general rule, even although there be no express provision to that end in the act making the grant.

The assertion that wherever it is stated in a legislative grant *or charter that it is to [651]
last for a given period of time, therefore such provision is a plain manifestation of the intention of the legislature that the grant or charter shall not be repealed or amended for the time for which it was declared that it

should exist, is fallacious, since it overlooks the consideration that the limit of time fixed for the duration of the charter or grant, like every other provision therein, is qualified by the reserved power to alter, amend, or repeal. It hence results that where in a charter or grant enacted, when there is a general statute reserving the power to repeal, alter, or amend, a time is stated, the granting act must be read just as if it declared that the charter or grant should exist for a designated time, unless sooner repealed, altered, or amended. Indeed, reduced to its final analysis, the argument that because in a grant or charter a time is designated for its duration, it cannot, therefore, until the expiration of such time, be repealed, altered, or amended, is equivalent to saying that the reserved power cannot be exercised in any case of contract. For, if every case of charter or grant where a time is fixed, either expressly or by necessary construction in the charter or grant, is taken out of the reach of the reserved power, it would follow that only those charters or grants which were determinable at will would come under the control of the power reserved. But to say this simply amounts to declaring that the reserved power applies and can be enforced only in those cases where it would be entirely unnecessary or useless to do so.

The source of the reservation, by many of the states in general laws, of the power to amend, alter, or repeal, was fully reviewed in *Greenwood* v. *Union Freight R. Company*, 105 U. S. 13 [26: 961], where it was shown that such legislation had its origin in the purpose to provide for a case exactly like the one before us. Referring to the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518 [4: 629], the court through Mr. Justice Miller, said (p. 20 [26: 965]): "It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power" (the power to repeal or amend), "without violating the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the
[652] *Dartmouth College* *Case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales* v. *Stetson*, 2 Mass. 143 [3 Am. Dec. 39]. It would seem that the states were not slow to avail themselves of this suggestion. . . ." As, then, the limitation in the charter of the bank was subject to repeal by the legislature, it cannot be claimed that such exemption was vested in the bank, and was therefore subject to be reinstated if the Hewitt act was not an irrevocable contract, even if the correctness of the claim that this result would legally arise, if the charter had been an irrevocable contract, be *arguendo* conceded.

It is urged that as the act of 1856 provides that other rights previously vested could not be taken away by the repealing act, therefore the exemption from taxation could not be withdrawn; but this is a mere form of restating the arguments already examined, and is tantamount to the reassertion of the proposition that the limited taxation established by the Hewitt act, or the one conferred by the charter, could not be taken away at all. Referring to this subject, this court in *Greenwood* v. *Union Freight R. Company* (*ubi supra*), said (p. 17 [26: 964]): "Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it or on the soundness of the reasons which prompted it." In *considering what constituted vested [653]
rights, the court clearly pointed out that rights of this character did not embrace mere privileges or franchises conferred by the granting act, and such rights obviously came within the power to repeal and amend, and were not within the category of those taken out of the reach of such power.

In the *Greenwood Case* the reserved power was, by the general statute, authorized to be exercised "at the pleasure of the legislature." But this qualification was decided in *Hamilton Gas Light & Coke Company* v. *Hamilton City*, 146 U. S. 271 [36: 969], to be no more comprehensive than the power which would be implied from a general law simply reserving the right to repeal, alter, or amend.

Nor is there force in the claim that before the adoption of the charter in question the courts of the state of Kentucky had settled the law to be that vested rights would include a mere privilege conferred by the granting act, and which was therefore necessarily subjected to the power to repeal or amend if such power is to have any application at all. This claim is based on what is assumed to have been decided in Kentucky in *Commissioners of the Sinking Fund* v. *Green & Barren River Navigation Company*, 79 Ky. 73, 75, 83. The case has not the import attributed to it. The scope of the question, in that case adjudged, was considered and commented on by this court in *Louisville Water Company* v. *Clark*, *supra*, where it was said (p. 16 [36: 59]):

"But there is nothing in that case inconsistent with the views we have expressed. It was there decided that the legislature could not consistently with the Constitution, or with the above statute of 1856, take from the Green & Barren River Navigation Company, without making compensation therefor, the right it acquired under a contract

with the state, concluded in 1868, to take, for a term of years, tolls from vessels navigating Green and Barren rivers, in consideration of its agreement, which had been fully performed, to maintain and keep in repair, at its own expense, such line of navigation. The case before us presents no such features. As already indicated, in losing an exemption from taxation the water company [654] *regained its rights to make such charges for water, furnished for fire protection, as it could rightfully have done before the act of 1882 was passed, and whilst its property was subject to taxation."

Finally, it is said that as at the time the Hewitt act was passed the rate of state taxation was lower than the sum of taxation fixed by that act on the banks, giving their assent to it, therefore this increased sum over and above the amount of state taxes paid by other taxpayers, to the state, constituted a consideration received by the state, and created a vested right of such a nature that the state could not repeal the Hewitt act without providing for the refunding of the sum paid the state in excess of the state taxes paid by other taxpayers. But this disregards the patent fact that whilst the amount of the state taxes, paid by the bank under the Hewitt act, was larger than the taxes paid by other taxpayers to the state, the bank was by the Hewitt act relieved from all obligation to pay county and municipal taxes. As the bank had at the time of the Hewitt act no contract limiting the taxing power of the state which could not have been repealed, it therefore could have been subjected by the state to the same rate of county and municipal taxes resting upon other taxpayers. It is not asserted that if this legislative power had been exerted and the bank been compelled to pay the same amount of taxation, for all governmental purposes, that other property owners were obliged to pay that it would not have contributed more than it was called upon to do under the Hewitt act. The claim therefore amounts to this: That because the Hewitt act relieved the bank from a part of the burden of taxation which rested upon the other taxpayers of the state, and this relief from burden was purely the result of the voluntary act of the lawmaker, that the power to remove the privilege cannot be exerted without refunding to the bank a portion of the lesser burden which it has paid. Thus to analyze the proposition is to answer it.

Our conclusion being that there was no irrevocable contract protecting the bank [655] from taxation, and therefore that the taxing law of Kentucky did not violate the contract clause of *the Constitution of the United States, it follows that *the decree below must be and it is affirmed.*

Mr. Justice **Brown** dissenting:

The cogency with which the opinion of the court is expressed is calculated to awaken a distrust as to the soundness of any conflicting views; but the very fact that the court to which this writ of error was issued, only two years before the decree was pronounced which this court has affirmed, came to a precisely opposite conclusion upon the same state of facts, indicates at least that the question is not free from a reasonable doubt. Indeed the judiciary of Kentucky appears to be about equally divided upon the subject.

The dominant question in the case is whether the written acceptance by the bank of the proposition contained in the act of 1886, known as the Hewitt act, constituted a contract which neither the legislature nor the bank could repudiate at pleasure. As stated in the opinion of the court, the bank was chartered in 1884, with a provision that its life should continue for thirty years, and that a payment of fifty cents on each one hundred dollars of stock should "be in full of all tax and bonus thereon of every kind." This charter fell under the provisions of the prior act of 1856, declaring that all such charters should be subject to amendment or repeal at the will of the legislature. There seems, however, to have been some dispute as to whether, under the power to amend, it was within the competency of the legislature to increase this tax during the life of the charter, without a violation of the Fourteenth Amendment to the Federal Constitution. To settle this question beyond peradventure, the legislature, in 1886, inaugurated a new policy, and in the Hewitt act made a distinct proposition that, if the banks and corporations interested with the consent of the majority in interest of their stockholders, at a regular meeting thereof, should give their consent to the levying of a tax of seventy-five cents on each share equal to one hundred dollars, and agree to pay the same as therein provided, and would agree to waive and release all *right [656] under the act of Congress, or under their charters, to a different mode or smaller rate of taxation, and should evidence such consent by writing under the seal of the bank delivered to the governor of the commonwealth, "such bank and its shares of stock should be exempt from all other taxation whatever, so long as said tax shall be paid during the corporate existence of such bank." There was a further provision that, in case of refusal to enter into this compact, the bank should be assessed as directed by a previous section, and such state, county, and municipal taxes imposed as were imposed on the assessed taxable property in the hands of individuals.

It is true that this act was made expressly subject to the prior act of 1856, declaring that all charters and grants to corporations should be subject to amendment or repeal at the will of the legislature; but this very act limited the power to repeal and amend to cases where a "contrary intent" was not "therein plainly expressed." In other words, that while such charters or grants were generally subject to amendment or repeal, if language were used by the legislature indicating clearly an intention that the privileges and franchises therein granted should not be subject to amendment or repeal, it was perfectly competent to do so, and the stipulation was binding. There was a further provision that no amendment or repeal should "impair other rights previously vested." How, then, could such intent to limit its own powers be manifested by the legislature? It will prob-

ably be conceded that, if the grant or charter contained a clause to the effect that any particular privilege therein granted should not be subject to amendment or repeal, it would be sufficient; but it seems to me equally clear that if it contained other language plainly evincing an intent that a particular clause should be irrepealable for a certain length of time; or, if it contained a proposition from which the legislature could not withdraw without a breach of faith toward those who had accepted its terms, it could not be intended that such contract, if accepted, should be subject to repudiation. Conceding to its fullest extent the doctrine of the *Dartmouth*
[657] *College Case*, that the charter of *a corporation is a contract, it follows that so far as it is a charter it is, under the act of 1856, subject to amendment or repeal; but so far as the legislature departs from the main object of the charter of granting privileges and franchises, and invites its corporations to enter into written contracts with it, requires such contracts to be executed in an unusual form, and to receive the consent, not only of the directors, but of a majority of its stockholders, and, further, that they be made under seal and delivered to the governor of the commonwealth, that then it evinces an intent as clearly as language can express it that such contract shall be binding, and that, in respect thereto, it yields up its right to amendment or repeal. *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352]. To hold that a contract thus solemnly entered into may be repudiated at the next session of the legislature is practically to say that the legislature may set a trap for its corporations, and that after it has enticed them into it by the offer of more favorable terms than they otherwise could obtain, may repudiate its own obligations, without restoring to the corporations what it had previously induced them to give up.

The difficulty with the position of the court is, that it renders it impossible for the commonwealth to enter into a contract with one of its own corporations, which it may not repudiate at the next session of its legislature. If capital may be enticed into the state under its solemn promise that certain privileges shall be granted, or that it shall be subject to a certain specified rate of taxation, which may be withdrawn at any moment, it can scarcely complain if foreign capital refuses to be tempted by such illusory offers. I see no reason why, under the decision of the court, if the legislature should enter into a compact with one of its own corporations to perform a great public work, it may not, after capital has been largely invested therein, and the work entered upon, under the guise of amending the grant, abrogate its contract and leave the corporation practically defenseless. Indeed it seems to me that it is not creditable to the legislature to impute to it an intent to subject corporations, which had accepted the benefits of the Hewitt act, to the rate of taxation prescribed by the act of
[658] 1892,*providing for a wholly different mode of assessment and taxation, and that it is more reasonable to assume that the taxing officers of the city of Owensboro exceeded their authority in attempting to exact the taxes in question.

The cases cited in the opinion of the court are not in conflict with the position here assumed. In *Tomlinson* v. *Jessup*, 15 Wall. 454 [21: 204], it was decided that an act of the legislature of South Carolina, passed in 1851, incorporating the Northeastern Railroad Company, and a subsequent act passed in 1855, providing that its stock should be exempt from taxation during the continuance of the charter, were subservient to a general act passed in 1841, reserving the right to amend, alter, or repeal every such charter, unless the act granting such charter should in express terms except it. As the amended charter in question contained no clause excepting it from the provisions of the general act of 1841, it was held that its property might be taxed by subsequent legislation. The case differs from the one under consideration in the fact that the amended charter contained no exception taking it out of the act of 1841, and that there was no express contract in that charter that no tax should be subsequently imposed. There was nothing to indicate that this charter was not intended to fall within the restrictions of the act of 1841.

In *Maine C. Railroad Company* v. *Maine*, 96 U. S. 499 [24: 836], there was a similar general law, passed in 1831, declaring any act of incorporation liable to be amended, altered, or repealed at the pleasure of the legislature, unless there was "an express limitation or provision to the contrary." It was held that an act of the legislature passed in 1856, authorizing corporations to consolidate and form a new corporation, was an act of incorporation of a new company, and, there being in this act no limitation upon the power of amendment, alteration, and repeal, the state retained the power to alter it in all particulars, constituting the grant of corporate rights, privileges, and immunities to the new company, and that a limitation upon the taxing power of the state prescribed in the charters of the old companies ceased upon their consolidation, though it was said that "rights and interests acquired by the company, not constituting a part of*the contract [659]
of incorporation, stand upon a different footing." In its application to this case it is subject to the same criticism as that of *Tomlinson* v. *Jessup*.

The case of the *Louisville Water Company* v. *Clark*, 143 U. S. 1 [36: 55], arose under the same act of Kentucky of 1856. In that case, an immunity from taxation, conferred upon the water company by an act passed in 1882, was withdrawn by a subsequent act passed in 1886, and it was held that as the act of 1882 contained no clause that "plainly expressed" an intention not to exercise the power reserved by the statute of 1856 to amend or repeal, at the will of the legislature, all charters or grants to corporations, the act was subject to that general statute for the very reason that there was no "contrary intent" "plainly expressed." The opinion harmonizes completely with the position here assumed, and contains a clear inference that where a subsequent act plainly evinces

an intention on the part of the legislature that the general statute of 1856 should not apply, such intention will be respected and will control the operation of the general statute. If the Hewitt act does not evince such intention, of course the whole argument falls to the ground; but it seems to me that its language in this particular is too clear to be disregarded.

The recent case of *Covington* v. *Kentucky*, 173 U. S. 231 [*ante*, 679] is of the same tenor. An act passed in 1886, authorizing the city of Covington to build a system of waterworks, contained a provision that they should "remain forever exempt from state, county, and city tax." This was held to be subject to the act of 1856, providing for the amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed. It was very properly held that there was nothing in the act of 1886 plainly expressing an intent that the provision exempting the property from taxation was not subject to repeal; but the whole theory of this dissent is embodied in the proposition that there was in the Hewitt act a plainly expressed intent that it should not be amended or repealed to the prejudice of banks accepting its terms. There was a plain intimation in that opinion that if the act of 1886 had contained evidence of such intent it would have been held to repeal the
[660] *act of 1856 to that extent. "Before a statute," said the court,—"particularly one relating to taxation,—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture."

Such intent *was* found by this court in *New Jersey* v. *Yard*, 95 U. S. 104 [24: 352], in the fact that there was in the supplemental charter of the corporation, precisely as in the Hewitt act (1) a subject of dispute and fair adjustment of it for a valuable consideration on both sides; (2) the contract assumed, by legislative requirement, the shape of a formal written contract; (3) the terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof," excluded, in view of the whole transaction, the right of the state to revoke it at pleasure. There was the same provision as in the Hewitt act, that the section providing for a commutation of taxes should not go into effect, or be binding upon the company, until it had signified its assent under its corporate seal and filed it in the office of the secretary of state. The language of Mr. Justice Miller is so pertinent that I cannot forbear quoting the following paragraph: "Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of the contract that the state of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the legislature to alter or amend it at pleasure? If the state intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the state could at any time make to suit itself?" I find it difficult to see how that case and the one under consideration can stand together.

So far as the court of appeals of Kentucky had spoken *upon this question, prior to the [661]
decision which is here affirmed, it was uniformly in favor of the position taken in this dissent. In *Franklin County Court* v. *Deposit Bank of Frankfort*, 87 Ky. 370, it was held that an act which continued the life of a charter to a period beyond the time fixed for its expiration, and reserved the corporate organization, privileges, powers, duties, and rights, was an extension of an old charter, and not the grant of a new one; that an act passed in 1858, "plainly expressed" an intention that the act of 1856 should not apply to it, and that such intent was evinced by the provision that the appellee bank should establish a branch at Columbus; "that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share of its capital stock, pay annually fifty cents upon each one hundred dollars of its contingent fund; that it should be subject to all the limitations, conditions, and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension."

I desire only to add that in *Commonwealth* v. *Farmers' Bank of Kentucky*, 97 Ky. 590, it was held, by the same majority of the court which subsequently overruled it, that there existed in the Hewitt act "every element of a contract between the state and the banks and, with such a consideration as will uphold it, no reasonable doubt can be entertained that such was the purpose of the parties to it." "We are satisfied," said the court, "after a careful consideration of this question, that the parties making the contract never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties." The argument is a powerful demonstration of the existence of an irrevocable contract; but the court of appeals subsequently overruled this decision, and this court has affirmed its action and in addition thereto has pronounced an opinion seemingly so inconsistent with *New Jersey* v. *Yard* as to practically amount to an overruling of that case. These cases, however, are but a reaffirmance of a *principle which the same court had pre- [662]
viously laid down in *Commissioners of Sinking Fund* v. *Green & Barren River Navigation Co.* 79 Ky. 73, and *Commonwealth* v. *Owensboro & N. R. Co.* 95 Ky. 60, that a distinct contract contained in a charter was not subject to the act of 1856. Indeed, I do not understand upon what other theory a positive acceptance of the taxation imposed by the Hewitt act was required of these banks.

DEPOSIT BANK OF OWENSBORO, *Plff. in Err.*,
v.
CITY OF OWENSBORO and A. M. C. Simmons.

(See S. C. Reporter's ed. 662.)

Citizens' Savings Bank of Owensboro v. *City of Owensboro and A. M. C. Simmons*, No. 669, *ante*, 840, followed.

[No. 149.]

Argued February 27, 28, 1899. Decided April 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky.

This case was argued with *Citizens' Savings Bank* v. *Owensboro*, No. 669, *ante*, p. 840.

Messrs. **W. T. Ellis** and *J. A. Dean* for plaintiff in error.

Messrs. **Chapeze Wathen** and **J. D. Atchison** for defendants in error.

[662] *Mr. Justice **White** delivered the opinion of the court:

The relief sought by the plaintiff in error was the nullity of certain taxes levied by the city of Owensboro for the years 1893 and 1894. The grounds upon which this relief was prayed are in all material respects like unto those relied on in the two cases against the city of Owensboro, just decided. The charter and an amendment extending the same were both enacted after the act of 1856.

Indeed, this case, along with the other two, was disposed of by the Kentucky court of appeals in the same opinion, because of the identity of the questions presented.

For the reasons given in the opinion in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons*, No. 669 [*ante*, 840] this term, *the decree is affirmed.*

DEPOSIT BANK OF OWENSBORO, *Plff. in Err.*,
v.
DAVIESS COUNTY *et al.*

(See S. C. Reporter's ed. 662.)

[No. 150.]

Argued February 27, 28, 1899. Decided April, 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky.

This case was argued with *Citizens' Savings Bank* v. *Owensboro*, No. 669, *ante*, p. 840, and by the same counsel.

[663] *Mr. Justice **White** delivered the opinion of the court:

By a written stipulation it is agreed that this cause abide the result of No 149, *Deposit Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons.* The decree in that case having been affirmed, the same result is therefore necessary in this, and accordingly the decree of the Court of Appeals of Kentucky in this case is also *affirmed.*

FARMERS' & TRADERS' BANK OF OWENSBORO, *Plff. in Err.*,
v.
CITY OF OWENSBORO and A. M. C. Simmons, Tax Collector.

(See S. C. Reporter's ed. 663, 664.)

Citizens' Savings Bank of Owensboro v. *City of Owensboro and A. M. C. Simmons*, No. 669, *ante*, 840, followed.

[No. 151.]

Argued February 27, 28, 1899. Decided April 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky.

This case was argued with No. 669, *ante*, p. 840.

Messrs. **W. T. Ellis** and *J. A. Dean* for plaintiff in error.

Messrs. **Chapeze Wathen** and **J. D. Atchison** for defendants in error.

*Mr. Justice **White** delivered the opinion [663] of the court:

The plaintiff in error was chartered by the legislature of Kentucky in 1876. The charter limited the taxing power to fifty cents on each one hundred dollars of capital stock, during the life of the corporation, which was fixed at twenty-five years. This suit was commenced by petition asserting the nullity of certain taxes levied by the city of Owensboro for the years 1893 and 1894. The petition was twice amended. The cause of action alleged was, in every material respect,*the same as that relied on in the case [664] of *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons, Tax Collector*, No. 669 of the docket of this term, [*ante*, 840] which we have just decided. For this reason the opinion in that case disposes of all the issues arising in this, and for the reasons therein given the decree of the Court of Appeals of Kentucky in this case rendered is *affirmed.*

OWENSBORO NATIONAL BANK, *Plff. in Err.*,
v.
CITY OF OWENSBORO and A. M. C. Simmons.

(See S. C. Reporter's ed. 664–684.)

Taxation of national banks—shares of stock and real estate—taxing law of Kentucky—tax on corporation or its property and franchise, void.

1. A state is without power to tax national banks, except under the permissive legislation of Congress.

2. Under U. S. Rev. Stat. § 5219, the power of a state to tax national banks is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank.
3. The taxing law of Kentucky taxing the franchises or intangible property of national banks is beyond the authority conferred by the act of Congress, and void.
4. A tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders.
5. Taxes imposed on a national bank and its property and franchises, and not upon the shares of stock in the names of the stockholders, are void.

[No. 148.]

Argued February 27, 28, 1899. Decided April 3, 1899.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming a judgment of the Circuit Court of that State dissolving an injunction and sustaining demurrers and dismissing a suit brought by the Owensboro National Bank against the city of Owensboro *et al.*, to perpetually restrain said city and its tax collector from enforcing the collection of alleged franchise taxes upon the said bank. *Reversed* and cause remanded for further proceedings.

Statement by Mr. Justice **White:**

This suit was originally instituted in a court of the state of Kentucky by the plaintiff in error, the Owensboro National Bank. The relief prayed was that the city of Owensboro and its tax collector Simmons be perpetually restrained from enforcing the collection of alleged "franchise" taxes for the years 1893 and 1894, claimed by the defendants to have been assessed under authority of a revenue act of the state of Kentucky enacted November 11, 1892, as amended. The taxes in question were laid upon the amount fixed by the state board of valuation and assessment provided for in the act, which valuation equalled the combined sum of the par of the capital stock of the bank, its surplus
[665] and undivided *profits. It is admitted on the record that the avails of the bank to the amount of the valuation were invested in nontaxable bonds of the United States. Various reasons why the taxes should be declared illegal were urged in the petition and the amendments thereto. Without going into detail, all the grounds are substantially included in the following summary:

1. That the levy of the taxes in question impaired the obligation of an alleged irrevocable contract entered into in 1886 between the bank and the state, and embodied in a legislative enactment referred to as the Hewitt act, which contract was protected from impairment by the Constitution of the United States;

2. That the taxes complained of were unlawful, because they were not laid on the shares of stock in the names of the shareholders, but were actually imposed on the property of the bank, contrary to the act of Congress;

3. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States, which the state was, under the law of the United States, without power to tax either directly or indirectly;

4. That even if the taxes were otherwise valid, they were unlawful, because discriminatory, inasmuch as certain state banks which were incorporated prior to the year 1856 were entitled to a low rate of taxation resulting from charter contracts, and it was illegal to tax national banks at a higher rate than that assessed against the most favored state bank;

5. That the law under which the taxes were levied and the modes of procedure adopted in carrying the law into effect operated to produce inequality in taxing the property of the bank, to its disadvantage, as compared with other property within the state, contrary to the state Constitution;

6. That the rate of taxation imposed by the city of Owensboro for the year 1893 was in excess of that authorized by the state Constitution or laws;

7. That if the taxes complained of were considered laid, *not upon the capital or fran- [666]
chise of the bank, but upon the shares of stock in the names of the shareholders, then they were discriminatory as against shareholders who were the heads of families, as such shareholders were not permitted to deduct from the assessment against their shares an exemption authorized by a statute of the state in favor of the class of individuals referred to;

8. That if the bank could be legally taxed upon its property of any kind it was a foreign corporation as to the state of Kentucky and could only be taxed to the extent that its property was invested and had been earned in the city of Owensboro.

The petitions and the amendments thereto were demurred to and an answer filed reserving the demurrers. Motions were made to dissolve a preliminary injunction which had been allowed. On these motions testimony was heard. The court dissolved the injunction and sustained the demurrers, and, the plaintiff failing to plead further, the petition and amended petitions were dismissed. On appeal the court of appeals of the state of Kentucky affirmed the judgment of the lower court, and the cause was then brought here for review.

Messrs. **W. T. Ellis**, *George W. Jolly*, and *Wilfred Carrico* for plaintiff in error.

Messrs. **Chapeze Wathen, J. D. Atchison** and *L. P. Little* for defendants in error.

*Mr. Justice **White**, after making the fore- [666]
going statement, delivered the opinion of the court:

The claim of contract arising from the Hewitt act need not be considered, as it is disposed of adversely to the contentions of the plaintiff in error by the opinion expressed in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro et al.*, just decided [*ante*,

545, 840]. We therefore dismiss that subject and the questions arising from it from further consideration.

The other issues which the cause presents group themselves under two distinct headings: First, a contention that the taxes [667]*levied were illegal, because imposed in violation of the act of Congress regulating the method of taxation which the respective states may exert against national banks or their stockholders as such; second, because the taxes imposed are discriminatory.

This latter question has a twofold aspect, since some of the charged discriminations are asserted to be in violation of the act of Congress, and others are claimed to arise because of an asserted contravention of the state law and Constitution. Of course, we are concerned only with the discrimination claimed to constitute a violation of the law of the United States. We need not, however, dissect the discriminations relied upon so as to separate the Federal from the state questions in this regard, at least until we have disposed of the contention that the taxes were levied upon the bank and its property in violation of the laws of the United States, since if error in this regard is found, the taxes will be illegal, and it will become unnecessary to determine whether they were discriminatory even from a Federal aspect.

Were the taxes complained of levied upon the bank, its property or franchise, and if so were they legal?—is the question which then arises on the threshold of the case.

Two elements are involved in the determination of this question—that is, the extent of the power of the respective states to tax national banks, and the ascertainment of the scope and purport of the law by which the taxes complained of were levied.

Early in the history of this government, in cases affecting the Bank of the United States, it was held that an agency, such as that bank was adjudged to be, created for carrying into effect national powers granted by the Constitution, was not in its capital, franchises, and operations subject to the taxing powers of a state. *M'Culloch* v. *Maryland*, 4 Wheat. 316 [4: 579]; *Osborn* v. *Bank of the United States*, 9 Wheat. 738 [6: 204].

The principles settled by the cases just referred to and subsequent decisions were thus stated by this court in *Davis* v. *Elmira Savings Bank*, 161 U. S. 283 [40: 701]:

"National banks are instrumentalities of [668]the Federal government,*created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

It follows then necessarily from these conclusions that the respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress.

The first act providing for the organization of national banks, passed February 25, 1863, chap. 58 (12 Stat. at L. 665), contained no grant of power to the states to tax national banks in any form whatever. Doubtless the far-reaching consequence to arise from depriving the states of the source of revenue which would spring from the taxation of such banks, and the error of not conferring the power to tax, early impressed itself upon Congress; for the following year (13 Stat. at L. 99, chap. 106) power was granted to the states, not to tax the banks, their franchises or property, but to tax the shares of stock in the names of the shareholders. This provision subsequently was amended and supplemented in various particulars (15 Stat. at L. 34, chap. 7), and the result of this legislation is embodied in section 5219 of the Revised Statutes, which is as follows:

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located *within the [669] state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void.

So self-evident are these conclusions that the adjudicated cases justify the deduction that they have been accepted from the beginning as axiomatic and unquestioned, since the controversies as to taxation of national banks illustrated in the opinions of this court mainly depend, not upon any attempted exercise of a power to tax the property and franchises of the banks, but involved controversies as to whether, when the shares of the stock in the names of the shareholders had been assessed according to law, the tax could

be imposed upon them because of alleged discrimination or other illegalities.

Does, then, the Kentucky statute tax the shares of stock in the names of the shareholders, or does it impose a tax upon the bank, its property or franchise?

Without undertaking to recapitulate the provisions of the Kentucky statutes, in virtue of which the taxes here in question were imposed, we content ourselves with reiterating, in the margin,† the statement of the taxing statutes of Kentucky *made by the [670] court in *Adams Express Company* v. *Kentucky*, 166 U. S. 175 *et seq.* [41: 961].

The effect of the statutory provisions contained in the third *article, sections 4077 *et* [671] *seq.*, as construed and interpreted by the court of appeals of the state of Kentucky, were considered in *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150 [41: 953],*and *Adams Express Company* v. [672] *Kentucky, supra*. In the *Bridge Company*

†Excerpt from *Adams Express Co.* v. *Kentucky*, 166 U. S. 173 [41: 961]:

Chapter 108 of the compilation of 1894 is divided into articles as well as sections, and may be referred to by way of convenience. There are some slight differences from the act of 1892 not material to be noted. The first article contains the general provisions relating to the assessment and collection of taxes "upon all property." Sections 4019 and 4020 are as follows:

"Sec. 4019. An annual tax of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided, shall be paid by the owner, person, or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the sinking fund; twenty-two (22) cents for the support of the common schools, and one half of one cent for the Agricultural and Mechanical College, as now provided by law, by an act entitled 'An Act for the Benefit of the Agricultural and Mechanical College,' approved April twenty-ninth, one thousand eight hundred and eighty, including the necessary traveling expenses of all pupils of the state entitled to free tuition in said college, and who continue students for the period of ten months, unless unavoidably prevented.

"Sec. 4020. All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of the state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Article two relates to the assessment of property by the assessors, to whom every person in the Commonwealth must give in a list of all his property under oath.

Section 4058 provides for schedules with interrogatories to be propounded to each person, "with affidavit thereto attached, to be signed and sworn to by the person whose property is assessed." The schedules contain a long list of items, including all forms of tangible and intangible, real, personal, and mixed property; the enumeration being exceedingly minute. The first eleven items relate to bonds, notes secured by mortgage, other notes, accounts, cash on hand, cash on deposit in bank, cash on deposit with other corporations, cash on deposit with individuals, all other credits or money at interest, stock in joint-stock companies or associations, stock in foreign corporations.

The third article covers the assessment of corporations, corporations generally, banks and trust companies, building and loan associations, turnpikes.

Sections 4077, 4078, 4079, 4080, 4081, 4082 and 4091 are as follows:

"Sec. 4077. Every railway company or corporation, and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company, bridge company, street-railway company, express company, electric-light company, electric-power company, telegraph company, press despatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation, or association, and also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district, where its franchises may be exercised. The auditor, treasurer, and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require.

"Sec. 4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by section four thousand and ninety-two of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts, *viz.:* The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the fifteenth day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes

Case, referring to the "franchise" tax there in controversy, it was said (p. 154[41:954]): [673] *"The tax in controversy was nothing more than a tax on the intangible property of the company in Kentucky, and was sustained as such by the court of appeals, as consistent *with the provisions of the Constitution of [674] Kentucky in reference to taxation."

---

from all other sources for twelve months next preceding the fifteenth day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the auditor may require.

"Sec. 4079. Where the line or lines of any such corporation, company, or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this state, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other state or government, or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this state and out of this state, on business done in this state, and the entire gross receipts of the corporation, company, or association in this state and elsewhere during the twelve months next before the fifteenth day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company, or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

"Sec. 4080. If the corporation, company, or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company, or association in this state and elsewhere, the proportion which the gross receipts in this state, within twelve months next before the fifteenth day of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company, or association for taxation in this state.

"Sec. 4081. If the corporation organized under the laws of this state or of some other state or government be a railroad, telegraph, telephone, express, sleeping, dining, palace, or chair car company, the lines of which extend beyond the limits of this state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased, or controlled in this state, bears to the total length of the lines owned, leased, or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through, or into which, such lines pass or are operated, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the state, less the value of any tangible property assessed, or liable to assessment, in any such county, city, town, or taxing district.

"Sec. 4082. Whenever any person or association of persons, not being a corporation nor having capital stock, shall, in this state, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation."

"Sec. 4091. All taxes assessed against any corporation, company, or association under this article, except banks and trust companies, shall be due and payable thirty days after notice of same has been given to said corporation, company, or association by the auditor; and every such corporation, company, or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum; any such corporation, company, or association failing to pay its taxes, penalty, and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction."

The fourth article relates to the assessment and payment of taxes by railroads; the fifth to distilled spirits; the sixth, seventh, eighth, and ninth articles to the board of supervisors and the collection of taxes and the revenue.

Articles 10 to 12 relate to license taxes, special taxes, privilege taxes, and the like; and articles 13, 14, and 15 prescribe certain duties for designated officers touching the collection of the revenue. Article 15 provides for a state board of equalization to equalize the assessments returned to them from each county.

By section 4092, banks and trust companies are required to file the report referred to in section 4078 by a date named. The section also prescribes when taxes are payable, and that upon failure to file the reports "or to pay said taxes, said banks and trust companies shall be subjected to the same fines and penalties as prescribed in section fifteen (4091) of this article."

In the *Express Company Case* the court said (pp. 180, 181 [41: 963, 964]):

"Taking the whole act together, and in view of the provisions of sections 4078 to 4081, we agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state. . . . There is nothing in the statute which exempts any intangible property owned by any corporation, company, or individual taxpayer from taxation, or discriminates between them. . . . The tax mentioned in section 4077, is not an additional tax upon the same property, but on intangible property which has not been taxed as tangible property."

True it is, since the decision referred to, the court of appeals of the state of Kentucky has, it is asserted in the case of *Louisville Tobacco Warehouse Company* v. *Commonwealth*, on a rehearing (48 S. W. 420 [20 Ky. L. Rep. 1047]), examined the terms of section 4077, and is stated to have said:

"The latter clause, 'also every other corporation, company, or association having or ex-
[675]ercising any special or exclusive*privilege or franchise not allowed by law to natural persons, or performing any public service,' seems to us to have been added for the purpose of including such corporations as were not strictly *ejusdem generis* with the companies previously enumerated, but which might possess exclusive privileges; and, as a provision for the future, to impose the intangible property tax upon corporations to be thereafter created, which might have exclusive privileges, or perform public services.

"The only authority relied upon in support of the contention that this language includes all corporations is the case of *Western Union Telegraph Company* v. *Norman*, 77 Fed. Rep. 27. But that case was in relation to a company specifically named in the statute under consideration. The question here presented did not arise in that, and was, presumably, not argued; and the suggestion made by the learned judge who delivered that opinion was made in argument in reaching a conclusion, to reach which the *dictum* cited was not necessary."

In deciding that the conviction of the corporation for wilfully failing to file with the state auditor the statement required by the Kentucky Statutes, sections 4077 and 4078, was erroneous, the court in that case, it is also stated, has, moreover, further observed:

"Nor can the appellant corporation be said to have any intangible property subject to taxation under this statute. Its tangible property—its warehouse, drays, and personal property—is of no greater value in the hands of the corporation than it would be if owned and managed by the natural persons who are its stockholders. This is also true of its choses in action, etc. The value of its capital stock must necessarily be the value of its tangible property, choses in action, etc. It had no intangible property subject to taxation under the statute, and, as matter of law, could have none. . . . The revenue law of the state is not unconstitutional because it does not require natural persons, possessing no special franchise or privilege, to make report of special privileges and franchises for taxation; nor is it unconstitutional in failing to require a report from all classes of corporations which can *possess the intangible property sought [676]
to be taxed by this statute. The tax upon tangible property of all corporations is elsewhere provided for."

The opinion, however, from which the foregoing extracts are made, has not as yet been reported. But, if the court of appeals of Kentucky has given to the state statute the construction indicated, the ruling does not affect the present case, as banks are specifically mentioned in the statute.

The tax then, as defined in the law, as interpreted by the court of appeals of Kentucky and by this court in the opinions from which we have excerpted, is a tax nominally on the franchise of the corporation, but in reality a tax on all the intangible property of the corporation. The proposition then comes to this: Nothing but the shares of stock in the hands of the shareholders of a national bank can be taxed, except the real estate of the bank. The taxes which are here resisted are not taxes levied upon the shares of stock in the names of the shareholders, but are taxes levied on the franchise or intangible property of the corporation. Thus, bringing the two conclusions together, there would seem to be no escape in reason from the proposition that the taxing law of the state of Kentucky is beyond the authority conferred by the act of Congress, and is therefore void for repugnancy to such act.

It is, however, urged that whilst the taxes may not be in form imposed on the shares of stock in the names of the shareholders, and may be in form a tax on the franchise or property of the bank, nevertheless they are equivalent to a tax on the shares of stock in the names of the shareholders, and therefore do not violate the act of Congress. But this proposition concedes that the taxing statute does not conform to the act of Congress, and yet invokes its permissive authority, since, as already shown, without the grant made by the act of Congress there would be no power to tax at all. Passing, nevertheless, this contradiction, and looking beneath the mere form, we come to the substance of things. The alleged equivalency, in order to be of any cogency, must of necessity contain two distinct and essential elements—equivalency in law and equivalency in fact. Does it contain either? is the question.

*To be equivalent in law, involves the prop- [677]
osition that a tax on the franchise and prop-

erty of a bank or corporation is the equivalent of a tax on the shares of stock in the names of the shareholders. But this proposition has been frequently denied by this court, as to national banks, and has been overruled to such an extent in many other cases relating to exemptions from taxation, or to the power of the states to tax, that to maintain it now would have the effect to annihilate the authority to tax in a multitude of cases, and as to vast sums of property upon which the taxing power is exerted in virtue of the decisions of this court holding that a tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders. A brief review of the two classes of cases, by which the doctrines just stated are overwhelmingly established, will make the foregoing result clear.

The earliest case in the reports of this court is *Van Allen* v. *The Assessors* (1865) 3 Wall. 573 [18: 229]. The tax was on the shares of stock in the names of the shareholders, pursuant to the act of Congress. Two issues were presented, one the assertion that the state banks were assessed on their capital and surplus, and therefore that stockholders in national banks were substantially discriminated against. This was held to be well taken; clearly, therefore, deciding that there was no equivalency between taxing the capital and surplus in the hands of the bank and taxing shares in the names of the shareholders, for if the two had been equivalent the decision would necessarily have been otherwise. The other question in the case was thus stated by the court, through Mr. Justice Nelson, page 581 [18: 233]:

"The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the state possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States."

This question was examined, and it was decided that, as the shares of stock in the hands of the shareholders were distinct and different subjects-matter of taxation from the
[678] property or *rights of the bank, therefore the power conferred by Congress could be exercised so as to tax the shareholders even although the property of the bank was invested in nontaxable bonds of the United States, because the two were distinct and different things.

It is to be remarked that it is patent from the opinion of the court that, if the shares of stock had been considered as in anywise the equivalent of the bonds, in which the property of the bank was invested, the tax would have been held invalid, despite the authority to tax the stock given by the act of Congress, as such authority would not have been construed as authorizing a violation of the faith of the United States by taxing bonds issued by the government which were not subject to taxation. It follows, then, that not only did this decision refute the claim of equivalency between the tax on the bank or its property or franchises and the tax on the stock in the names of the stockholders, but by a negative affirmative it demonstrates that if the two are equivalent the tax in this case would be illegal, since the record here admits that a sum, at least the equivalent of the capital, surplus, and undivided profits of the bank, was invested in bonds of the United States. The contention of equivalency then destroys itself, and if it were conceded would bring about the illegality of the tax, in support of the legality of which the argument is advanced.

Following this came the decision in *People* v. *New York Tax & A. Commissioners* (1866) 4 Wall. 244 [18: 344], in which, reiterating the decision in *Van Allen* v. *The Assessors*, it was held, because the property of the bank was distinct and separate from the shares of stock in the names of the shareholders, therefore the latter were not entitled to deduct exempt property belonging to the bank from the assessment on their shares. The court said, again through Mr. Justice Nelson, and in part quoting from the opinion in the *Van Allen Case* (p. 258 [18: 350]):

"'The corporation is the legal owner of all the property of the bank, real and personal; and, within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as *a private individ- [679]
ual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him;' and, we add, of course, is subject to like taxation."

The next case in order of time is *Bradley* v. *The People* (1866) 4 Wall. 459 [18: 433]. The question which the case presented was whether a tax on the property or rights of the bank was the legal equivalent of a tax on the shares of stock in the names of the shareholders. The argument of counsel was that in determining this question the method was immaterial, but the substance would be considered. The argument urged (p. 460 [18: 435]): "Neither the national government, the creator of the species of property now taxed, nor the shareholders can be interested in the *methods* which may be adopted by the state for the imposition of the tax." The court, through Mr. Justice Nelson, after referring to the decision in *Van Allen* v. *The Assessors*, and the tax there imposed, said (p. 462 [18: 435]):

"It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the state banks may consist of the bonds of the United States, which were exempt from state taxation, it was not easy to see

that the tax on the capital was an equivalent to a tax on the shares."

In *First National Bank* v. *Commonwealth* (1870) 9 Wall. 353 [19: 701], a statute of the state of Kentucky which imposed a tax of fifty cents a share on bank stock, or stock in any moneyed corporation, of loan or discounts, owned by individuals, corporations, or societies, was held to authorize a tax on the shares of the stockholders, as distinguished from the capital of the bank invested in Federal securities, and this, although the
[680]tax* was collected from the bank instead of the individual stockholders. In the opinion of the court, delivered by Mr. Justice Miller, a summary statement was made of the doctrine enunciated in the prior decisions recognizing the distinction between the property owned by an incorporated bank as a corporate entity and the property or interest of the stockholders in such bank, commonly called a share.

These cases, interpreting the act of Congress, have never been questioned, and indeed form the basis upon which the taxation of the shares of stock in the names of the shareholders allowed by the act of Congress has been made efficacious for the purpose of bringing a vast amount of property within the taxing power of the states, which would have been excluded had not the principles which the cases announced been established. If the postulate upon which they necessarily rest be overthrown by saying that there is an equivalency between the taxation of the property of the bank and the shares of stock in the names of the stockholders, it would follow that the principles upheld by the cases would disappear with the destruction of the reasons upon which they were placed. It would then necessarily follow that the grant by Congress of authority to tax the shares of stock in the names of the shareholders could not be exercised where the bank held bonds of the United States exempt from taxation; that the two things being the same, the shareholders would be entitled to deduct the property of the bank from the sum of the taxation of the shares; in other words, that the right to tax the shareholders would be a vain thing.

It has been suggested that other cases decided since the cases referred to, whilst not questioning the latter, in effect admit a doctrine which tends to a contrary result. We do not stop to review in detail the cases from which this result is claimed to arise. They are: *Palmer* v. *McMahon*, 133 U. S. 660 [33: 772]; *Bank of Redemption* v. *Boston*, 125 U. S. 60 [31: 689]; *Davenport National Bank* v. *Davenport Bd. of Equalization*, 123 U. S. 83 [31: 94]; *Mercantile Bank* v. *City of New York*, 121 U. S. 138 [30: 895]. It suffices to say that the claim is de-
[681]void of foundation.* In all the cases referred to the taxation was specifically imposed on the shares of stock in the names of the shareholders, and the question presented, in various forms, was whether the provisions of state taxing laws created a discrimination in favor of other moneyed capital and against the shareholders in national banks, contrary to the act of Congress. On these questions, interpreting the act of Congress with the liberality of construction resorted to in the *Van Allen Case* and those which followed it, the court in most of the instances rejected the charge of discrimination. The result of the cases in question tended to give efficient vitality to the grant of Congress to tax the shares of stock in the names of the shareholders. The argument now relied on would, if it were adopted, operate to destroy the power to tax, which the act of Congress sanctions.

It cannot be doubted that, as a general principle, it is settled that the taxation of the property, franchises, and rights of a corporation is one thing and the taxation of the shares of stock in the names of the shareholders is another and different one. This doctrine has been applied to sanction the taxation of the one where the other was covered by a contract of exemption. As the result of its application, it is unquestioned that much property has been brought within the range of the taxing power which otherwise would have escaped taxation. It is unnecessary to multiply citations on this subject, as the question has been in recent cases reviewed and restated fully by the court. Thus in *Bank of Commerce* v. *Tennessee*, 161 U. S. 146 [40: 649], it was said, through Mr. Justice Peckham:

"The capital stock of a corporation and the shares into which such stock may be divided and held by individual shareholders are two distinct pieces of property. The capital stock and the shares of stock in the hands of the shareholders may both be taxed, and it is not double taxation. *Van Allen* v. *Assessors*, 3 Wall. 573 [18: 229]; *People* v. *New York Tax & A. Commissioners*, 4 Wall. 224 [18: 344], cited in *Farrington* v. *Tennessee*, 95 U. S. 687 [24: 560].

"This statement has been reiterated many times in various decisions by this court, and is not now disputed by anyone. In the case last cited Mr. Justice Swayne, in delivering
the *opinion of the court, enumerated many[682]
objects liable to be taxed other than the capital stock of a corporation, and among them he instanced, (1) the franchise to be a corporation; (2) the accumulated earnings; (3) profits and dividends; (4) real estate belonging to the corporation and necessary for its business; and he adds that 'this enumeration shows the searching and comprehensive taxation to which such institutions are subjected where there is no protection by previous compact.' And in *Tennessee* v. *Whitworth*, 117 U. S. 129 [29: 830], at page 136 [29: 832], Mr. Chief Justice Waite, in delivering the opinion of the court, says: 'That in corporations four elements of taxable value are sometimes found: First, the franchise; second, the capital stock in the hands of the corporation; third, the corporate property; and, fourth, the shares of capital stock in the hands of the individual stockholders.'

"The surplus belonging to this bank is 'corporate property,' and is distinct from the capital stock in the hands of the corporation. The exemption, in terms, is upon the payment of an annual tax of one half of one per

cent upon each share of the capital stock, which shall be in lieu of all other taxes. The exemption is not, in our judgment, greater in its scope than the subject of the tax."

And, in the case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371 [42: 202], although it was held that the capital of the bank was exempt from taxation by a charter contract, and that, owing to the peculiar provisions of the charter, it would violate the contract to compel the bank to pay a tax levied on its shareholders, nevertheless the exemption did not preclude the levy of a tax upon the stock in the names of the stockholders, the court said (p. 402 [42: 213]):

"The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned."

There being then no equivalency between the assessment of the bank and the assessment of the shares in the names of the shareholders, it follows that the tax here complained of, which was assessed on the franchise or intangible property* of the corporation, was not within the purview of the authority conferred by the act of Congress, and was therefore illegal. [683]

Whilst this conclusion suffices to dispose of the case, we advert to the contention that although there may not be a legal equivalency, there is nevertheless one in fact, and therefore the tax should be sustained. It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment. The fact that it is not is well illustrated by *Henderson Bridge Company* v. *Kentucky, supra*, for there the tax which was sustained on the franchise or intangible property of the corporation admittedly enormously exceeded the total of the capital stock, and proceeded upon the theory that the bonds issued by the corporation were an element to be taken into consideration in fixing the value of the franchise or intangible property. If the mere coincidence of the sum of the taxation is to be allowed to frustrate the provisions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration.

The system of taxation devised by the act of Congress is entirely efficacious and easy of execution. By its enforcement, as interpreted, settled policies of taxation have been evolved embracing large amounts of property which would not otherwise be taxable, and which, as we have seen, will escape taxation if the past development of the system be destroyed by recognizing, without reason, a principle inconsistent with the law and destructive of the safeguards which it imposes.

*From the foregoing conclusions, it results [684] that as the taxes were imposed upon the bank and its property or franchise, and not upon the shares of stock in the name of the stockholders, such taxes were void, and the decree below must be and the same is hereby *reversed* and the cause be remanded for further proceedings not inconsistent with this opinion, and it is so ordered.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *Plff. in Err.*, *v.*

HENRY C. SMITH.

(See S. C. Reporter's ed. 684–699.)

Power of state to fix rates for railroad companies—power to discriminate in favor of those who buy thousand-mile tickets—police power—exception in favor of a particular class—voluntary sale of thousand-mile tickets—Michigan statute as to thousand-mile tickets, unconstitutional.

1. A state may provide by legislation for maximum rates of charges for railroad companies, provided they are such as will admit of the carrier earning a compensation just to it and to the public; and whether they are or not is a judicial question.
2. The power to fix maximum rates and charges for railroad transportation does not include the right to compel a discrimination in rates in favor of those who buy thousand-mile tickets.
3. An opportunity to purchase a thousand-mile ticket for less than the standard rate is not a "convenience," within the rule that the legislature may make regulations of the business of carriers to provide for the safety, health, and convenience of the public.
4. The power of the state legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of a particular class, and to carry members of that class at a less sum than those who are not such members.
5. The voluntary sale of thousand-mile tickets good for a year from the time of their sale does not furnish a criterion for the measurement of legislative power to require the sale of thousand-mile tickets, or a standard by which to measure the reasonableness of legislative action in that matter.
6. The Michigan statute requiring thousand-mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and making them valid for two years after date of purchase, is a violation of the constitutional rights of the railroad companies to due process of law and the equal protection of the laws.

[No. 227.]

Argued March 14, 15, 1899. Decided April 17, 1899.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment of that court deciding that the statute of Michigan requiring the sale of thousand-mile tickets violated no provision, either of the Federal or the state Constitution, but was a valid enactment of the legislature, and affirming an order for a mandamus, in an action brought by Henry C. Smith against the Lake Shore & Michigan Southern Railway Company in the circuit court for Lenawee county, Michigan. *Reversed*, and case remanded for further proceedings.

See same case below, 114 Mich. 460, 72 N. W. 328.

Statement by Mr. Justice **Peckham:**

[685] *In 1891 the general railroad law of the state of Michigan was amended by the legislature by Act No. 90, a portion of the ninth section of which reads as follows:

". . . *Provided, further,* That one-thousand-mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this state or carrying on business partly within and partly without the limits of the state, at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula. Such one-thousand-mile tickets may be made nontransferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one-thousand-mile ticket shall be forfeited to the railroad company. Each one-thousand-mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used."

On April 19, 1893, and again on October 17, 1893, the defendant in error demanded of the ticket agent of the plaintiff in error, in the city of Adrian, Michigan, a thousand-mile ticket, pursuant to the provisions of the above section, in the names of himself and his wife, Emma Watts Smith, which demand was refused. The defendant in error then applied for a mandamus to the circuit court to compel the railway company to issue such ticket upon the payment of the amount of $20, and after a hearing the motion was granted. Upon certiorari the supreme court
[686] of Michigan affirmed that order *and held that the statute applied only to the railway lines of the plaintiff in error operated within the state of Michigan.

The defense set up by the railway company was that, under the charter from the state to one of the predecessors of the company to whose rights it had succeeded, it had the right to charge three cents a mile for the transportation of all passengers, and that such charter constituted a contract between the state and the company, which the former had no right to impair by any legislative action, and that the statute compelling the company to sell thousand-mile tickets at the rate of two cents a mile was an impairment of the contract, and was therefore void as in violation of the Constitution of the United States. It also alleged that the act was in violation of the Fourteenth Amendment of the Constitution of the United States, in that it deprived the company of its property and liberty of contract without due process of law, and also deprived it of the equal protection of the laws. The act was also alleged to be in violation of the Constitution of the state of Michigan on several grounds.

The supreme court of the state decided that there was no contract in relation to the rates which the company might charge for the transportation of passengers, and that the statute violated no provision either of the Federal or the state Constitution, but was a valid enactment of the legislature, and therefore the court affirmed the order for mandamus, the ticket to be good upon and limited to the railway lines of the defendant railroad company within the state of Michigan. ([114 Mich. 460] 72 N. W. 328.) The company sued out a writ of error from this court.

Messrs. **George C. Greene** and *Ashley Pond*, for plaintiff in error:

The statute sought to be enforced is in violation of the 14th Amendment of the Constitution of the United States, which declares that no state shall deprive any person of liberty or property without due process of law.

Allgeyer v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832; *People* v. *Marx*, 99 N. Y. 386, 52 Am. Rep. 34; *State* v. *Campbell*, 32 N. J. L. 309; *Boston & L. R. Co.* v. *Proctor*, 1 Allen, 267, 79 Am. Dec. 729; *Rawitzky* v. *Louisville & N. R. Co.* 40 La. Ann. 50; *Dietrich* v. *Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711.

The power here sought to be exercised is not legislative in its nature, nor within the scope of the legislative authority.

Com. v. *Maxwell*, 27 Pa. 444; *Hanson* v. *Vernon*, 27 Iowa, 28, 1 Am. Rep. 215; *Taylor* v. *Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Clark* v. *Mitchell*, 64 Mo. 564; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *Wheeling Bridge & Terminal R. Co.* v. *Gilmore*, 8 Ohio C. C. 658.

The act of 1891 in question is in violation of art. 1, § 10, of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts.

Tomlinson v. *Branch*, 15 Wall. 460, 21 L. ed. 189; *Central R. & Bkg. Co.* v. *Georgia*, 92 U. S. 665, 23 L. ed. 757; *Citizens' Street R. Co.* v. *Memphis*, 53 Fed. Rep. 715; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363; *Green County* v. *Conness*, 109 U. S. 104, 27 L. ed. 872; *Tennessee* v. *Whitworth*, 117 U. S. 139, 29 L. ed. 833; *Charleston* v. *Branch*, 15 Wall. 470, 21 L. ed. 193; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97.

The contention that the act in question is valid because it is within the scope of the police power of the state cannot be sustained.

Allgeyer v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832; *Chicago, B. & Q. R. Co.* v. *Nebraska, Omaha*, 170 U. S. 57, 42 L. ed. 948.

Messrs. **Fred A. Maynard,** and **Henry C. Smith,** in proper person, for defendant in error:

The legislature of a state has the power to fix said rates, and the extent of judicial interference is protection against unreasonable rates.

Chicago & G. T. R. Co. v. *Wellman*, 143 U. S. 344, 36 L. ed. 179; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 567, 38 L. ed. 273.

Railroad corporations are subject to the legislative control in all respects necessary to protect the public against danger, injustice, and oppression.

Nashville, C. & St. L. R. Co. v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585; *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051; *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364, 37 L. ed. 769; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 586, 30 L. ed. 254, 1 Inters. Com. Rep. 31.

The right to regulate, to some extent, the business of railroads has always been conceded.

Chicago & A. R. Co. v. *People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599; *Com.* v. *Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Chicago & N. W. R. Co.* v. *Fuller*, 17 Wall. 560, 21 L. ed. 710; *New York* v. *Miln*, 11 Pet. 139, 9 L. ed. 662; *Munn* v. *Illinois*, 94 U. S. 125, 24 L. ed. 84; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 215, 38 L. ed. 967, 4 Inters. Com. Rep. 649.

The police power is paramount to contracts in charters.

Kansas P. R. Co. v. *Mower*, 16 Kan. 573; *Nelson* v. *Vermont & C. R. Co.* 26 Vt. 717, 62 Am. Dec. 614; *Lyman* v. *Boston & W. R. Corp.* 4 Cush. 288; *Pratt* v. *Atlantic & St. L. R. Co.* 42 Me. 579; *Norris* v. *Androscoggin R. Co.* 39 Me. 273, 63 Am. Dec. 621; *Bulkley* v. *New York & N. H. R. Co.* 27 Conn. 479; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 700, 40 L. ed. 859; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *East Hartford* v. *Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518.

In *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, it is decided that the right of a state to reasonably limit the amount of charges by a railroad company for the transportation of passengers and property within its jurisdiction cannot be granted away by its legislature, unless by word of positive grant or words equivalent in law.

The several states have a right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders.

Chicago, B. & Q. R. Co. v. *Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik* v. *Chicago & N. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co.* v. *Ackley*, 94 U. S. 179, 24 L. ed. 99; *Illinois C. R. Co.* v. *Illinois*, 108 U. S. 541, 27 L. ed. 818; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636; *Dow* v. *Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56.

*Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court: [686]

*The only subject of inquiry for us in this case is whether the act of the legislature of the state of Michigan violates any provision of the Federal Constitution. It is not within our province to review the decision of the supreme court upon the question whether the act violates the Constitution of the state. [687]

The two questions of a Federal nature that are raised in the record are, (1) whether the act violates the Constitution of the United States by impairing the obligation of any contract between the state and the railroad company; and (2) if not, does it nevertheless violate the Fourteenth Amendment of the Constitution by depriving the company of its property or liberty without due process of law or by depriving it of the equal protection of the laws; if we should decide that this act violates any provision of the Fourteenth Amendment it would be unnecessary to examine the question whether there was any contract between the state and the company as claimed by it. We will therefore first come to an investigation of the legislative authority with reference to that amendment.

If unhampered by contract there is no doubt of the power of the state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public, and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of the property of the company without due process of law. *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339, 344 [36: 176, 179]; *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 399 [38: 1014, 1024, 4 Inters. Com. Rep. 560]; *St. Louis & S. F. R. Company* v. *Gill*, 156 U. S. 649 [39: 567]; *Smyth* v. *Ames*, 169 U. S. 466, 523 [42: 819, 841].

The extent of the power of the state to legislate regarding the affairs of railroad companies has within the past few years been several times before this court. *Wabash, St. L. & P. R. Company* v. *Illinois*, 118 U. S. 557 [30: 244, 1 Inters. Com. Rep. 31]; *Illinois Central R. *Company* v. *Illinois*, 163 U. S. 142 [41: 107]; *Lake Shore & M. S. R. Company* v. *Ohio*, 173 U. S. 285 [*ante* 702], and [688]

cases cited. These cases arose under the commerce clause of the Federal Constitution, the inquiry being whether the legislation in question violated that provision. In the cases in which the legislation was upheld it was on the ground that the state was but exercising its proper authority under its general power to legislate regarding persons and things within its jurisdiction, sometimes described as its police power, and that in exercising that power in the particular cases it did not violate the commerce clause of the Federal Constitution by improperly regulating or interfering with interstate commerce. The extent of the right of the state to legislate was examined in these various cases—so far, at least, as it was affected by the commerce clause of the Constitution of the United States.

In *Illinois Central R. Company* v. *Illinois, supra*, the state statute imposed the duty upon the company of stopping its fast mail train at the station of Cairo, to do which the train had to leave the through route at a point three miles from that station and then return to the same point in order to resume its journey. This statute was held to be an unconstitutional interference with interstate commerce and therefore void.

In *Lake Shore & M. S. R. Company* v. *Ohio, supra*, a statute of the state of Ohio required the company to stop certain of its trains at stations containing 3,000 inhabitants for a time sufficient to receive and let off passengers, and the statute was held to be a valid exercise of legislative power and not an improper interference with interstate commerce. In the course of the opinion of the court, which was delivered by Mr. Justice Harlan, it was said that "the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may
[689] sometimes *reach subjects over which national legislation can be constitutionally extended." And again, speaking of cases involving state regulations more or less affecting interstate or foreign commerce, it was said that these cases "were sustained upon the ground that they were not directed against nor were direct burdens upon interstate or foreign commerce; and having been enacted only to protect the public safety, the public health, or the public morals, and having a real, substantial relation to the public ends intended to be accomplished thereby, were not to be deemed absolutely forbidden because of the mere grant of power to Congress to regulate interstate and foreign commerce, but to be regarded as only incidentally affecting such commerce, and valid until superseded by legislation of Congress on the same subject."

The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. As stated by Mr. Chief Justice Taney, in the course of his opinion in the *License Cases*, 5 How. 504, 583 [12: 256, 291], in describing the powers of a state: "They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a state directly and plainly violates a provision of the Constitution of the United States, such legislation would be void.

The validity of this act is rested by the counsel for the defendant in error upon the proposition that the state legislature has the power of regulation over the corporation created by it, and in cases of railroad corporations, the same power of regulation and also full control over the subject of rates to be charged by them as carriers for the transportation of persons *and property. Assum- [690]
ing that the state is not controlled by contract between itself and the railroad company, the question is, How far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter, or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers? It has no right even under such circumstances to take away or destroy the property or annul the contracts of a railroad company with third persons. (*Greenwood* v. *Union Freight R. Company*, 105 U. S. 13, 17 [26: 961, 964]; *Commonwealth* v. *Essex Co.* 13 Gray, 239; *People* v. *O'Brien*, 11 N. Y. 1, 52 [2 L. R. A. 255]; *Detroit* v. *Detroit & H. Plank Road Company*, 43 Mich. 140.)

A railroad company, although a quasi public corporation, and although it operates a public highway (*Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641 [34: 295]; *Lake Shore & M. S. Railway Co.* v. *Ohio*, 173 U. S. 285, 301 [*ante*, 702], has nevertheless rights which the legislature cannot take away without a violation of the Federal Constitution, as stated in *Smyth* v. *Ames* (169 U. S. 466, 544 [42: 819, 848].) A corporation is a person within the protection of the Fourteenth Amendment. *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 [32: 585]; *Smyth* v. *Ames*, 169 U. S. 522, 526 [42: 840, 842]. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.

The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limita

tions above stated, and having power to alter, amend, or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has
[691] power to *lower those rates, in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the leg-
[692] islature in the exercise of its power to *provide for the safety, the health, and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company.

It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of a ticket is thus justified by the reasons stated.

The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word "convenience," it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience.

The power of the legislature to enact general laws regarding *a company and its af- [693]
fairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to

charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.

The act also compels the company to carry, not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years why can it not provide that they shall be good for five or ten or even a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would and five years would not be reasonable, why not? And if five years would be reasonable, why would not ten? If [694] the power exist at all, what are the *factors which make it unreasonable to say that the tickets shall be valid for five or for ten years? It may be said that circumstances can change within that time. That is true, but circumstances may change within two just as well as within five or ten years. There is no particular time in regard to which it may be said in advance and as a legal conclusion that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the legislature has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company.

If this power exist it must include the right of the legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law;* but it cannot enact a law making [695] maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. Prima facie, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed them affords a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a partial *reduction, by [696] means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional, and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates.

True it is that the railroad company exercises a public franchise and that its occupa-

tion is of a public nature, and the public therefore has a certain interest in and rights connected with the property, as was held in *Munn* v. *Illinois*, 94 U. S. 125 [24: 84], and the other kindred cases. The legislature has the power to secure to the public the services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.

The legislature having fixed a maximum rate at what must be presumed, prima facie, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and therefore to part with its property without due process of law. The affairs of the com-
[697]pany are *in this way taken out of its own management, not by any general law applicable to all, but by a discrimination made by law to which the company is made subject. Whether an act of this nature shall be passed or not, is not a matter of policy to be decided by the legislature. It is a matter of right of the company to carry on and manage its concerns subject to the general law applicable to all, which the legislature may enact in the legal exercise of its power to legislate in regard to persons and things within its jurisdiction.

This case differs from that which has just been decided, *Lake Shore & M. S. R. Company* v. *Ohio*, 173 U. S. 285 [*ante*, 702]. In that case the convenience of the public in the state was the basis of the decision, regard being also had to the convenience of the public outside of and beyond the state. It included all the public who desired to ride from the stations provided for in the act, and the convenience to the people in taking a train at these stations was held by this court to be so substantial as to justify the enactment in question.

But in this case it is not a question of convenience at all within the proper meaning of that term. Aside from the rate at which the ticket may be purchased, the convenience of purchasing this kind of a ticket is so small that the right to enact the law cannot be founded upon it. It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

To say that the legislature has power to absolutely repeal *the charter of the com-[698]
pany, and thus to terminate its legal existence, does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts.

In *Attorney General* v. *Old Colony Railroad Co.* 160 Mass. 62 [22 L. R. A. 112], the statute required every railroad corporation in the commonwealth to have on sale certain tickets which should be received for fare on all railroad lines in the commonwealth, etc., and the statute was held invalid. The precise question involved in this case was not there presented, and the court said it was not necessary or practicable to attempt to determine in that case just how far the legislature could go by way of regulating the business of railroad companies, or just where were the limits of its power.

The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest.

In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does not. It is a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not legislation for the *safety, health, or proper convenience of the[699]

public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason. Whether the legislature might not in the fair exercise of its power of regulation provide that ordinary tickets purchased from the company should be good for a certain reasonable time, is not a question which is now before us, and we need not express any opinion in regard to it.

In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public. We say this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated.

The judgment of the supreme court of the state of Michigan *should be reversed*, and the case remanded for further proceedings not inconsistent with the opinion of this court, and it is so ordered.

The Chief Justice and Mr. Justice **Gray** and Mr. Justice **McKenna** dissented.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1898.

Vol. 174.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1898,

AND REPORTED HEREIN,

VOLUME 174,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 174 U. S.	Title.	Here in.
1–3	Capital Traction Co. v. Hof	873
3–5	" "	874
5–8	" "	875
8–11	" "	876
11–13	" "	877
13–16	" "	878
16–19	" "	879
19–22	" "	880
22–24	" "	881
24–27	" "	882
27–30	" "	883
30–33	" "	884
33–36	" "	885
36–38	" "	886
38–41	" "	887
41–43	" "	888
43–46	" "	889
46	Metropolitan R. Co. v. Church Brightwood R. Co. v. O'Neal	890
47	Kirby v. United States - -	890
47–49	" " - -	891
49–52	" " - -	892
52–55	" " - -	893
55–58	" " - -	894
58–60	" " - -	895
60–63	" " - -	896
63–64	" " - -	897
64–66	Cosgrove v. Winney - -	897
66–68	" " - -	898
68–69	" " - -	899
70–71	American Refrigerator Transit Co. v. Hall - - -	899
71–73	" "	900
73–75	" "	901
75–78	" "	902
78–80	" "	903
80–82	" "	904
82–83	Holmes v. Hurst - - -	904
83–85	" " - - -	905
85–88	" " - - -	906
88–90	" " - - -	907

Off. Rep. 174 U. S.	Title.	Here in.
91	White v. Leovy - - -	907
91–94	" " - - -	908
94–96	" " - - -	909
96	Atchison, T. & S. F. R. Co. v. Matthews - - -	909
97–99	" "	910
99–101	" "	911
101–104	" "	912
104–107	" "	913
107–110	" "	914
110–113	" "	915
113–115	" "	916
115–118	" "	917
118–121	" "	918
121–123	" "	919
123–125	" "	920
125–126	Auten v. United States Nat. Bank - - - -	920
126–129	" "	921
129–132	" "	922
132–134	" "	923
134–137	" "	924
137–140	" "	925
140–143	" "	926
143–145	" "	927
145–148	" "	928
148–149	" "	929
149–151	United States v. One Distillery	929
151–152	" "	930
153	Moran v. Dillingham - -	930
153–156	" " - -	931
156–158	" " - -	932
158	Kimball v. Kimball - -	932
159–161	" " - -	933
161–163	" " - -	934
164	Nelson v. Moloney - -	934
164–167	" " - -	935
167–168	" " - -	936
168–169	McCain v. Des Moines - -	936
169–172	" " - -	937
172–175	" " - -	938
175–178	" " - -	939
178–180	" " - -	940
180–181	" " - -	941

Off. Rep. 174 U. S.	Title.	Here in.
182–183	Bosworth v. St. Louis Terminal R. Asso.	941
183–186	“ “	942
186–189	“ “	943
189–190	“ “	944
190–191	Humphries v. District of Columbia	944
191–194	“ “	945
194–196	“ “	946
196	Morris v. United States	946
198	“ “	947
198–201	“ “	948
201–203	“ “	949
204–206	“ “	950
206–209	“ “	951
209–212	“ “	952
212–215	“ “	953
215–217	“ “	954
217–223	“ “	955
223–226	“ “	956
226–229	“ “	957
229–231	“ “	958
231–234	“ “	959
234–237	“ “	960
237–240	“ “	961
240–242	“ “	962
242–245	“ “	963
245–248	“ “	964
248–251	“ “	965
251–253	“ “	966
253–256	“ “	967
256–259	“ “	968
259–262	“ “	969
262–265	“ “	970
265–267	“ “	971
267–270	“ “	972
270–273	“ “	973
273–276	“ “	974
276–279	“ “	975
279–281	“ “	976
281–284	“ “	977
284–287	“ “	978
287–290	“ “	979
290–292	“ “	980
292–295	“ “	981
295–298	“ “	982
298–301	“ “	983
301–304	“ “	984
304–306	“ “	985
306–309	“ “	986
309–312	“ “	987
312–314	“ “	988
314–317	“ “	989
317–320	“ “	990
320–323	“ “	991
323–326	“ “	992
326–328	“ “	993
328–331	“ “	994
331–334	“ “	995
334–336	“ “	996
336–339	“	997
339–342	“	998
342–345	“ “	999
345–347	“ “	1000
347–350	“ “	1001
350–353	“ “	1002
353–356	“ “	1003
356–358	“ “	1004
358–359	“ “	1005

Off. Rep. 174 U. S.	Title.	Here in.
360–361	Raton Water Works Co. v. Raton	1005
361–363	“ “	1006
363–364	“ “	1007
364–365	Concord First Nat. Bank v. Hawkins ("First Nat. Bank of Concord v. Hawkins")	1007
365–366	“ “	1008
366–368	“ “	1009
368–371	“ “	1010
371–373	“ “	1011
373	Price v. United States & Osage Indians	1011
373–375	“ “	1012
375–378	“ “	1013
378–379	“ “	1014
379–381	Northern P. R. Co. v. Freeman	1014
381	“ “	1015
381–384	“ “	1016
384	“ “	1017
385–386	United States v. Krall	1017
386–389	“ “	1018
389–391	“ “	1019
391	Israel v. Gale	1019
391–393	“ “	1020
393–396	“ “	1021
396–397	“ “	1022
397–398	McDonald v. Williams	1022
398–401	“ “	1023
401–403	“ “	1024
403–405	“ “	1025
405–408	“ “	1026
409–411	Stone v. Farmers' Bank Farmers' Bank v. Stone	1027
411–412	“ “	1028
412–413	Stone v. Bank of Commerce	1028
413–416	“ “	1029
416–419	“ “	1030
419–422	“ “	1031
422–424	“ “	1032
424–427	“ “	1033
427–428	“ “	1034
428	Louisville v. Bank of Commerce	1034
429	Fidelity, Trust, & S. V. Co. v. Louisville Fidelity, Trust, & S. V. Co. v. Stone Louisville Trust Co. v. Louisville Louisville Trust Co. v. Stone	1034
429–431	“ “	1035
432	Third Nat. Bank v. Stone	1035
432–434	“ “	1036
434	“ “	1037
435	Louisville v. Third Nat. Bank	1037
436	Louisville v. Citizens' Nat. Bank Citizens' Nat. Bank v. Stone	1037
436–437	“ “	1038
438–439	First Nat. Bank v. Louisville First Nat. Bank v. Stone	1038
439–441	Louisville v. Bank of Louisville Stone v. Bank of Louisville	1039
441–444	“ “	1040
444–445	“ “	1041

Off. Rep. 174 U. S.	Title.	Here in.
445–447	Stephens v. Cherokee Nation Choctaw Nation v. Robinson Johnson v. Creek Nation Chickasaw Nation v. Robinson	1041
447–449	" "	1042
449–452	" "	1043
452–455	" "	1044
455–458	" "	1045
458–460	" "	1046
460–463	" "	1047
463–466	" "	1048
466–469	" "	1049
469–471	" "	1050
471–473	" "	1051
473–477	" "	1052
477–480	" "	1053
480–483	" "	1054
483–485	" "	1055
485–488	" "	1056
488–491	" "	1057
491–492	" "	1058
492–493	Office Specialty Mfg. Co. v. Fenton Metalic Mfg. Co.	1058
493–496	" "	1059
496–499	" "	1060
499	Wade v. Travis County	1060
499–501	" "	1061
501–504	" "	1062
504–507	" "	1063
507–509	" "	1064
509–510	" "	1065
510–511	The Olinde Rodrigues	1065
511–514	" "	1066
514–517	" "	1067
517–520	" "	1068
520–523	" "	1069
523–525	" "	1070
525–528	" "	1071
528–530	" "	1072
530–531	" "	1073
530–532	" "	1074
533–535	" "	1075
535–538	" "	1076
538–539	" "	1077
539–541	Cohn v. Daley	1077
541–543	" "	1078
543–545	" "	1079
545–546	New Mexico v. United States Trust Co.	1079
546–549	" "	1080
549–551	" "	1081
552	Louisville, N. A. & C. R. Co. v. Louisville Trust Co. Louisville, N. A. & C. R. Co. v. Louisville Banking Co.	1081
552–553	" "	1082
553–556	" "	1083
556–558	" "	1084
558–561	" "	1085
561–562	" "	1086
562–564	" "	1087
564–567	" "	1088
567–570	" "	1089
570–572	" "	1090
572–575	" "	1091
575–577	" "	1092
578	United States v. Coe	1092
578–579	" "	

Off. Rep. 174 U. S.	Title.	Here in.
580	Missouri, K. & T. R. Co. v. McCann	1093
580–583	" "	1095
583–586	" "	1096
586–589	" "	1097
589–590	" "	1098
590–591	West Co. v. Lea ("George M. West Co. v. Lea")	1098
591–595	" "	1099
595–596	" "	1100
596–599	" "	1101
599	" "	1102
600–602	Columbus Const. Co. v. Crane Co.	1102
602–603	" "	1103
603	Columbus Const. Co. v. Crane Co.	1103
603–604	Rio Grande Irrigation & C. Co. v. Gildersleeve	1103
604–606	" "	1104
606–609	" "	1105
609–610	" "	1106
610	Rio Grande Irrigation & C. Co. v. Gildersleeve	1106
610–611	McDonald v. Chemical Nat. Bank	1106
611–614	" "	1107
614–616	" "	1108
616–618	" "	1109
618–621	" "	1110
622–624	Northern P. R. Co. v. De Lacey	1111
624–627	" "	1112
627–629	" "	1113
629–632	" "	1114
632–635	" "	1115
635–638	" "	1116
638–639	" "	1117
639–640	McMullen v. Hoffman	1117
640–643	" "	1118
643–644	" "	1119
644–647	" "	1120
647–650	" "	1121
650–652	" "	1122
652–655	" "	1123
655–658	" "	1124
658–661	" "	1125
661–664	" "	1126
664–666	" "	1127
666–669	" "	1128
669–670	" "	1129
670–672	United States v. Dudley	1129
672–674	" "	1130
674	Louisville Trust Co. v. Louisville, N. A. & C. R. Co.	1130
675–677	" "	1131
677–679	" "	1132
679–682	" "	1133
682–685	" "	1134
685–688	" "	1135
688–689	" "	1136
690	United States v. Rio Grande Dam & I. Co.	1136
690–692	" "	1137
692–695	" "	1138
695–698	" "	1139
698–701	" "	1140
701–703	" "	1141
703–706	" "	1142
706–709	" "	1143
709–710	" "	1144

Off. Rep. 174 U. S.	Title.	Here in.
710–712	Chicago, R. I. & P. R. Co. v. Sturm	1144
712–714	" "	1145
714–717	" "	1146
717–718	" "	1147
718	Chicago, R. I. & P. R. Co. v. Campbell	1147
719	Davis v. Coblens	1147
720–722	" "	1148
722–725	" "	1149
725–727	" "	1150
728	Spurr v. United States	1150
729–731	" "	1151
731–734	" "	1152
734–737	" "	1153
737–739	" "	1154
739	San Diego Land & T. Co. v. National City	1154
740–742	" "	1155
742–745	" "	1156
745–747	" "	1157
747–750	" "	1158
750–753	" "	1159
753–756	San Diego Land & T. Co. v. National City	1160
756–758	" "	1161
758–760	" "	1162
761	Richmond v. Southern Bell Teleph. & Teleg. Co.	1162
761–764	" "	1163
764–766	" "	1164
766–769	" "	1165
769–772	" "	1166
772–775	" "	1167
775–777	" "	1168
777–778	" "	1169
778–780	Oakes v. United States	1169
780–783	" "	1170
783–786	" "	1171
786–788	" "	1172
788–791	" "	1173
791–794	" "	1174
794–797	" "	1175
797–798	" "	1176
799–	Memorandum Cases	1177
803		1188

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1898.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

[1] CAPITAL TRACTION COMPANY, *Plff. in Err.*,
v.
CHARLES HOF.

(See S. C. Reporter's ed. 1–46.)

Jurisdiction of this court—trial by jury—trial before justice of the peace and a jury, not a trial by jury within the constitutional provision—when trial by jury in appellate court satisfies constitutional right of trial by jury—re-examination of the facts—enlarging jurisdiction of justices of the peace.

1. This court has jurisdiction of a writ of error to the court of appeals of the District of Columbia, to review its decision as to the validity and effect of the legislation of Congress conferring upon justices of the peace in that District jurisdiction in civil actions in which the matter in dispute exceeds $20 in value, and providing for a trial by jury before the justice, an appeal to the supreme court of the District, and a trial by jury in the appellate court, at the request of either party.
2. Trial by jury under the Constitution means a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law, and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.
3. A trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, is not a trial by jury within the meaning of U. S. Const. 7th Amend.
4. A common-law trial by jury in a court of record upon appeal from a judgment of a justice of the peace in a civil action, after giving bond with surety to prosecute the appeal and to abide the judgment of the appellate court, is sufficient to satisfy the constitutional right of trial by jury.
5. The constitutional provision, that no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law is not violated by allowing an appeal, for trial by a common-law jury, from the judgment on the verdict of a jury of twelve men in a court of a justice of the peace, as that is not a common-law jury.
6. The right of trial by jury is not unduly obstructed by enlarging the civil jurisdiction of justices of the peace to $300, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court in order to obtain a trial by a common-law jury on appeal.

[No. 108.]

Argued January 5, 6, 1899. Decided April 11, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court reversing an order of the Supreme Court of the District and remanding the case with directions to quash a writ of certiorari to a justice of the peace to prevent a civil action to recover damages in the sum of $300 from being tried by a jury before him. *Affirmed.*

See same case below, 24 Wash. L. Rep. 646 and 10 App. D. C. 205.

The facts are stated in the opinion.

Mr. **R. Ross Perry** for plaintiff in error.

Mr. **Alexander Wolf** for defendant in error.

*Mr. Justice **Gray** delivered the opinion of the court: [2]

On September 8, 1896, the Capital Traction Company, a street-railway corporation in the District of Columbia, presented to the supreme court of the District a petition for a writ of certiorari to a justice of the peace to prevent a civil *action to recover damages [3] in the sum of $300 from being tried by a jury before him.

The petition for a writ of certiorari alleged that Charles Hof, on August 17, 1896, caused a summons to be issued by Lewis I.

O'Neal, Esquire, one of the justices of the peace in and for the District of Columbia, summoning the Capital Traction Company to appear before him on August 20, 1896, "to answer unto the complaint of Charles Hof in a plea of damage of $300," and the matter was postponed until September 8, on which day, after the company had put in its plea, and issue had been joined thereon, the attorney for Hof demanded of the justice of the peace that the action should be tried by a jury, and thereupon the justice of the peace issued a *venire* to a constable, commanding him to summon twelve jurors to appear before said justice on September 10; that the petitioner was advised that such a demand for the so-called jury was founded upon sections 1009-1016 of the Revised Statutes of the District of Columbia, and was intended to subject the petitioner, without appeal, to a form of trial before a justice of the peace, unknown to the common law, and, as the petitioner was advised, illegal and unconstitutional; that the petitioner was informed and believed that Hof's claim was for damages sustained by him through its negligence, while he was a passenger on one of its cars; and that it had a good defense on the merits to his claim, and sought a fair opportunity to make such defense before an impartial tribunal, and was ready and willing to give any security that might be required for the prompt payment of any final judgment which might be pronounced against it in due course of law.

The petition further averred that the only method in which Hof's claim against the petitioner could be tried by a jury according to the common law and the Constitution was by removing his suit from the justice of the peace into the supreme court of the District of Columbia; that if this was not done, the petitioner would be deprived of its constitutional right to a trial by jury, and would be in danger of being deprived of its property
[4] without due process of law, and would*be denied the equal protection of the laws; and that the amount claimed by Hof was within the jurisdiction of that court.

Wherefore the petitioner prayed that a writ of certiorari might be issued to the justice of the peace to remove Hof's claim into that court for trial according to the course of the common law, upon such terms as to security for costs and damages as the court might think proper; and for such other and further relief as the petitioner might be entitled to.

The supreme court of the District of Columbia granted a writ of certiorari to the justice of the peace, as prayed for; and the justice of the peace, in his return thereto, set forth the proceedings before him in the action of Hof against the Capital Traction Company, showing the issue and return of the summons to the defendant, its oral plea of not guilty, the plaintiff's joinder of issue and demand of a jury, and the stay of further proceedings by the writ of certiorari.

On October 6, 1896, the supreme court of the District of Columbia overruled a motion of Hof to quash the writ of certiorari; and entered an order quashing all proceedings before the justice of the peace after issue joined. 24 Wash. L. Rep. 646. Hof appealed to the court of appeals of the District of Columbia, which on February 17, 1897, reversed that order, and remanded the case with directions to quash the writ of certiorari. 10 App. D. C. 205. The Capital Traction Company thereupon sued out a writ of error from this court, under the act of February 9, 1893, chap. 74, § 8. 27 Stat. at L. 436.

The petition for a writ of certiorari presents for determination a serious and important question of the validity, as well as the interpretation and effect, of the legislation of Congress conferring upon justices of the peace in the District of Columbia jurisdiction in civil actions in which the matter in dispute exceeds twenty dollars in value, and providing for a trial by a jury before the justice of the peace, an appeal from his judgment to the supreme court of the District of Columbia, and a trial by jury, at the request of either party, in the appellate court. This court, therefore, has jurisdiction of the writ of error. *Baltimore & Potomac Railroad Co.* v. *Hopkins*, 130 U. S. 210, 224 [32: 908, 913]; **Parsons* v. *District of Columbia*, [5]
170 U. S. 45 [42: 943].

The court of appeals was unanimous in maintaining the validity of the proceedings looking to a trial by a jury before the justice of the peace. But there was a difference of opinion between the two associate justices and the chief justice upon the question whether such a trial before the justice of the peace would be a trial by jury according to the common law and the Constitution; as well as upon the question whether the trial by jury, allowed by Congress in the supreme court of the district, upon appeal from the judgment of the justice of the peace, and upon the condition of giving bond to pay the final judgment of the appellate court, satisfied the requirements of the Constitution.

I. The Congress of the United States, being empowered by the Constitution "to exercise exclusive legislation in all cases whatsoever" over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States. *Kendall* v. *United States* [*Stokes*] (1838) 12 Pet. 524, 619 [9: 1181, 1218]; *Mattingly* v. *District of Columbia* (1878) 97 U. S. 687, 690 [24: 1098, 1100]; *Gibbons* v. *District of Columbia* (1886) 116 U. S. 404, 407 [29: 680, 681].

It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia. *Webster* v. *Reid* (1850) 11 How. 437, 460 [13: 761, 770]; *Callan* v. *Wilson* (1888) 127

U. S. 540, 550 [32: 223, 226]; *Thompson* v. *Utah* (1898) 170 U. S. 343 [42: 1061].

The decision of this case mainly turns upon the scope and effect of the Seventh Amendment of the Constitution of the United States. It may therefore be convenient, before particularly examining the acts
[6] of Congress now in question, to *refer to the circumstances preceding and attending the adoption of this Amendment, to the contemporaneous understanding of its terms, and to the subsequent judicial interpretation thereof, as aids in ascertaining its true meaning, and its application to the case at bar.

II. The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that "the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.

The Ordinance of 1787 declared that the inhabitants of the Northwest Territory should "always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury," "and of judicial proceedings according to the course of the common law." 1 Charters and Constitutions, 431.

The Constitution of the United States, as originally adopted, merely provided in article 3, section 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury." In the Convention which framed the Constitution, a motion to add this clause, "and a trial by jury shall be preserved as usual in civil cases," was opposed by Mr. Gorham of Massachusetts, on the ground that "the constitution of juries is different in different states, and the trial itself is usual in different cases, in different states;" and was unanimously rejected. 5 Elliott's Debates, 550.

Mr. Hamilton, in number 81 of the Federalist, when discussing the clause of the Constitution which confers upon this court "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make," and again, in more detail, in number 83, when answering the objection to the want of any provision securing trial by jury in civil actions, stated the diversity then existing in the laws of the different states regarding appeals and jury trials; and especially pointed out that in the New England states, and in those alone, appeals were allowed, as of course, from one jury to another until there had been two verdicts on one side, and in no
[7] other state but Georgia was there any *appeal from one to another jury. The diversity in the laws of the several states, he insisted, "shows the impropriety of a technical definition derived from the jurisprudence of any particular state," and "that no general rule could have been fixed upon by the Convention which would have corresponded with the circumstances of all the states." And he suggested that "the legislature of the United States would certainly have full power to provide that in appeals to the supreme court there should be no re-examination of facts where they had been tried in the original causes by juries;" but if this "should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial." 2 Federalist (ed. 1788) pp. 319-321, 335, 336.

At the first session of the first Congress under the Constitution, Mr. Madison, in the House of Representatives, on June 8, 1789, submitted propositions to amend the Constitution by adding, to the clause concerning the appellate jurisdiction of this court, the words, "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law;" and, to the clause concerning trial by jury, these words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 Annals of Congress, 424, 435. And those propositions, somewhat altered in form, were embodied in a single article, which was proposed by Congress on September 25, 1789, to the legislatures of the several states, and upon being duly ratified by them, became the Seventh Amendment to the Constitution, in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance *of 1787, with the essays of Mr. [8]
Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that "no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law," had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states.

This conclusion has been established, and "the rules of the common law" in this respect clearly stated and defined, by judicial decisions.

In *United States* v. *Wonson* (1812) 1 Gall. 5, a verdict and judgment for the defendant having been rendered in the district court of the United States for the district of Massachusetts in an action of debt for a penalty, the United States appealed to the circuit court, and were held not to be entitled to try by a new jury in that court facts which had been tried and determined by the jury in the court below. "We should search in vain," said Mr. Justice Story, "in the common law, for an instance of an appellate court retrying the cause by a jury, while the former verdict and judgment remained in full force. The practice indeed seems to be a peculiarity of New England, and, if I am

not misinformed, does not exist in more than one (if any) other state in the Union." And, after quoting the words of the Seventh Amendment, he observed: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence." "Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* is awarded. This is the invariable usage, settled by the decisions of ages." 1 Gall. 14, 20.

In *Parsons* v. *Bedford* (1830) 3 Pet. 433 [7: 732], this court, on writ of error to a lower court of the United States, held that
[9] *it had no power to re-examine facts tried by a jury in the court below, although that court was held in Louisiana, where Congress had enacted that the mode of proceeding should conform to the laws directing the mode of practice in the district courts of the state, and a statute of the state authorized its supreme court to try anew on appeal facts tried by a jury in a district court. Mr. Justice Story, in delivering the judgment of this court, expounding the Seventh Amendment to the Constitution, after showing that in the first clause the words "suits at common law" were used in contradistinction to suits in equity and in admiralty, and included "not merely suits which the common law recognized among its old and settled proceedings," but all suits in which legal rights, and not equitable rights, were ascertained and determined, proceeded as follows: "But the other clause of the Amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings." 3 Pet. 446–448 [7: 736, 737].

This last statement has been often reaffirmed by this court. *Barreda* v. *Silsbee* (1858) 21 How. 146, 166 [16: 86, 93]; *Justices* v. *Murray* (1869) 9 Wall. 274, 277 [19: 658, 660]; *Miller* v. *Brooklyn Life Insurance Co.* (1870) 12 Wall. 285, 300 [20: 398, 401]; *Knickerbocker Insurance Co.* v. *Comstock* (1872) 16 Wall. 258, 269 [21: 493, 498]; *Mercantile Mut. Insurance Co.* v. *Folsom* (1873) 18 Wall. 237, 249 [21: 827, 833]; *New York C. & H. R. R. Co.* v. *Fraloff* (1879) 100 U. S. 24, 31 [25: 531–535]; *Lincoln* v. *Power* (1894) 151 U. S. 436, 438 [38: 224, 225]; *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago* (1897) 166 U. S. 226, 246 [41: 979, 988].

The judiciary act of September 24, 1789, chap. 20, drawn by Senator (afterwards Chief Justice) Ellsworth, and passed—within six months after the organization of the government under the Constitution, and on the day before the first ten *Amendments were [10]
proposed to the legislatures of the states—by the First Congress, in which were many eminent men who had been members of the convention which formed the Constitution, has always been considered as a contemporaneous exposition of the highest authority. *Cohens* v. *Virginia* (1821) 6 Wheat. 264, 420 [5: 257, 295]; *Parsons* v. *Bedford*, above cited; *Börs* v. *Preston* (1884) 111 U. S. 252, 256 [28: 419, 420]; *Ames* v. *Kansas* [*Johnston*] (1884) 111 U. S. 449, 463, 464 [28: 482, 488]; *Wisconsin* v. *Pelican Ins. Co.* (1888) 127 U. S. 265, 297 [32: 239, 246]. That act provided, in §§ 9 and 12, that the trial of issues of fact, in a district or circuit court, in all suits, except those of equity or admiralty jurisdiction, should be by jury; in § 13, that the trial of issues of fact in this court, in the exercise of its original jurisdiction, in all actions at law against citizens of the United States, should be by jury; in § 17, that "all the said courts of the United States" should "have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law;" and in §§ 22 and 24, that final judgments of the district court might be reviewed by the circuit court, and final judgments of the circuit court be reviewed by this court, upon writ of error, for errors in law, but not for any error in fact. 1 Stat. at L. 77, 80, 81, 83, 84. Those provisions, so far as regards actions at law, have since remained in force, almost uninterruptedly; and they have been re-enacted in the Revised Statutes, allowing the parties, however, to waive a jury and have their case tried by the court. Rev. Stat. §§ 566, 633, 648, 689, 691, 726, 1011.

The only instances that have come to our notice, in which Congress has undertaken to authorize a second trial by jury to be had in a court of the United States, while the verdict of a jury upon a former trial in a court of record has not been set aside, are to be found in two temporary acts passed during the last war with Great Britain, and in an act passed during the War of the Rebellion and continued in force for a short time afterwards, each of which provided that certain actions brought in a state court against officers or persons acting under the authority of the United States might, after final judgment, be removed by appeal or writ of error to the* circuit court of the United States, [11]
and that court should "thereupon proceed to try and determine the facts and the law in such action in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding." Acts of February 4, 1815, chap. 31, §§ 8, 13, and March 3, 1815, chap. 94, §§ 6, 8; 3 Stat. at L. 199, 200, 234, 235; Act of March 3, 1863, chap. 81, § 5; 12 Stat. at L. 757; Act of May 11, 1866, chap. 80, § 3; 14 Stat. at

L. 46. But such a provision, so far as it authorized the facts to be tried and determined in the circuit court of the United States in a case in which a verdict had been returned in the state court, was held to be inconsistent with the Seventh Amendment of the Constitution of the United States by the supreme judicial court of Massachusetts, in a case arising under the acts of 1815; and by the supreme court of New York and by this court, in cases arising under the acts of 1863 and 1866. *Wetherbee* v. *Johnson* (1817) 14 Mass. 412; *Patrie* v. *Murray* (1864) 43 Barb. 323; *S. C. nom. Justices* v. *Murray* (1869) 9 Wall. 274 [19: 658]; *McKee* v. *Rains* (1869) 10 Wall. 22 [19: 860].

In *Justices* v. *Murray*, an action was brought by Patrie against Murray, a United States marshal, and his deputy, in the supreme court of the state of New York, and a verdict and judgment for the plaintiff were rendered in that court. The defendant sued out a writ of error from the circuit court of the United States, under the act of Congress of March 3, 1863, chap. 81, § 5; and moved the state court to stay proceedings. The state court denied the motion, and refused to make a return to the writ of error, upon the ground that the act of Congress, so far as it provided that a case, after verdict and judgment in a state court, might be removed to the circuit court of the United States for trial and determination upon both the facts and the law, in the same manner as if the case had been originally commenced in that court, was in violation of the Seventh Amendment of the Constitution of the United States, and for that reason null and void. *Patrie* v. *Murray*, 43 Barb. 323. Thereupon the circuit court of the United States, without expressing any opinion upon this point, granted a writ of mandamus to the clerk of the state
[12] court. **Murray* v. *Patrie*, 5 Blatchf. 343, 9 Wall. 276, note [19: 658]. The judgment of the circuit court ordering a mandamus was then brought to this court by writ of error, and reversed. Mr. Justice Nelson, in delivering judgment, after remarking that the case (which had been twice argued by very able counsel) had received the most deliberate consideration of the court, quoting the statements of Mr. Justice Story in *Parsons* v. *Bedford*, above cited, and recognizing that the second clause of the Seventh Amendment could not be invoked in a state court to prohibit it from re-examining, on a writ of error, facts that had been tried by a jury in a lower court, went on to say: "It is admitted that the clause applies to the appellate powers of the Supreme Court of the United States in all common-law cases coming up from an inferior Federal court, and also to the circuit court, in like cases, in the exercise of its appellate powers. And why not, as it respects the exercise of these powers, in cases of Federal cognizance coming up from a state court? The terms of the Amendment are general, and contain no qualification in respect to the restriction upon the appellate jurisdiction of the courts, except as to the class of cases, namely, suits at common law, where the trial has been by jury. The natural inference is that no other was intended. Its language, upon any reasonable, if not necessary, interpretation, we think, applies to this entire class, no matter from what court the case comes, of which cognizance can be taken by the appellate court." The *ratio decidendi*, the line of thought pervading and controlling the whole opinion, was that the Seventh Amendment undoubtedly prohibited any court of the United States from re-examining facts once tried by a jury in a lower court of the United States, and that there was no reason why the prohibition should not equally apply to a case brought into a court of the United States from a state court. "In both instances," it was said, "the cases are to be disposed of by the same system of laws, and by the same judicial tribunal." 9 Wall. 277-279 [19: 660, 661].

In *Chicago, Burlington, & Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, 242-244 [41: 979, 987] the same course of reasoning was followed,* and was applied to a case brought [13]
by writ of error from the highest court of a state to this court.

It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.

The case of enforcing, in a court of the United States, a statute of a state giving one new trial, as of right, in an action of ejectment, is quite exceptional; and such a statute does not enlarge, but restricts, the rules of the common law as to re-examining facts once tried by a jury, for by the common law a party was not concluded by a single verdict and judgment in ejectment, but might bring as many successive ejectments as he pleased, unless restrained by a court of equity after repeated verdicts against him. Bacon, Abr. Ejectment, L. *Equator Min. & Smelting Co.* v. *Hall* (1882) 106 U. S. 86 [27: 114]; *Smale* v. *Mitchell* (1892) 143 U. S. 99 [36: 90].

III. "Trial by jury," in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution

on their verdict; but it is a trial by a jury of twelve men, in the presence and under the
[14] superintendence of a judge empowered to *instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books.

Lord Hale, in his History of the Common Law, chap. 12, "touching trial by jury," says: "Another excellency of this trial is this, that the judge is always present at the time of the evidence, given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges." And again, in summing up the advantages of trial by jury, he says: "It has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury." 2 Hale, Hist. Com. Law, 5th ed. 147, 156. See also 1 Hale, P. C. 33.

The supreme court of Ohio held that the provision of article 1, section 19, of the Constitution of that state, requiring compensation for private property taken for the public use to "be assessed by a jury," was not satisfied without an assessment by a jury of twelve men under the supervision of a court; and, speaking by Chief Justice Thurman, said: "That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." "We agree with Grimke, J., in *Willyard* v. *Hamilton*, 7 Ohio, pt. 2, pp. 111, 118 [30 Am. Dec. 195], that a jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, that a presid-
[15] ing law tribunal *is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference, that a mere commission, though composed of twelve men, can never be properly regarded as a jury. Upon the whole, after a careful examination of the subject, we are clearly of the opinion that the word 'jury,' in section 19 of article 1, as well as in other places in the Constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties." *Lamb* v. *Lane* (1854) 4 Ohio St. 167, 177, 179.

The Justices of the supreme judicial court of New Hampshire, in an opinion given to the house of representatives of the state, said: "The terms 'jury,' and 'trial by jury,' are, and for ages have been, well known in the language of the law. They were used at the adoption of the Constitution, and always, it is believed, before that time, and almost always since, in a single sense. A jury for the trial of a cause was a body of twelve men, described as upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly empaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them: who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issue submitted to them." *Opinion of the Justices* (1860) 41 N. H. 550, 551.

Judge Sprague, in the district court of the United States for the district of Massachusetts, said: "The Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This
*direction and superintendence was an essen- [16]
tial part of the trial." "At the time of the adoption of the Constitution, it was a part of the system of trial by jury in civil cases that the court might, in its discretion, set aside a verdict." "Each party, the losing as well as the winning, has a right to the legitimate trial by jury, with all its safeguards, as understood when the Constitution was adopted." *United States* v. *1363 Bags of Merchandise* (1863) 2 Sprague, 85–88.

This court has expressed the same idea, saying: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts." *Vicksburg & M. Railroad Co.* v. *Putnam* (1886) 118 U. S. 545, 553 [30: 257, 258]. And again: "Trial by jury in the courts of the United States is a trial presided over by a judge, with authority, not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination." *United States* v. *Philadelphia & Reading Railroad Co.* (1887) 123 U. S. 113, 114 [31: 138, 139]. And see *Sarf* v. *United States* (1895) 156 U.

S. 51, 102, 106 [39: 343, 361, 363]; *Thompson* v. *Utah* (1898) 170 U. S. 343, 350 [42: 1061, 1066]; Miller on the Constitution, 511; Cooley, Principles of Constitutional Law, 239.

IV. By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man. There were in England, however, courts baron, county courts, courts of conscience, and other petty courts, which were not courts of record, and whose proceedings varied in many respects from the course of the common law, but which were empowered to hear and determine, in a summary way, without a jury, personal actions in which the debt or damages demanded did not ex-
[17] ceed forty *shillings. 3 Bl. Com. 33, 35, 81. The twelve freeholders summoned to the county court of Middlesex, and authorized, when there assembled, together with the county clerk, and without any judge being present, to decide by a majority, and in a summary way, causes not exceeding forty shillings, under the statute of 23 Geo. II., chap. 33 (1750) commended by Blackstone, were clearly not a common-law jury. 3 Bl. Com. 83, and Coleridge's note.

In this country before the Declaration of Independence, the jurisdiction over small debts, which county courts and similar courts had in England, was generally vested in single justices of the peace. Whenever a trial by jury of any kind was allowed at any stage of an action begun before a justice of the peace, it was done in one of two ways; either by providing for an appeal from the judgment of the justice of the peace to a court of record, upon giving bond, with surety, "to prosecute the said appeal there with effect, and to abide the order of said court," and for a trial in that court by a common jury, as in Massachusetts; (6 Dane, Abr. 405, 442; Mass. Prov. Stats. 1697, chap. 8, § 1, and 1699, chap. 2, § 3 (1 Prov. Laws, State ed. pp. 283, 370), and Stat. 1783, chap. 42); or "by providing for a trial by a jury of six before the justice of the peace, as in New York and in New Jersey. 6 Dane, Abr. 417; N. Y. Stats. of December 16, 1737, 1 Smith & Livingston's Laws, p. 238, § 4, and of December 24, 1759, 2 Id. p. 170, § 4; N. J. Stat. February 11, 1775, Allinson's Laws, p. 468; *Wanser* v. *Atkinson* (1881) 43 N. J. L. 571, 572.

Justices of the peace in the District of Columbia, in the exercise of the jurisdiction conferred upon them by Congress to try and determine cases, criminal or civil, are doubtless, in some sense, judicial officers. *Wise* v. *Withers*, 3 Cranch, 330, 336 [2: 457, 458]. But they are not inferior courts of the United States, for the Constitution requires judges of all such courts to be appointed during good behavior. Nor are they, in any sense, courts of record. They were never considered in Maryland as "courts of law." *Weikel* v. *Cate* (1882) 58 Md. 105, 110. The statutes of Maryland of 1715, chap. 12, and of 1763, chap. 21 (in Bacon's Laws of Maryland), and of 1791, chap 68 (in 2 Kilty's
[18] Laws) *defining the civil jurisdiction of justices of the peace, were entitled acts "for the Speedy Recovery of Small Debts out of Court." And Congress has vested in them, "as individual magistrates," the powers and duties which justices of the peace previously had under the laws in force in the District of Columbia. Act of February 27, 1801, chap. 15, § 11; 2 Stat. at L. 107; Rev. Stat. D. C. § 995.

A trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, can hardly have been within the contemplation of Congress in proposing, or of the people in ratifying, the Seventh Amendment to the Constitution of the United States.

V. Another question having an important bearing on the validity and the interpretation of the successive acts of Congress, concerning trial by jury in civil actions begun before justices of the peace in the District of Columbia, is whether the right of trial by jury, secured by the Seventh Amendment to the Constitution, is preserved by allowing a common-law trial by jury in a court of record, upon appeal from a judgment of a justice of the peace, and upon giving bond with surety to prosecute the appeal and to abide the judgment of the appellate court.

The question considered and decided by this court in *Callan* v. *Wilson* (1888) 127 U. S. App. 540 [32: 223] though somewhat analogous, was essentially a different one. That case was a criminal case, not affected by the Seventh Amendment of the Constitution, but depending upon the effect of those other provisions of the original Constitution and of the Fifth and Sixth Amendments, which declare that "the trial of all causes, except in cases of impeachment, shall be by jury," that "no person shall be deprived of life, liberty, or property without due process of law," and that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." The point there decided was that a person accused of a conspiracy to prevent another person from pursuing his lawful calling, and by intimidations and molestations to reduce him to beggary, had the right to a trial by *jury in the first instance, and that it was [19]
not enough to allow him a trial by jury after having been convicted by a justice of the peace without a jury. The decision proceeded upon the ground that such a conspiracy was an offense of a grave character, affecting the public at large, as well as one the punishment of which might involve the liberty of the citizen; it was conceded that there was a class of minor offenses to which the same rule could not apply; and the question of applying a like rule to civil cases did not arise in the case, and was not touched by the court.

All the other cases cited at the bar, in which the constitutional right of trial by jury was held not to be secured by allowing such a trial on appeal from a justice of the peace, or from an inferior court, were criminal cases. *Greene* v. *Briggs* (1852) 1 Curt. C. C. 311, 325; *Saco* v. *Wentworth* (1853) 37 Me. 165 [58 Am. Dec. 786]; *Re Dana* (1873) 7 Ben. 1.

On the other hand, the authority of the legislature, consistently with constitutional provisions securing the right of trial by jury to provide, in civil proceedings for the recovery of money, that the trial by jury should not be had in the tribunal of first instance, but in an appellate court only, is supported by unanimous judgments of this court in two earlier cases, the one arising in the District of Columbia, and the other in the state of Pennsylvania.

The declaration of rights, prefixed to the Constitution of Maryland of 1776, declared, in article 3, that "the inhabitants of Maryland are entitled to the common law of England, and the trial by jury according to the course of that law;" and, in article 21, repeated the words of Magna Charta, "No person ought to be taken or imprisoned," etc., "or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." 1 Charters and Constitutions, 817, 818. The statute of the state of Maryland of 1783, chap. 30, incorporating a bank in the District of Columbia, provided that on any bill or note made or indorsed to the bank, and expressly made negotiable at the bank, and not paid when due, or within ten days after demand, the bank, upon filing an affidavit of its president to the sum due,
[20] might obtain *from the clerk of a court an execution against the property of the debtor; "and if the defendant shall dispute the whole or any part of the said debt, on the return of the execution the court before whom it is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner." 2 Kilty's Laws. The general court of Maryland, in 1799, held that this statute did not infringe the constitutional right of trial by jury. *Bank of Columbia* v. *Ross*, 4 Harr. & McH. 456, 464, 465. The statute was continued in force in the District of Columbia by the acts of Congress of February 27, 1801, chap. 15, § 5, and March 3, 1801, chap. 24, § 5. 2 Stat. at L. 106, 115; *Bank of Columbia* v. *Okely* (1819) 4 Wheat. 235, 246 [4: 559–562].

In *Bank of Columbia* v. *Okely* an execution so issued was sought to be quashed upon the ground that the statute of Maryland violated the Seventh Amendment of the Constitution of the United States, as well as the Constitution of the state of Maryland. But this court held the statute to be consistent with both Constitutions, and, speaking by Mr. Justice Johnson, said: "This court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judge, to make such rules and orders 'as that justice may be done;' and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves that, in practice, the evils so eloquently dilated on by the counsel do not exist. And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the Seventh Amendment of the Constitution is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been that 'the *trial* by jury shall be preserved,' it might *have been contended that [21]
they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words of Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost, he has voluntarily relinquished; and the trial by jury is open to him, either to arrest the progress of the law in the first instance, or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland Constitution." 4 Wheat. 243, 244 [4: 561].

The Constitution of Pennsylvania of 1776 provided, in article 11 of the declaration of rights, that "in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred," and, in section 25 of the Frame of Government, that "trials shall be by jury as heretofore;" and the Constitution of 1790, in section 6 of the bill of rights, declared that "trial by jury shall be as heretofore, and the right thereof remain inviolate." 2 Charters and Constitutions, 1542, 1546, 1554. The statutes of Pennsylvania, from 1782, required all accounts between the state and its officers to be settled by the comptroller general, and approved by the executive council; and, if a balance was found due to the state, authorized the comptroller general to direct the clerk of the county where the officer resided to issue summary process to collect the amount due. And a statute of February 18, 1785, after reciting "whereas it will be agreeable to the Constitution of this state, which has declared that 'trial by jury shall be as heretofore,' that persons conceiving themselves aggrieved by the *proceedings of the [22]
said comptroller general should be allowed to have trial of the facts by a jury, and questions of law arising thereupon determined in a court of record," enacted that any such person might appeal from the settlement or award of the comptroller general to the supreme court of the state, "provided the said party enter sufficient security" before a judge "to prosecute such appeal with effect, and to pay all costs and charges which the Su-

preme Court shall award, and also pay any sum of money which shall appear by the judgment of the said court to be due from him" to the state; and might have the whole matter tried by a jury upon the appeal. This statute also provided that the settlement of any account by the comptroller general, and confirmation thereof by the executive council, whereby any sum of money should be found due from any person to the state, should be a lien on all his real estate throughout the state. 2 Dall. Laws Pa. 44, 247, 248, 251.

In *Livingston* v. *Moore* (1833) 7 Pet. 469, [8: 751], which came to this court from the circuit court of the United States for the eastern district of Pennsylvania, the validity of a lien so acquired by the state was attacked on the ground, among others, that the statutes creating it were contrary to section 6 of the Pennsylvania bill of rights of 1790. But this court upheld the validity of the lien, and in an opinion delivered by Mr. Justice Johnson, after elaborately discussing the other questions in the case, briefly disposed of this one as follows: "As to the sixth section of the Pennsylvania bill of rights, we can see nothing in these laws on which to fasten the imputation of a violation of the right of trial by jury; since, in creating the lien attached to the settled accounts, the right of an appeal to a jury is secured to the debtor." 7 Pet. 552 [8: 781].

While, as has been seen, the Seventh Amendment to the Constitution of the United States requires that "the right of trial by jury shall be preserved" in the courts of the United States in every action at law in which the value in controversy exceeds twenty dollars, and forbids any fact once tried by a jury to "be otherwise re-examined, in any court of the United States, than according to the rules
[23] of the common law," meaning *thereby the common law of England, and not the law of any one or more of the states of the Union, yet it is to be remembered that, as observed by Justice Johnson, speaking for this court, in *Bank of Columbia* v. *Okely*, above cited, it is not "trial by jury," but "the right of trial by jury," which the Amendment declares "shall be preserved." It does not prescribe at what stage of an action a trial by jury must, if demanded, be had; or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. In passing upon these questions, the judicial decisions and the settled practice in the several states are entitled to great weight, inasmuch as the Constitutions of all of them had secured the right of trial by jury in civil actions, by the words "shall be preserved," or "shall be as heretofore," or "shall remain inviolate," or "shall be held sacred," or by some equivalent expression.

A long line of judicial decisions in the several states, beginning early in this century, maintains the position that the constitutional right of trial by jury in civil actions is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular Constitution was adopted, allows a trial by jury for the first time upon appeal from the judgment of the justice of the peace, and requires of the appellant a bond with surety to prosecute the appeal and to pay the judgment of the appellate court. The full extent and weight of those precedents cannot be justly appreciated without referring to the texts of the statutes which they upheld, and which have not always been fully set forth in the reports.

The leading case is *Emerick* v. *Harris* (1808) 1 Binn. 416, which arose under the statutes of Pennsylvania. The provisions of the Constitution of the state are quoted above. The provincial statute of March 1, 1745, gave a justice of the peace jurisdiction of actions to recover the sum of forty shillings and upwards and not exceeding five pounds; and authorized any person aggrieved by his judgment to appeal to the court of common pleas, "first entering into recognizance, with at least one sufficient security, at least in double value *of the debt [24]
or damages sued for, and sufficient to answer all costs, to prosecute the said appeal with effect, and to abide the order of the said court, or in default thereof to be sent by *mittimus* to the sheriff of the county, by him to be kept until he shall give such security, or be otherwise legally discharged." 1 Dall. Laws Pa. 304, 307. The statute of April 5, 1785, enlarged the summary jurisdiction of a justice of the peace to sums not exceeding ten pounds; and, for the avowed purpose of conforming to the Constitution of the state, gave an appeal to the court of common pleas, upon the like terms as by the statute of 1745. And the statute of March 11, 1789, conferred upon the aldermen of the city of Philadelphia the jurisdiction of justices of the peace. 2 Dall. Laws Pa. 304, 305, 660. The statute of April 19, 1794, extended the jurisdiction of justices of the peace, as well as of the aldermen of Philadelphia, to demands not exceeding twenty pounds, with a right of appeal, after judgment, if the amount exceeded five pounds, to the court of common pleas, "in the same manner, and subject to all other restrictions and provisions," as in the statute of 1745. 3 Dall. Laws Pa. 536-538. In support of a writ of certiorari to quash a judgment for eleven pounds and six shillings, rendered in the alderman's court of Philadelphia upon default of the defendant, it was argued "that the Constitution, by directing that trial by jury should be as heretofore, and the right thereof remain inviolate, had interdicted the legislature from abolishing or abridging this right in any case in which it had existed before the Constitution; that a prohibition to do this directly was a prohibition to do it indirectly, either by deferring the decision of a jury until one, two, or more previous stages of the cause had been passed, or by clogging the resort to that tribunal by penalties of any kind, either forfeiture of costs, security upon appeal, or delay; that the power to obstruct at all implied the power to increase the obstructions until the object became unattainable; and that the instant the enjoyment of the right was to be purchased by sacrifices unknown before the Constitution, the right was violated, and ceased to exist as

before." But the supreme court of Pennsylvania held that the statute of 1794 was
[25] a constitutional *regulation of judicial proceedings by legislative authority. 1 Binn. 424, 428. See also *M'Donald* v. *Schell* (1820) 6 Serg. & R. 240; *Biddle* v. *Commonwealth* (1825) 13 Serg. & R. 405, 410; *Haines* v. *Levin* (1866) 51 Pa. 412.

Soon after the decision in *Emerick* v. *Harris*, a similar decision was made by the supreme court of North Carolina. In the Constitution of that state of 1776 it was declared that "in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." 2 Charters and Constitutions, 1410. When that Constitution was formed, justices of the peace had jurisdiction over sums of twenty shillings and under. In 1803 the legislature extended their jurisdiction to thirty pounds, "subject, nevertheless, to the right of appeal, as in similar cases"—a statute of 1794 having provided that in all cases of appeals from the judgment of a justice, the appellant's subscription and acknowledgment of the security, attested by the justice, "shall be sufficient to bind the security to abide by and perform the judgment of the court; and where judgment shall be against the appellant the same shall be entered on motion against the security, and execution shall issue against the principal, or against both principal and security, at the option of the plaintiff." 2 Martin's Laws of North Carolina, pp. 60, 207. "The legislature has," said the court, "given to either party the right of appealing to a court, where he will have the benefit of a trial by jury. It cannot, therefore, be said that the right of such trial is taken away. So long as the trial by jury is preserved through an appeal, the preliminary mode of obtaining it may be varied at the will and pleasure of the legislature. The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of right." *Keddie* v. *Moore* (1811) 6 N. C. (2 Murph.) 41, 45 [5 Am. Dec. 518]; followed in *Wilson* v. *Simonton* (1821) 8 N. C. (1 Hawks) 482.

The Constitution of Tennessee of 1796 declared that "the right of trial by jury shall
[26] remain inviolate." 2 Charters and *Constitutions, 1674. At the time of the adoption of that Constitution, as appears by the territorial statute of 1794, chap. 1, §§ 52, 54, justices of the peace had jurisdiction only of actions for twenty dollars and under; and either party might appeal to the county court, "first giving security for prosecuting such appeal with effect, which said appeal shall be tried and determined at the first court, by a jury of good and lawful men, and determination thereon shall be final." The jurisdiction of a justice of the peace was extended by the statute of 1801, chap. 7, to fifty dollars, "subject, nevertheless, to appeal by either party, to be tried in the county court by a jury, as in other cases." And the statute of 1809, chap. 63, provided that an appeal from the judgment of a justice of the peace should not be granted, unless the appellant "enter into bond with good and sufficient security, with a condition to prosecute said appeal;" and that, if the papers should not be returned to the clerk of the county court at the return term, it should "be lawful for the appellee, on the production of the papers in the cause, to move for judgment against the appellant and his securities, for the amount of the debt and costs, if he should have been the original defendant; if not, for the amount of costs." 1 Scott's Laws of Tennessee, pp. 476, 695, 1166. The statute of 1831, chap. 59, further extended the jurisdiction of a justice of the peace to one hundred dollars. Public Acts of Tennessee of 1831, p. 83. In a case arising under the last statute, the supreme court of Tennessee, while Chief Justice Catron (afterwards a justice of this court) was a member thereof, declared it to have been settled by a long series of its decisions, beginning under the statute of 1801, that such a statute was constitutional, upon the ground that "inasmuch as the party was in all cases allowed his appeal, when he could have a trial by jury, the right of trial by a jury was not taken away; so that the terms of requiring bail or security for the money belonged to the legislature to provide, and though the security required in the cases of appeal differed from those cases where the party was brought into court by original writ, still, as it did not take away the right of trial by jury, the act was not unconstitutional." *Morford* v. *Barnes* (1835) 8 Yerg. 444, 446; *followed in *Pryor* v. *Hays* (1836) [27]
9 Yerg. 416.

The Constitution of Connecticut of 1818, article 1, section 21, likewise declared that "the right of trial by jury shall remain inviolate." 1 Charters and Constitutions, 259. At the time of its adoption, the jurisdiction of justices of the peace, in actions of trespass, was limited to fifteen dollars. In the Revised Laws of 1821, tit. 2, § 23, their jurisdiction was extended to thirty-five dollars; but in demands for more than seven dollars an appeal was allowed to the county court, the appellant to "give sufficient bond, with surety, to the adverse party, to prosecute such appeal to effect, and to answer all damages in case he make not his plea good." The supreme court of Connecticut held the statute constitutional; and Chief Justice Hosmer, in delivering judgment, said: "I admit that the trial by jury must continue unimpaired; and shall not now dispute that there can be no enlargement of a justice's jurisdiction, which shall take from anyone the legal power of having his cause heard by a jury, precisely as it might have been before the Constitution was adopted. It is indisputable that a justice of the peace is empowered to hear all causes personally, and that he cannot try them by a jury. The question, then, is brought to this narrow point, whether the enlargement of a justice's jurisdiction, with the right of appeal, as it existed when the Constitution was adopted, is a violation of the above privilege, secured by

that instrument. I am clear that it is not; and that a construction of this nature is equally unwarranted by the words, and by the intention, of the Constitution. An instrument remains inviolate if it is not infringed; and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which, if they do not amount to a literal prohibition, are, at least, virtually of that character. It never could be the intention of the Constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made, and no regulation even of the right of trial by jury could be had. It is sufficient, and within
[28] the reasonable *intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new modes, and even rendered more expensive, if the public interest demands such alteration. A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations, as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation, made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited because it increases the burden or expense of the litigating parties." "In conclusion, I am satisfied that the liberty of appeal preserves the right of trial by jury inviolate, within the words and fair intendment of the Constitution; and that no such unreasonable hardship is put on the appellant, by the bond required for the prosecution of the appeal, as to justify the assertion that the right of trial by jury is in any manner impaired." *Beers* v. *Beers* (1823) 4 Conn. 535, 538, 540 [10 Am. Dec. 186]. See also *Colt* v. *Eves* (1837) 12 Conn. 243, 253; *Curtis* v. *Gill* (1867) 34 Conn. 49.

Before the adoption of the Constitution of the state of Maryland, each of the statutes of the province "for the speedy recovery of small debts out of court, before a single justice of the peace," would appear to have restricted his civil jurisdiction to claims for thirty-three shillings and four pence, as in the statute of 1715, chap. 12, or for fifty shillings, as in the statute of 1763, chap. 21. Bacon's Laws.

By the statute of the state of Maryland of 1791, chap. 68, "for the speedy recovery of small debts out of court," § 1, any one justice of the peace, of the county wherein the debtor resided, was vested with jurisdiction to try, hear, and determine "all cases where the real debt and damages doth not exceed ten pounds current money" (or twenty-six and two-thirds dollars), "and, upon full hearing of the allegations and evidences of both parties, to give judgment, according to the laws of the land, and the equity and right of the matter." By § 6 his jurisdiction was made exclusive to that extent. By § 4, "in all cases where the debt or demand doth exceed twenty
[29] *shillings common money" (or two and two-thirds dollars), "and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any magistrate, he or she shall be at liberty to appeal to the next county court, before the justices thereof, who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to the law of the land, and the equity and right of the matter;" and "either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election." And by § 5, the appellant was required to give bond with sufficient sureties, in double the sum to be recovered, to prosecute his appeal, and to pay the appellee, "in case the said judgment shall be affirmed, as well as the debt, damage, and cost adjudged by the justice from whose judgment such appeal shall be made, as also all cost and damage that shall be awarded by the court before whom such appeal shall be heard, tried, and determined." Latrobe's Justices' Practice, 1st ed. 1826, pp. 56, 112, 360, 362; 2 Kilty's Laws.

By the statute of Maryland of 1809, chap. 76, §§ 1, 6 (3 Kilty's Laws), the exclusive original jurisdiction of justices of the peace was extended to all cases where the real debt or damages demanded did not exceed fifty dollars. And by the statute of Maryland of 1852, chap. 239, their original jurisdiction was extended to all cases of contract, tort, or replevin, where the sum or damage or thing demanded did not exceed one hundred dollars, with a right of appeal to the county court; and was made concurrent with that of the county court where it exceeded fifty dollars.

In *Steuart* v. *Baltimore* (1855) 7 Md. 500, the court of appeals of Maryland, speaking by Judge Eccleston, said: "In the third section of the old Bill of Rights, it was declared 'that the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law.' Notwithstanding this, the legislature passed laws at different times, extending the jurisdiction of justices of the peace in matters of contract, and giving jurisdiction *in [30]
matters of tort where they had none previously. These laws, of course, made no provision for trials by jury except on appeal to the county courts, and yet they were constantly acquiesced in, and not considered as being repugnant to the Bill of Rights." The court then referred to *Morford* v. *Barnes*, *Beers* v. *Beers*, and *McDonald* v. *Schell*, above cited, and added: "These cases fully establish the principle that where a law secures a trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground that the party, if he thinks proper, can have his case decided by a jury before it is finally settled." 7 Md. 511, 512.

To the like general effect are the following: Kentucky Stat. January 30, 1812, §§ 4-6, 2 Morehead & Brown's Digest, pp. 893, 894; *Pollard* v. *Holeman* (1816) 4 Bibb, 416; *Head* v. *Hughes* (1818) 1 A. K. Marsh. 372 [10 Am. Dec. 742]; *Feemster* v. *Ander-*

son (1828) 6 T. B. Mon. 537; *Flint River S.B. Co.* v. *Foster* (1848) 5 Ga. 194, 208 [48 Am. Dec. 248]; *Lincoln* v. *Smith* (1855) 27 Vt. 328, 361; *Lamb* v. *Lane* (1854) 4 Ohio St. 167, 180; *Norton* v. *McLeary* (1858) 8 Ohio St. 205, 209; *Reckner* v. *Warner* (1872) 22 Ohio St. 275, 291, 292; Cooley, Const. Lim. 6th ed. 505; 1 Dillon, Mun. Corp. 4th ed. § 439.

VI. When the District of Columbia passed under the exclusive jurisdiction of the United States, the statute of Maryland of 1791, chap. 68, above quoted (having been continued in force by the statute of that state of 1798, chap. 71, 2 Kilty), was one of the laws in force in the District.

The act of Congress of February 27, 1801, chap. 15, in § 1, enacted that the laws in force in the state of Maryland, as they then existed, should be and continue in force in that part of the District which had been ceded by that state to the United States—which, since the retrocession of the county of Alexandria to the state of Virginia by the act of Congress of July 9, 1846, chap. 35 (9 Stat. at L. 35), is the whole of the District of Columbia—and in § 11, provided for the appointment of "such number of discreet persons to be justices of the peace" in the District of Columbia as the President should think ex-
[31] pedient, *who should continue in office five years, and who should "in all matters civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace as individual magistrates, by the laws hereinbefore continued in force in those parts of said District for which they shall have been respectively appointed; and they shall have cognizance in personal demands of the value of twenty dollars, exclusive of costs; which sum they shall not exceed, any law to the contrary notwithstanding." 2 Stat. at L. 104, 107.

In quoting the provisions of subsequent acts of Congress, the re-enactments of them in the corresponding sections of the Revised Statutes of the District of Columbia will be referred to in brackets.

On March 1, 1823, Congress took up the subject in the act of 1823, chap. 24, entitled "An Act to Extend the Jurisdiction of Justices of the Peace in the Recovery of Debts in the District of Columbia." 3 Stat. at L. 743.

The first section of that act gave to any one justice of the peace, of the county wherein the defendant resided, jurisdiction to try, hear, and determine "all cases where the real debt or damages do not exceed the sum of fifty dollars, exclusive of costs," "and, upon full hearing of the allegations and evidence of both parties, to give judgment, according to the laws existing in the said District of Columbia, and the equity and right of the matter, in the same manner and under the same rules and regulations, to all intents and purposes, as such justices of the peace are now authorized and empowered to do when the debt and damages do not exceed the sum of twenty dollars, exclusive of costs." [Rev. Stat. D. C. §§ 997, 1006.] And by section 6, the jurisdiction of justices of the peace up to fifty dollars was made exclusive. [Rev. Stat. D. C. § 769.] The reference in section 1 was evidently to the act of Congress of February 27, 1801, § 11, above quoted; and sections 1 and 6 of the act of 1823 followed, as to jurisdictional amount, the statute of Maryland of 1809, chap. 76, §§ 1, 6.

Sections 3 and 4 of the act of Congress of 1823 made it the duty of every justice of the peace to keep a docket containing * a rec- [32]
ord of his proceedings, and subjected him to damages to any person injured by his neglect to keep one. [Rev. Stat. D. C. §§ 1000, 1001.] Those provisions were evidently taken from the statute of Maryland of 1809, chap. 76, §§ 4, 5. But they never were considered, either in the state of Maryland or in the District of Columbia, as making a justice of the peace a court of record.

By section 7 of the act of Congress of 1823, "in all cases where the debt or demand doth exceed the sum of five dollars, and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace, he or she shall be at liberty to appeal to the next circuit court in the county in which the said judgment shall have been rendered, before the judges thereof, who are hereby, upon the petition of the appellant, in a summary way, empowered and directed to hear the allegations and proofs of both parties, and determine upon the same according to law, and the equity and right of the matter;" "and either of the said parties may demand a trial by jury, or leave the cause to be determined by the court, at their election." [Rev. Stat. D. C. §§ 775, 776, 1027]. These provisions (increasing the requisite sum, however, from twenty shillings, or two and two thirds dollars, to five dollars) were evidently copied from the statute of Maryland of 1791, chap. 68, § 4, above cited; and the provision of § 5 of that statute, which required the appellant to give bond with sureties to pay, if the judgment should be affirmed, as well the sum and costs adjudged by the justice of the peace, as also those awarded by the appellate court, was not repealed or modified by the act of Congress of 1823, and appears to have been considered as still in force in the District of Columbia. *Butt* v. *Stinger* (1832) 4 Cranch, C. C. 252.

The same act of 1823, for the first time in the legislation of Congress, provided that actions might be tried by a jury before a justice of the peace, as follows:

"Sec. 15. In every action to be brought by virtue of this act, where the sum demanded shall exceed twenty dollars, it shall be lawful for either of the parties to the suit, after issue joined, and before the justice shall proceed to inquire into the *merits of the [33]
cause, to demand of the said justice that such action be tried by a jury; and upon said demand the said justice is hereby required to issue a *venire* under his hand and seal, directed to any constable of the county where said cause is to be tried, commanding him to summon twelve jurors to be and appear before the justice issuing such *venire*,

at such time and place as shall be therein expressed; and the jurors thus summoned shall possess the qualifications, and be subject to the exceptions, now existing by law in the District of Columbia.

"Sec. 16. If any of the persons so summoned and returned as jurors shall not appear, or be challenged and set aside, the justice before whom said cause is to be tried shall direct the constable to summon and return forthwith a *tales*, each of whom shall be subject to the same exceptions as the jurors aforesaid, so as to make up the number of twelve, after all causes of challenge are disposed of by the justice; and the said twelve persons shall be the jury who shall try the cause, each of whom shall be sworn by the justice well and truly to try the matter in difference between the parties, and a true verdict to give, according to evidence; and the said jury, being sworn, shall sit together, and hear the proofs and allegations of the parties, in public, and when the same is gone through with, the justice shall administer to the constable the following oath, *viz.:* 'You do swear, that you will keep this jury together in some private room, without meat or drink, except water; that you will not suffer any person to speak to them, nor will you speak to them yourself, unless by order of the justice, until they have agreed on their verdict.' And when the jurors have agreed on their verdict, they shall deliver the same publicly to the justice, who is hereby required to give judgment forthwith thereon; and the said justice is hereby authorized to issue execution on said judgment, in the manner, and under the limitations, hereinbefore directed." 3 Stat. at L. 746. [Rev. Stat. D. C. §§ 1009–1017.]

These sections, providing for a trial by a jury before the justice of the peace, would appear, from their position in the act, to have been added, by an afterthought, to the scheme of the earlier sections, derived from
[34] the legislation of Maryland, *and providing for a trial without any jury before a justice of the peace, and for a trial by jury, if demanded by either party, in an appellate court; and were evidently taken, in great part *verbatim*, from the twelfth section of the statute of New York of 1801, chap. 165 (which gave justices of the peace jurisdiction of actions in which the debt or damages did not exceed twenty-five dollars), as modified by the twenty-second section of the statute of New York of 1818, chap. 94, which extended their civil jurisdiction to fifty dollars. The material parts of both those statutes are copied, for convenience of comparison, in the margin.†

*The provisions of the New York statute [35]
of 1801 (copied in the margin) were re-enacted, almost word for word, in the statutes of that state of 1808, chap. 204, § 9, and of 1813, chap. 53, § 9.

The New York statutes of 1801, 1808, and 1813, indeed, differed from the act of Congress of 1823, in giving a justice of the peace civil jurisdiction up to twenty-five dollars only; in authorizing every action "brought by virtue of this act," without restriction of amount, to be tried by a jury before a justice of the peace; in providing for a jury of six, instead of a jury of twelve men; and in the mode of selecting the jury; but were construed to authorize the justice of the peace (as the act of Congress of 1823 afterwards did in terms) to award a *tales* in case of a default of the jurors summoned on the *venire*. *Zeely* v. *Yansen* (1807) 2 Johns. 386.

The New York statute of 1818, however, like the act of Congress of 1823, extended the civil jurisdiction of a justice *of the peace to [36]
fifty dollars, and (in the section copied in the margin) provided for a trial by a jury of twelve men before the justice of the peace, although it differed from the act of Congress in allowing such a trial to be had only when the sum demanded exceeded twenty-five dollars, whereas the act of Congress allowed it whenever the sum demanded exceeded twenty dollars.

The New York statute of 1801 also, in its first section, differed from the act of Congress, by expressly authorizing a justice of the peace to hold a court, and vesting him with all the powers of a court of record; and, in the twelfth section, by not requiring the justice of the peace to give judgment "forthwith" upon the verdict of the jury.

Yet under that statute it was held by the supreme court of the state of New York, in *per curiam* opinions, doubtless delivered by Chancellor (then Chief Justice) Kent, and, before the passage of the act of Congress of 1823, was understood to be settled law in that state, that upon a trial by a jury before a justice of the peace (differing in these respects from a trial by jury in a superior court), the jury were to decide both the law and the facts, and the justice was bound to render judgment, as a thing of course, upon the verdict of the jury, and had no authority to arrest the judgment, or to order a new trial. *Felter* v. *Mulliner* (1807) 2 Johns. 181; *M'Neil* v. *Scoffield* (1808) 3 Johns. 436; *Hess* v. *Beekman* (1814) 11 Johns. 457; Cowen's Justice of the Peace, 1st ed. 1821, 541, 544.

By a familiar canon of interpretation,

† "In every action to be brought by virtue of this act, it shall be lawful for either of the parties to the suit, or the attorney of either of them, after issue joined and before the court shall proceed to inquire into the merits of the cause, to demand of the said court that such action be tried by a jury; and upon such demand the said justice holding such court is hereby required to issue a *venire*, directed to any constable of the city or town where the said cause is to be tried, commanding him to summon twelve good and lawful men, being freeholders or freemen of such city, or being freeholders of such town, where said cause is to be tried, and who shall be in nowise of kin to the plaintiff or defendant, nor interested in such suit, to be and appear before such justice issuing such *venire*, at such time and place as shall be expressed in such *venire*, to make a jury for trial of the action between the parties mentioned in the said *venire*." [It is then provided that the names of the jurors so summoned shall be written on separate papers and put into a box.] "And on the trial of such cause such justice, or such indifferent person as he shall appoint for that purpose, shall draw out six of the said papers

heretofore applied by this court whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that construction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state. *Metropolitan Railroad Co.* v. *Moore* (1887) 121 U. S. 558, 572 [30: 1022, 1026]; *Willis* v. *Eastern Trust & Bkg. Co.* (1898) 169 U. S. 295, 307, 308 [42: 752, 758].

[37] *VII. The questions of the validity and the effect of the act of Congress of 1823 then present themselves in this aspect:

The Seventh Amendment to the Constitution of the United States secures to either party to every suit at law, in which the value in controversy exceeds twenty dollars, the right of trial by jury; and forbids any such suit, in which there has once been a trial by jury, within the sense of the common law and of the Constitution, to be tried anew upon the facts in any court of the United States.

Congress, when enlarging, by the act of 1823, the exclusive original jurisdiction of justices of the peace in the District of Columbia from twenty to fifty dollars, manifestly intended that the dictates of the Constitution should be fully carried out, in letter and spirit. With this object in view, Congress first enacted that "in all cases" before a justice of the peace, in which the demand exceeded five dollars, either the plaintiff or the defendant should have a right to appeal from the judgment of the justice of the peace to the circuit court of the United States, and either of the parties might elect to have "a trial by jury" in that court. Congress also, by way of additional precaution, further enacted that every case, in which the sum demanded exceeded twenty dollars, should, if either party so requested, "be tried by a jury" of twelve men before the justice of the peace.

In all acts of Congress regulating judicial proceedings, the very word "appeal," unless restricted by the context, indicates that the facts, as well as the law, involved in the judgment below, may be reviewed in the appellate court. *Wiscart* v. *Dauchy* (1796) 3 Dall. 321, 327 [1: 619, 622]; *Re Neagle* (1890) 135 U. S. 1, 42 [34: 55, 64]; *Dower* v. *Richards* (1894) 151 U. S. 658, 663, 664 [38: 305, 307, 308].

By section 7 of the act of 1823, the right of appeal to a court of record was expressly given "in all cases where the debt or demand doth exceed the sum of five dollars, and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace." The words "in all cases," in their natural meaning, include cases which have been tried by a jury before the justice of the *peace, as well as those tried [38] by him without a jury; and we perceive no necessity and no reason for restricting their application to the latter class of cases, and thereby allowing the fact, that upon the demand of one party the case has been tried by a jury before the justice of the peace, to prevent the other party from appealing to a court of record and obtaining a trial by jury in that court.

Neither the direction of section 1, that the justice of the peace should give judgment "according to the laws existing in the District of Columbia, and the equity and right of the matter," nor the similar direction of section 7, that the case should be determined on appeal "according to law, and the equity and right of the matter," can reasonably be construed as conferring chancery jurisdiction, either upon the justice of the peace, or

---

one after another; and if any of the persons whose names shall be so drawn shall not appear, or shall be challenged and set aside, then such further number thereof shall be drawn as shall make up the number of six who do appear, after all legal causes of challenge allowed by the said justice, unless the said parties agree that the said constable shall summon six men at his discretion; and the said six persons so first drawn and appearing, and approved by the court as indifferent, shall be the jury who shall try the cause, to each of whom the said justice shall administer the following oath: 'You do swear in the presence of Almighty God, that you will well and truly try the matter in difference between—plaintiff and—defendant, and a true verdict will give according to evidence.' And after the said jury have taken the oath aforesaid, they shall sit together, and hear the several proofs and allegations of the parties, which shall be delivered in public in their presence." [Provision is then made for the form of oath to be administered to witnesses.] "And after hearing the proofs and allegations, the jury shall be kept together in some convenient place until they all agree upon a verdict, and for which purpose a constable shall be sworn, and to whom the said justice shall administer the following oath, *viz.:* 'You do swear in the presence of Almighty God, that you will, to the utmost of your ability, keep every person sworn on this inquest together in some private and convenient place, without meat or drink, except water; you will not suffer any person to speak to them nor speak to them yourself, unless by order of the justice, unless it be to ask them whether they have agreed on their verdict, until they have agreed on their verdict.' And when the jurors have agreed on their verdict, they shall deliver the same to the justice in the same court, who is hereby required to give judgment thereupon, and to award execution in manner hereafter directed." N. Y. Stat. 1801, chap. 165, § 12.

"In every action to be brought by virtue of this act, wherein the sum or balance due, or thing demanded, shall exceed twenty-five dollars, if either of the parties, the agent or attorney of either of them, after issue joined, and before the court shall proceed to inquire into the merits of the cause, shall demand of the court that such action be tried by a jury, and that such jury shall consist of twelve men, the *venire* to be issued shall in every such case require twenty good and lawful men to be summoned as jurors, and the jury for the trial of every such issue shall in such cases consist of twelve men, instead of six, as in other cases of trial before a justice; and the provisions in the ninth and tenth sections of the act above mentioned [of 1813, chap. 53, re-enacting the statute of 1801, chap. 165, §§ 12, 13], shall be followed, and shall be deemed to apply in every other respect." N. Y. Stat. 1818, chap. 94, § 22.

upon the appellate court, or as substituting the rules of technical equity for the rules of law.

The trial by jury, allowed by the seventh section of the act, in a court of record, in the presence of a judge having the usual powers of superintending the course of the trial, instructing the jury on the law and advising them on the facts, and setting aside their verdict if in his opinion against the law or the evidence, was undoubtedly a trial by jury, in the sense of the common law, and of the Seventh Amendment to the Constitution.

But a trial by a jury before a justice of the peace, pursuant to sections 15 and 16 of the act, was of quite a different character. Congress, in regulating this matter, might doubtless allow cases within the original jurisdiction of a justice of the peace to be tried and decided in the first instance by any specified number of persons in his presence. But such persons, even if required to be twelve in number, and called a jury, were rather in the nature of special commissioners or referees. A justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law; his authority was created and
[39] defined by, and *rested upon, the acts of Congress only. The act of 1823, in permitting cases before him to be tried by a jury, did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common-law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution. It was no more a jury, in the constitutional sense, than it would have been, if it had consisted, as has been more usual in statutes authorizing trials by a jury before a justice of the peace, of less than twelve men.

There was nothing, therefore, either in the Constitution of the United States, or in the act of Congress, to prevent facts once tried by such a jury before the justice of the peace from being tried anew by a constitutional jury in the appellate court.

VIII. The majority of the court of appeals, in the case at bar, in holding that no appeal lay from a judgment entered by a justice of the peace on a verdict in the District of Columbia, appears to have been much influenced by the practice, which it declared to have prevailed in the District for seventy years, in accordance with decisions made by the circuit court of the United States of the District of Columbia soon after the passage of the act of Congress of 1823. But the reasons assigned for those decisions are unsatisfactory and inconclusive.

Such decisions, indeed, were made by the circuit court in several early cases. *Davidson* v. *Burr* (1824) 2 Cranch, C. C. 515; *Maddox* v. *Stewart* (1824) 2 Cranch, C. C. 523; *Denny* v. *Queen* (1827) 3 Cranch, C. C. 217; *Smith* v. *Chase* (1828) 3 Cranch, C. C. 348. Yet the appellant in one of those cases, whose appeal had been dismissed as unauthorized by law, was notwithstanding held liable on his bond to prosecute the appeal. *Chase* v. *Smith* (1830) 4 Cranch, C. C. 90.

The decisions in question would appear, by the brief notes *of them in the report of [40]
Chief Justice Cranch, to have proceeded upon the assumption that the trial before a justice of the peace, by a jury impaneled pursuant to the act of 1823, was a trial by jury within the meaning of the Seventh Amendment to the Constitution, and therefore the facts could not be tried anew upon appeal. In *Smith* v. *Chase*, however, that learned judge (declaring that he spoke for himself only) delivered an elaborate opinion, in which he maintained the position that, upon the demand of a trial by jury, the cause was taken entirely out of the hands of the justice of the peace; that he was obliged to summon and swear the jury, and to render judgment according to their verdict; that no authority was given him to instruct the jury upon matter of law or of fact, or to set aside their verdict and grant a new trial; and that the jury were not bound by his opinion upon matter of law, but were to decide the law as well as the fact. 3 Cranch, C. C. 351, 352. From these premises he inferred (by what train of reasoning does not clearly appear) that such a trial by a jury before the justice of the peace was a trial by jury within the meaning of the Seventh Amendment to the Constitution; that the facts so tried, therefore, could not be tried anew in an appellate court; and that no appeal lay in such a case. Curiously enough, that opinion, purporting to have been delivered at December term, 1828, refers to the opinion of this court in *Parsons* v. *Bedford*, 3 Pet. 446–448 [7: 736, 737], which was not delivered until January term, 1830.

In 1863, all the powers and jurisdiction, previously possessed by the circuit court of the District, including the appellate jurisdiction from justices of the peace, were transferred by Congress to the supreme court of the District of Columbia. Act of March 3, 1863, chap. 91, §§ 1, 3, 12; 12 Stat. at L. 762–764. [Rev. Stat. D. C. §§ 760, 1027.]

The foregoing decisions of the circuit court were followed in the supreme court of the District at general term in 1873, without much discussion, in *Fitzgerald* v. *Leisman*, 3 MacArth. 6; and at special term in 1896, by Justice Bradley in [*United States*], *Brightwood Railway Co.*, v. *O'Neal*, 24 Wash. L. Rep. 406, and by Justice Cox in the present case. *Capital Traction Co.* v. *Hof*, 24 Wash. L. Rep. 646. *But each of these two [41]
judges, while holding himself bound by the previous decisions of the courts of the District, expressed a clear and positive opinion that they were erroneous.

Apart from the inconsistencies in the opinions delivered in the courts of the District of Columbia, it is quite clear that the decisions

of those courts, especially when they involve questions of the interpretation of the Constitution of the United States, and of the constitutionality and effect of acts of Congress, cannot be considered as establishing the law, or as relieving this court from the responsibility of exercising its own judgment. *Ex parte Wilson* (1885) 114 U. S. 417, 425 [29: 89, 92]; *Andrews* v. *Hovey* (1888) 124 U. S. 694, 717 [31: 557,563]; *The J. E. Rumbell* (1893) 148 U. S. 1, 17 [37: 345, 349].

IX. The legislation of Congress since the act of 1823 has not changed the character of the office, or the nature of the powers, of the justices of the peace in the District of Columbia, or of the juries summoned to try cases before those justices. The principal changes have been by enlarging the limits of the civil jurisdiction of the justices of the peace, and by expressly requiring security on appeals from their judgments.

By the act of February 22, 1867, chap. 63, § 1 (14 Stat. at L. 401), Congress enlarged the jurisdiction of justices of the peace in the District of Columbia to "all cases where the amount claimed to be due for debt or damages arising out of contracts, express or implied, or damages for wrongs or injuries to persons or property, does not exceed one hundred dollars, except in cases involving the title to real estate, actions to recover damages for assault, or assault and battery, or for malicious prosecution, or actions against justices of the peace or other officers for misconduct in office, or in actions for slander, verbal or written." [Rev. Stat. D. C. § 997.] And on the same day, Congress, by the act of 1867, chap. 64 (14 Stat. at L. 403), provided that "no appeal shall be allowed from a judgment of a justice of the peace, unless the appellant, with sufficient surety or sureties, approved by the justice, enter into an undertaking to satisfy and pay all intervening damages and costs arising

[42] on the appeal;" and that, "when such*undertaking has been entered into, the justice shall immediately file the original papers, including a copy of his docket entries, in the office of the clerk of the supreme court of the District of Columbia; and thereupon, as soon as the appellant shall have made the deposit for costs required by law, or obtained leave from one of the justices, or from the court, to prosecute his appeal without a deposit, the clerk shall docket the cause," and it should be proceeded with substantially in the manner prescribed by the act of Congress of 1823. [Rev. Stat. D. C. §§ 774, 1027-1029.]

In 1874, the provisions, above quoted, of the acts of 1823 and 1867, were re-enacted (with hardly any change except by subdividing and transposing sections) in the Revised Statutes of the District of Columbia, at the places above referred to in brackets.

By the act of February 19, 1895, chap. 100, §§ 1, 2, justices of the peace of the District of Columbia have been granted (with the same exceptions as in the act of February 22, 1867, chap. 63, also excepting, however, actions for damages for breaches of promise to marry, and not excepting actions for assault or for assault and battery) exclusive original jurisdiction of "all civil pleas and actions, including attachment and replevin, where the amount claimed to be due or the value of the property sought to be recovered does not exceed" one hundred dollars, and concurrent original jurisdiction with the supreme court of the District of Columbia, where it is more than one hundred and not more than three hundred dollars; "and where the sum claimed exceeds twenty dollars, either party shall be entitled to a trial by jury." And by § 3, "no appeal shall be allowed from the judgment of a justice of the peace in any common-law action, unless the matter in demand in such action, or pleaded in set-off thereto, shall exceed the sum of five dollars; nor unless appellant, with sufficient surety approved by the justice, enters into an undertaking to pay and satisfy whatever final judgment may be recovered in the appellate court." 28 Stat. at L. 668.

Under the act of 1895, as under the previous acts of Congress, where the matter in controversy exceeds five dollars in value, an appeal lies to a court of record from any judgment *of a justice of the peace, whether [43] rendered upon a verdict or not, and either party may have a trial by a common-law jury in the appellate court; and the trial by jury in that court is, and the trial before a justice of the peace is not, a trial by jury within the meaning of the Seventh Amendment to the Constitution.

The only question remaining to be considered is of the constitutionality of the provisions of the act of 1895, by which the civil jurisdiction of justices of the peace is extended to three hundred dollars, and either party, on appealing from the judgment of the justice of the peace to the supreme court of the District of Columbia, is required to enter into an undertaking to pay and satisfy whatever judgment may be rendered in that court.

For half a century and more, as has been seen, after the adoption of the earliest Constitutions of the several states, their courts uniformly maintained the constitutionality of statutes more than doubling the pecuniary limit of the civil jurisdiction of justices of the peace as it stood before the adoption of Constitutions declaring that trial by jury should be preserved inviolate, although those statutes made no provision for a trial by jury, except upon appeal from the judgment of the justice of the peace, and upon giving bond with surety to pay the judgment of the appellate court. And such appears to have been understood to be the law of Maryland and of the District of Columbia before and at the time of the passage of the act of Congress of 1823.

Legislation increasing the civil jurisdiction of justices of the peace to two or three hundred dollars, and requiring each appellant from the judgment of a justice of the peace to a court of record, in which a trial by jury may be had for the first time, to give security for the payment of the judgment of the court appealed to, has not generally been

considered as unreasonably obstructing the right of trial by jury, as is shown by the numerous statutes cited in the margin†
[44] *from which it appears that the civil jurisdiction of justices of the peace has been increased to three hundred dollars in Pennsylvania, Ohio, Michigan, Kansas, Arkansas, Colorado, and California; to two hundred and fifty dollars in Missouri; and to two hundred dollars in New York, Indiana, Illinois, Wisconsin, Delaware, North Carolina, Mississippi, and Texas; and that the appellant is required (at least when the appeal is to operate as a supersedeas) to enter into a bond or recognizance, not only to prosecute his appeal, but to pay the judgment of the appellate court, in all those states, except Pennsylvania; and in that state any corporation, except a municipal corporation, is required to give such a bond, but other appellants are required to give bond for the payment of costs only. And we have not been referred to a single decision in any of those states that holds such a statute to be unconstitutional in any respect.

The legislature, in distributing the judicial power between courts of record, on the one hand, and justices of the peace or other subordinate magistrates, on the other, with a view to prevent unnecessary delay and unreasonable expense, must have a considerable discretion, whenever in its opinion, because
[45] *of general increase in litigation, or other change of circumstances, the interest and convenience of the public require it, to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance to the decision of justices of the peace, provided always the right of trial by jury is not taken away in any case in which it is secured by the Constitution.

Having regard to the principles and to the precedents applicable to this subject, we should not be warranted in declaring that the act of Congress of 1895 so unreasonably obstructs the right of trial by jury, that it must for this reason be held to be unconstitutional and void.

X. Upon the whole matter, our conclusion is, that Congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount by a justice of the peace, or, in his presence, by a jury of twelve, or of any less number, allowing to either party, where the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace of a court of record, and to have a trial by jury in that court; that Congress, in every case where the value in controversy exceeds five dollars, has authorized either party to appeal from the judgment of the justice of the peace, although entered upon the verdict of a jury, to the supreme court of the District of Columbia, and to have a trial by jury in that court; that the trial by a jury of twelve, as permitted by Congress to be had before a justice of the peace, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the Seventh Amendment to the Constitution; that therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being re-examined by a jury in the appellate court; that the right of trial by jury in the appellate court is not unduly obstructed by the provisions enlarging the civil jurisdiction of justices of the peace to three hundred dollars, and requiring every appellant to give security to pay and satisfy the judgment of the appellate court; that the legislation of Congress upon the subject is in all respects consistent *with the Constitution of the [46]
United States; and that upon these grounds (which are substantially those taken by Chief Justice Alvey below) the judgment of the court of appeals, quashing the writ of certiorari to the justice of the peace, must be affirmed.

The effect of so affirming that judgment will be to leave the claim of Hof against the Capital Traction Company open to be tried by a jury before the justice of the peace, and, after his judgment upon their verdict, to be taken by appeal to the supreme court of the District of Columbia, and to be there tried by jury on the demand of either party.

Judgment affirmed.

Mr. Justice **Brewer** concurred in the judgment of affirmance, but dissented from so much of the opinion as upheld the validity of the provision of the act of Congress requiring every appellant from the judgment of a justice of the peace to give bond with surety for the payment of the judgment of the appellate court.

Mr. Justice **Brown** did not sit in this case, or take any part in its decision.

†Arkansas. Digest 1894, §§ 4317, 4431, 4432.
California. Code of Civil Procedure 1872, §§ 114, 974, 978.
Colorado. Rev. Stat. 1867, chap. 50, §§ 1, 38, 39; Gen. Laws 1877, §§ 1482, 1519, 1520; Gen. Stat. 1883, §§ 1924, 1979, 1980.
Delaware. Rev. Stat. 1893, chap. 99, §§ 1, 25.
Illinois. Rev. Stat. 1874, chap. 79, §§ 13, 62; Starr & Curtis's Stat. 1896, chap. 79, §§ 16, 115.
Indiana. Rev. Stat. 1881, §§ 1433, 1500.
Kansas. Gen. Stat. 1868, chap. 81, §§ 2, 121; Gen. Stat. 1897, chap. 103, §§ 20, 188.
Michigan. Rev. Stat. 1872, §§ 5249, 5433; Howell's Stat. 1882, §§ 6814, 7000.
Mississippi. Code 1892, §§ 2394, 82.
Missouri. Rev. Stat. 1889, §§ 6122, 6328.
New York. Stat. 1861, chap. 158; Rev. Stat. 1875, 6th ed. pt. 3, tit. 2, § 56; tit. 4, § 53.
North Carolina. Code 1883, §§ 834, 884.
Ohio. Rev. Stat. 1880, §§ 585, 6584.
Pennsylvania. Stat. July 7, 1879, chap. 211; Purdon's Digest 1885, 11th ed. Justice of the Peace, §§ 35, 99, 100.
Texas. Rev. Stat. 1879, §§ 1539, 1639; Rev. Stat. 1895, §§ 1568, 1670.
Wisconsin. Rev. Stat. 1878, §§ 3572, 3756; Stat. 1898, §§ 3572, 3760.

METROPOLITAN RAILROAD COMPANY,
Plff. in Err.,
v.
SAMUEL R. CHURCH.

BRIGHTWOOD RAILWAY COMPANY,
Plff. in Err.,
v.
LEWIS I. O'NEAL and James T. H. Landon.

(See S. C. Reporter's ed. 46.)

No. [illegible]8, *Capital Traction Company* v. *Hof, ante*, p. [illegible]73, followed.

[Nos. 114, 195.]

Argued and Submitted January 5, 6, 1899. Decided April 11, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review judgments of that court.

See same case below, 11 App. D. C. 57.

Messrs. **D. W. Baker** and *Nathaniel Wilson* for Metropolitan Railroad Company, plaintiff in error.

Mr. **Ernest L. Schmidt** for Samuel R. Church, defendant in error.

Messrs. **Henry P. Blair** and *Corcoran Thom* for the Brightwood Railway Company, plaintiff in error.

Messrs. **Raymond A. Heiskell** and **M. J. Colbert** for O'Neal *et al.*, defendants in error.

BY THE COURT:

In No. 114, METROPOLITAN RAILWAY COMPANY v. CHURCH, and No. 195, BRIGHTWOOD RAILWAY COMPANY v. O'NEAL, argued at the same time, the judgments of the court of appeals of the District of Columbia, quashing writs of certiorari to set aside proceedings of a justice of the peace under similar circumstances, are likewise *affirmed.*

---

[47] JOE KIRBY, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 47–64.)

Presumption of innocence of accused—act of March 3, 1875, as to evidence, unconstitutional—indictment for receiving stolen property of the United States—need not state from whom property was received.

1. The presumption of the innocence of the accused attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt.
2. The provision of the act of March 3, 1875, that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver, that the property of the United States, alleged to have been embezzled, stolen, or purloined, had been embezzled, stolen, or purloined, is in violation of the clause of the United States Constitution that in criminal prosecutions the accused shall be confronted with the witnesses against him.
3. An indictment for receiving stolen property of the United States sufficiently alleges its ownership of the property when it was feloniously received by the accused, by alleging that the property was that of the United States when stolen, and was stolen two days previously to its being received by him, and that he received it knowing that it had been stolen.
4. An indictment for receiving stolen property need not state from whom the accused received it, or state that the name of such person is unknown to the grand jurors.

[No. 164.]

Argued January 20, 1899. Decided April 11, 1899.

IN ERROR to the District Court of the United States for the District of South Dakota to review a judgment of that court convicting the plaintiff in error, Joe Kirby, for feloniously receiving property stolen from the United States, with intent to convert the same to his own use. *Reversed,* and case remanded with directions for a new trial and for further proceedings.

The facts are stated in the opinion.

Messrs. **A. G. Sandford,** *C. O. Bailey*, and *Joe Kirby, propria persona*, for the plaintiff in error:

The finding of a sufficient indictment by a grand jury is jurisdictional and a right of which the accused, under the Constitution, cannot be deprived.

Ex parte Bain, 121 U. S. 1, 30 L. ed. 849.

The first count in the indictment under which the plaintiff in error was convicted is fatally defective. Every ingredient of which the crime is composed must be actually and clearly alleged.

United States v. *Cook*, 17 Wall. 174, 21 L. ed. 539; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Reg.* v. *Martin*, 9 Car. & P. 215.

The ownership of the property of the United States is a jurisdictional question; and such ownership at the time the crime is charged to have been committed must be distinctly alleged and proved.

Affierbach v. *McGovern*, 79 Cal. 268; *Miller* v. *People*, 13 Colo. 166; *State* v. *Lyon*, 17 Wis. 238; *People* v. *Vice*, 21 Cal. 345; *Higgins* v. *State* (Tex. App.) 19 S. W. 503; *State* v. *Lathrop*, 15 Vt. 279; *Thomas* v. *State*, 96 Ga. 311.

The indictment is also defective in that it fails to allege from whom the plaintiff in error received the stamps which had been stolen.

United States v. *De Bare*, 6 Biss. 358; *State* v. *Ives*, 35 N. C. (13 Ired. L.) 338; *Foster* v. *State*, 106 Ind. 272; 2 Bish. New Cr. Law, § 1140.

The indictment is also fatally defective for duplicity; it contains complete indictments against the principal felons, and what is claimed to be an indictment against the plaintiff in error.

U. S. Rev. Stat. § 1024; *State* v. *Lyon*, 17

Wis. 238; *State* v. *Longley*, 10 Ind. 482; *Elliott* v. *State*, 26 Ala. 80; *State* v. *Daubert*, 42 Mo. 242; *State* v. *Hall*, 97 N. C. 474; *State* v. *Wainwright*, 60 Ark. 280.

The mere fact that a party has, in the absence of the accused, said that he himself is guilty, is not to be received as evidence sufficient to justify the conviction of the accused.

Com. v. *Elisha*, 3 Gray, 460; *State* v. *Newport*, 4 Harr. (Del.) 567; *State* v. *Arnold*, 48 Iowa, 566; *State* v. *Westfall*, 49 Iowa, 328; *Hicks's Case*, 1 N. Y. City Hall Rec. 66; *People* v. *Kraker*, 72 Cal. 459; *Reg.* v. *Robinson*, 4 Fost. & F. 43; *Reg.* v. *Pratt*, 4 Fost. & F. 315.

If the record of the conviction of the principal felons be laid out of the case, there is then no evidence that the property was "stolen property," and the verdict must be set aside.

State v. *Caveness*, 78 N. C. 484.

The possession of stolen stamps by a regular practitioner in the court ought not to be considered as a presumption against him, unless long continued and coupled with some other incriminating circumstances.

Durant v. *People*, 13 Mich. 351; *State* v. *Bulla*, 89 Mo. 595; *State* v. *Caveness*, 78 N. C. 484; *Wilson* v. *State*, 12 Tex. App. 481.

Mr. **James E. Boyd**, Assistant Attorney General, for defendant in error:

Commonly in England and in numbers of our states, the indictment does not aver from whom the stolen goods were received.

3 Chitty, Crim. Law, 991; Arch. Crim. Pl. & Ev. 10th Lon. ed. 269, 19th ed. 472; Arch. New Crim. Proc. 474; *Jupitz* v. *People*, 34 Ill. 516; *Cohen* v. *People*, 5 Park. Crim. Rep. 330; *State* v. *Murphy*, 6 Ala. 845; *Com.* v. *Lakeman*, 5 Gray, 82; *Queen* v. *Goldsmith*, L. R. 2 C. C. 74; *Horan* v. *State*, 24 Tex. 161; *Rex* v. *Jervis*, 6 Car. & P. 156; *Thomas's Case*, 2 East, P. C. 781.

[47] *Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error Kirby was indicted in the district court of the United States for the southern division of the district of South Dakota under the act of Congress of
[48] March 3d, 1875, *entitled "An Act to Punish Certain Larcenies, and the Receivers of Stolen Goods." 18 Stat. at L. 479, chap. 144.

The first section provides that "any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

By the second section it is provided that "if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined." 18 Stat. at L. 479, chap. 144.

The indictment contained three counts, but the defendant was tried only on the first. In that count it was stated that Thomas J. Wallace, Ed. Baxter, and Frank King on the 7th day of June, 1896, at Highmore, within the jurisdiction of the court, feloniously and forcibly broke into a postoffice of the United States, and feloniously stole, took, and carried away *therefrom certain moneys and [49]
property of the United States, to wit: 3,750 postage stamps of the denomination of two cents and of the value of two cents each, 1,266 postage stamps of the denomination of one cent and of the value of one cent each, 140 postage stamps of the denomination of four cents and of the value of four cents each, 250 postage stamps of the denomination of five cents and of the value of five cents each, 80 postage stamps of the denomination of eight cents and of the value of eight cents each, and also United States Treasury notes, national bank notes, silver certificates, gold certificates, silver, nickel, and copper coins of the United States as well as current money of the United States, a more particular description of which the grand jury were unable to ascertain, of the value of $58.19; and that the persons above named were severally indicted and convicted of that offense, and had been duly sentenced upon such conviction.

It was then alleged that the defendant on the 9th day of June, 1896, at the city of Sioux Falls, the postage stamps "so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States."

At the trial of Kirby the government offered in evidence a part of the record of the trial of Wallace, Baxter, and King, from which it appeared that Wallace and Baxter after severally pleading not guilty withdrew their respective pleas and each pleaded

guilty and was sentenced to confinement in the penitentiary at hard labor for the term of four years. It appeared from the same record that King having pleaded not guilty was found guilty and sentenced to the penitentiary at hard labor for the term of five years.

The admission in evidence of the record of the conviction of Wallace, Baxter, and King, was objected to upon the ground that the above act of March 3d, 1875, was unconsti-
[50] tutional so *far as it made that conviction conclusive evidence in the prosecution of the receiver that the property of the United States described in the indictment against him had been embezzled, stolen, or purloined. The objection was overruled, and the record offered was admitted in evidence, with exceptions to the accused.

After referring to the provisions of the act of March 3d, 1875, and to the indictment against Kirby, the court, among other things, said in its charge to the jury: "In order to make out the case of the prosecution, and in order that you should be authorized to return a verdict of guilty in this case, you must find beyond a reasonable doubt from the evidence in the case certain propositions to be true. In the first place it must be found by you beyond a reasonble doubt that the property described in the indictment, and which is also described in the indictment against these three men [Wallace, Baxter, and King] who it is alleged have been convicted, was actually stolen from the postoffice at Highmore, was the property of the United States and of a certain value. Second. You must find beyond a reasonable doubt that the defendant Joseph Kirby received or had in his possession a portion of that property which had been stolen from the postoffice at Highmore. Third. That he received or had it in his possession with intent to convert it to his own use and gain. Now, upon the first proposition—as to whether the property described in the indictment was stolen as alleged in the indictment—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties who it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, the record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a prima facie case on the part of the government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in
[51] coming to a conclusion that the property *described in the indictment was actually stolen, as alleged, from the postoffice at Highmore. But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore postoffice. Upon the further proposition that the court has suggested, after you have found, by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the postoffice at Highmore. Now, in order to find the defendant guilty of the offense charged in the indictment, you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion or all of the property which was stolen from the postoffice at Highmore, and that he received that property from the thief or thieves who committed the theft at the Highmore postoffice or some agent of these thieves. The statute punishes, you will observe, both the receipt of stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession of such property, knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the postoffice at Highmore was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession or received it from the thief or his agent, knowing at the time that it was stolen property. Now, upon the question of whether the defendant knew that it was stolen property, you will, of course consider all the evidence in the case. You have the right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer *that he did know. [52]
Now, if a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen. Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving of stolen property. That was the common law. But this statute has added this further ingredient that it must be done with the intent to convert it to the party's own use and gain. It was probably put in for the reason that the statute goes further than the common law, making it punishable to conceal or aid in concealing with intent to convert it to his own use and gain. Now, all these propositions that I have charged must be made out by the prosecution, of

course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it will be your duty to acquit the defendant."

In response to a request from the jury to be further instructed, the court, after referring to the indictment and to the second section of the act of 1875, said: "This indictment does not contain all the words of the statute. This indictment charges the defendant with having, on the 9th day of June, 1896, received and had in his possession these postage stamps that were stolen from the United States at Highmore. Now, if you should find beyond a reasonable doubt from all the testimony in the case, in the first place, that the postage stamps mentioned in the indictment or any of them were stolen from the postoffice at Highmore by these parties who, it is alleged, did steal them, and you further find beyond a reasonable doubt that these postage stamps or any portion of them were on the 9th day of June, 1896, received by the defendant from the thieves or
[53] their agent, knowing the same to have *been so stolen from the United States by these parties, with the intent to convert the same to his own use or gain, or if you find beyond a reasonable doubt that they were so stolen at the Highmore postoffice, as I have stated, and that the defendant, on or about the 9th day of June had them in his possession or any portion of them, knowing the same to have been so stolen, with the intent to convert the same to his own use and gain, and you will find all these facts beyond a reasonable doubt, you would be authorized to return a verdict of guilty as charged."

The jury returned a verdict of guilty against Kirby. The exceptions taken by him at the trial were sufficient to raise the questions that will presently be considered.

As shown by the above statement the charge against Kirby was that on a named day he feloniously received and had in his possession with intent to convert to his own use and gain certain personal property of the United States, theretofore feloniously stolen, taken, and carried away by Wallace, Baxter, and King, who had been indicted and convicted of the offense alleged to have been committed by them.

Notwithstanding the conviction of Wallace, Baxter, and King, it was incumbent upon the government, in order to sustain its charge against Kirby, to establish beyond reasonable doubt: (1) That the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession, with intent to convert it to his own use or gain; and (3) that he received or retained it with knowledge that it had been stolen from the United States.

How did the government attempt to prove the essential fact that the property was stolen from the United States? In no other way than by the production of a record showing the conviction under a separate indictment of Wallace, Baxter, and King—the judgments against Wallace and Baxter resting wholly upon their respective pleas of guilty, while the judgment against King rested upon a trial and verdict of guilty. With the record of those convictions out of the present case, *there was no evidence [54]
whatever to show that the property alleged to have been received by Kirby was stolen from the United States.

We are of the opinion that the trial court erred in admitting in evidence the record of the convictions of Wallace, Baxter, and King, and then in its charge saying that in the absence of proof to the contrary the fact that the property was stolen from the United States was sufficiently established against Kirby by the mere production of the record showing the conviction of the principal felons. Where the statute makes the conviction of the principal thief a condition precedent to the trial and punishment of a receiver of the stolen property, the record of the trial of the former would be evidence in the prosecution against the receiver to show that the principal felon had been convicted; for a fact of that nature could only be established by a record. The record of the conviction of the principals could not, however, be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offense charged against them. If he had sought to do either of those things—even upon the ground that the conviction of the pricipal felons might be taken as establishing prima facie a vital fact in the separate prosecution against himself as the receiver of the property—the court would have informed him that he was not being tried and could not be permitted in anywise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment *against them alone was [55]
sufficient prima facie to show, as against Kirby, indicted for another offense, the existence of the fact that the property was stolen—a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.

One of the fundamental guaranties of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was con-

fronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. "This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin* v. *United States*, 156 U. S. 432, 459 [39: 481, 493]. But that presumption in *Kirby's Case* was in effect held in the court below to be of no consequence; for as to a vital fact which the government
[56] was bound to establish affirmatively, *he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been *said* in another criminal prosecution with which he was not connected and at which he was not entitled to be represented. In other words, the United States having secured the conviction of Wallace, Baxter, and King as principal felons, the defendant charged by a separate indictment with a different crime—that of receiving the property in question with knowledge that it was so stolen and with intent to convert it to his own use or gain—was held to be presumptively or prima facie guilty so far as the vital fact of the property having been stolen was concerned, as soon as the government produced the record of such conviction and without its making any proof whatever by witnesses confronting the accused of the existence of such vital fact. We cannot assent to this view. We could not do so without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most, if not of all, the states composing the Union.

This precise question has never been before this court, and we are not aware of any adjudged case which is in all respects like the present one. But there are adjudications which proceed upon grounds that point to the conclusion reached by us.

A leading case is *Rex* v. *Turner*, 1 Moody, C. C. 347. In that case the prisoner was indicted for feloniously receiving from one Sarah Rich certain goods and chattels theretofore feloniously stolen by her from one Martha Clarke. At the trial before Mr. Justice Patteson it was proposed to prove a confession of Sarah Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner and others as well as herself. The evidence was not admitted, but the court admitted other evidence of what Sarah Rich said *respecting herself only. The prisoner [57]
was convicted and sentenced. The report of the case proceeds: "Having since learned that a case occurred before Mr. Baron Wood at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver, the learned judge thought it right to submit to the learned judges the question whether he was right in admitting the confession of Sarah Rich in the present case. The learned judge thought it right to add that the prisoner, one Taylor, and Sarah Rich had immediately before been tried upon an indictment for burglary, and stealing other property in the house of Mrs. Clarke on the night of the 22d of August; and that Taylor and Rich had been found guilty, but the prisoner had been acquitted, there being no proof of his presence. The learned judge did not pass sentence upon Sarah Rich immediately; but a new jury was called, and the prisoner was tried as a receiver, so that either party might have called her as a witness. In Easter term, 1832, all the judges (except Lord Lyndburst, C. B., and Taunton, J.) met, and having considered this case, were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means; and the conviction was held wrong." In a later case, *Keable* v. *Payne*, 8 Ad. & El. 555, 560, which was an action involving a question as to the admission of certain evidence, and was heard in the Queen's Bench before Lord Denman, Chief Justice, and Littledale, Patteson, and Williams, Justices, Mr. Justice Patteson, referring to *Rex* v. *Turner*, above cited, said: "On an indictment for receiving goods feloniously taken, the felony must be proved; and neither a judgment against a felon, nor his admission, would be evidence against the receiver. In such a case I *once admitted evidence of a [58]
plea of guilty by the taker; and it was held that I did wrong." A note in Starkie on Evidence, p. 367, is to this effect: "In *Rex* v. *Turner*, 1 Moody, C. C. 347; *Rex* v. *Ratcliffe*, 1 Lewin, C. C. 121; *Keable* v. *Payne*, 8 Ad. & El. 560, it is stated that many of the judges (all the judges except two being assembled) were of opinion that the record of the conviction of the principal would not

be evidence of the fact, where the indictment against the accessory alleged, not the conviction, but the guilt of the principal. And on principle it would seem to be evidence only when the indictment alleges the conviction of the principal, and *simply to support that allegation.*"

The leading American case on the question is *Commonwealth* v. *Elisha*, 3 Gray, 460. The indictment was for receiving stolen goods knowing them to have been stolen. The court, speaking by Metcalf, J., said: "This indictment is against the defendant alone, and charges him with having received property stolen by Joseph Elisha and William Gigger, knowing it to have been stolen. It is not averred, nor was it necessary to aver or prove (Rev. Stat. chap. 126, § 24), that they had been convicted of the theft. But it was necessary to prove their guilt, in order to convict the defendant. Was the record of their conviction on another indictment against them only, upon their several pleas of guilty to a charge of stealing the property, legal evidence, against the defendant, that they did steal it? We think not, either on principle or authority. That conviction was *res inter alios*. The defendant was not a party to the proceedings, and had no opportunity nor right to be heard on the trial. And it is an elementary principle of justice, that one man shall not be affected by another's act or admission, to which he is a stranger. That conviction being also on the confession of the parties, the adjudged cases show that it is not evidence against the defendant. *Rex* v. *Turner*, 1 Moody, C. C. 347, and 1 Lewin, C. C. 119; 1 Greenl. Ev. § 233; Rosc. Crim. Ev. 2d ed. 50; *The State* v. *Newport*, 4 Harr. (Del.) 567. We express no opinion concerning a case differing in any particular from this, but confine ourselves to
[59] the exact *question presented by these exceptions. Our decision is this, and no more: The record of the conviction of a thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of the receiver of that property, upon an indictment against him alone, which does not aver that the thief has been convicted."

To the same general effect are some of the text-writers. Phillips, in his Treatise on the Law of Evidence, referring to the rule as to the admissibility and effect of verdicts or judgments in prosecutions, says: "A record of conviction of a principal in felony has been admitted in some cases, not of modern date, as evidence against the accessory. *King* v. *Smith*, 1 Leach, C. C. 288; *Rex* v. *Baldwin*, 3 Campb. 265. This has been supported on the ground of convenience, because the witnesses against the principal might be dead or not to be found, and on the presumption that the proceedings must be taken to be regular, and the guilt of the convicted party to be established. Fost. Disc. iii. chap. 2, § 2, p. 364. But this is not strictly in accordance with the principle respecting the admissibility of verdicts as evidence against third persons. From the report of the recent case of *Rex* v. *Turner*, it seems that a record of conviction of a principal in the crime of stealing, who pleads guilty, would not now be received as evidence of the guilt of the principal against the receivers of the stolen property, or the accessory after the fact; and it is said to be doubtful whether a record of the conviction of the principal on his plea of not guilty would be admissible against the accessory. As proof of *the fact of conviction*, the record would be admissible and conclusive, but it seems not to be admissible evidence of the *guilt* of the convict, as against another person charged with being connected with him in crime, the record being in this respect *res inter alios acta*. It is evidence that a certain person, named in the record, was convicted by the jury, but not evidence as against a third person, supposed to have been engaged with him in a particular transaction, as to the *ground* on which the conviction proceeded, namely, that the convict committed the criminal act described in the record." 2 Phillips, Ev. 3d ed. pp. 22–3.
*Taylor in his Treatise on Evidence, after [60]
stating that a prisoner is not liable to be affected by the confessions of his accomplices, says: "So strictly is this rule enforced, that where a person is indicted for receiving stolen goods a confession by the principal that he was guilty of the theft is no evidence of that fact as against the receiver (*Rex* v. *Turner*); and it would be the same, it seems, if both parties were indicted together, and the principal were to plead guilty. (Id.)" 1 Taylor, Ev. 6th ed. § 826.

The principle to be deduced from these authorities is in harmony with the view that one accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not within the meaning of the Constitution, confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel. As heretofore stated, the crime charged against Wallace, Baxter, and King and the crime charged against Kirby were wholly distinct—none the less so because in each case it was essential that the government should prove that the property described was actually stolen. The record of the proof of a vital fact in one prosecution could not be taken as proof in the other to the existence of the same fact. The difficulty was not met when the trial court failed as required by the act of 1875 to instruct the jury that the record of the conviction of the principal felons was conclusive evidence of the fact that the property had been actually stolen, but merely said that such record made a prima facie case as to such fact. The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felons as competent proof for any purpose. That those persons had been convicted was a fact not necessary to be established in the case against the alleged receiver; for under the statute he could be prosecuted even if the principal felons had not been tried or indicted. As already stated,

[61] the effect of the charge was *to enable the government to put the accused, although shielded by the presumption of innocence, upon the defensive as to a vital fact involved in the charge against him by simply producing the record of the conviction of other parties of a wholly different offense with which the accused had no connection.

It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath,—"the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth." *Mattox* v. *United States*, 146 U. S. 140, 151 [36: 917-921]; Cooley, Const. Lim. 318; 1 Phillips, Ev. chap. 7, § 6.

For the reasons stated it must be held that so much of the above act of March 3, 1875, as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen, or purloined had been embezzled, stolen, or purloined, is in violation of the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Upon this ground the judgment must be reversed and a new trial had in accordance with law. But as the case must go back to the circuit court for another trial, it is proper to notice other questions presented by the assignments of error.

The accused contends that the indictment is defective in that it does not allege ownership by the United States of the stolen articles of property at the time they were alleged to have been feloniously received by him. This contention is without merit. The
[62] indictment alleges that the articles *described were the property of the United States when they were feloniously stolen on the 7th day of June, 1896, and that the defendant only two days thereafter, on the 9th day of June, 1896, "the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use or gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away." The stamps alleged to have been feloniously received by the accused on the 9th day of June are thus alleged to have been the same that were stolen from the United States two days previously. The larceny did not change the ownership, and it must be taken that the United States had not regained possession of the stamps before they were received by Kirby, and that the indictment charges that they were out of the possession of the United States and were stolen property when they came to the hands of the accused.

Another contention by the accused is that the indictment was fatally defective in not stating from whom the defendant received the stamps. This contention is apparently supported by some adjudications, as in *State* v. *Ives*, 35 N. C. (13 Ired. L.) 338. But upon a careful reading of the opinion in that case it will be found that the judgment rests upon the ground that the statute of North Carolina, taken from an old English statute, made the receiver of stolen goods strictly an accessory and contemplated the case of goods being received from the person who stole them. As already stated the act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony, for which he can be tried either before or after the conviction of the principal felon, or whether the latter is tried or not. Under such a statute the person who stole the property might be pardoned, and yet the receiver could be indicted and convicted of the crime committed by him. Bishop in his New Criminal Procedure says that while some American cases have held it to be *necessary in an indictment against the re- [63]
ceiver of stolen goods to state from whom he received the goods, "commonly, in England and in numbers of our states, the indictment does not aver from whom the stolen goods were received." Vol. 2, § 983. By an English statute, 7 & 8 Geo. IV., chap. 29, § 54, it was enacted that "if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice," etc. Under that statute a receiver of stolen goods was indicted. It was objected that one of the counts did not state the name of the principal, or that he was unknown. Tindall, Ch. J., said: "It will do. The offense created by the act of Parliament is not receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question therefore will be, whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offense." *Rex* v. *Jervis*, 6 Car. & P. 156; 2 Russell, Crimes, 6th ed. 436. In *State* v. *Hazard*, 2 R. I. 474 [60 Am. Dec. 96], an indictment charging the accused with fraudulently receiving stolen goods, knowing them

to have been stolen, was held to be good, although it did not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown to the grand jurors. We therefore think that the objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken. If the stamps were in fact stolen from the United
[64] States, and if they were received by the *accused, no matter from whom, with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged even if it were not shown by the evidence from whom he received the stamps. This rule cannot work injustice nor deprive the accused of any substantial right. If it appears at the trial to be essential in the preparation of his defense that he should know the name of the person from whom the government expected to prove that he received the stolen property, it would be in the power of the court to require the prosecution to give a bill of particulars. *Coffin* v. *United States*, 156 U. S. 432, 452 [39: 481, 491]; *Rosen* v. *United States*, 161 U. S. 29, 35 [40: 606, 608]; *Commonwealth* v. *Giles*, 1 Gray, 466; Rosc. Crim. Ev. 6th ed. 178, 179, 420.

The judgment is reversed, and the case is remanded with directions for a new trial and for further proceedings consistent with law. *Reversed.*

Mr. Justice **Brewer** did not participate in the decision of this case.

Mr. Justice **Brown** and Mr. Justice **McKenna** dissented.

THOMAS COSGROVE, *Appt.*,
v.
EUGENE D. WINNEY, United States Marshal for the Eastern District of Michigan.

(See S. C. Reporter's ed. 64-69.)

Right of extradited person not to be arrested for another offense until his return to his own country.

The right of a person extradited under the treaty of 1890 with Great Britain, to have a reasonable time to return to his own country after his discharge from custody or imprisonment on account of the offense for which he is extradited, before he can be arrested for any other offense committed prior to his extradition, is not lost or waived by going to his own country and voluntarily returning while at liberty on bail before his final discharge in the case for which he is extradited.

[No. 172.]

Submitted January 19, 1899. Decided April 24, 1899.

APPEAL from an order of the District Court of the United States for the Eastern District of Michigan, denying an application for a writ of habeas corpus to relieve Thomas Cosgrove from the custody of the marshal of the United States upon arrest upon an indictment for obstructing the marshal in the execution of a writ of attachment and remanding him to the custody of the marshal. Cosgrove had been arrested after having been extradited from Canada to the United States on a criminal charge, and while he was out upon bail before the trial of such offense. *Order reversed,* and cause remanded with directions to discharge said Cosgrove.

Statement by Mr. Chief Justice **Fuller:**

*November 7, 1895, Winney, United States [65]
Marshal for the eastern district of Michigan, made a complaint before one of the police justices of the city of Detroit within that district against Thomas Cosgrove for the larceny of a boat, named the Aurora, her tackle, etc., whereon a warrant issued for his arrest. Cosgrove was a resident of Sarnia, in the Province of Ontario, Dominion of Canada, and extradition proceedings were had in accordance with the treaty between the United States and Great Britain, which resulted in a requisition on the Canadian government, which was duly honored, and a surrendering warrant issued May 19, 1896, on which Cosgrove was brought to Detroit to respond to the charge aforesaid; was examined in the police court of Detroit; was bound over to the July term, 1896, of the recorder's court of that city; and was by that court held for trial, and furnished bail. He thereupon went to Canada, but came back to Detroit in December, 1896.

December 3, 1895, a capias issued out of the district court of the United States for the eastern district of Michigan, on an indictment against Cosgrove, on the charge of obstructing the United States marshal in the execution of a writ of attachment, which was not served until December 10, 1896, some months after Cosgrove had been admitted to bail in the recorder's court.

Cosgrove having been taken into custody by the marshal applied to the district court for a writ of habeas corpus which was issued, the marshal made return, and the cause was duly argued.

The court entered a final order denying the application and remanding the petitioner. From this order an appeal was taken to the circuit court of appeals and there dismissed,
*whereupon an appeal to this court was al- [66]
lowed, and Cosgrove discharged on his own recognizance.

The district judge stated in his opinion that it appeared "that the property, for the taking of which he [Cosgrove], is charged with larceny, was the vessel which, under the indictment in this court, he was charged with having unlawfully taken from the custody of the United States marshal, while the same was held under a writ of attachment issued from the district court in admiralty."

And further: "The only question which arises under this treaty therefore is whether upon the facts stated in the return which was not traversed, the petitioner has had the opportunity secured him by that treaty to

return to his own country. If he has had such opportunity, then article 3 has not been violated, either in its letter or spirit, by the arrest and detention of the petitioner. It is conceded that he was delivered to the authorities of the state of Michigan in May, 1896, to stand his trial upon the charge of larceny. He gave bail to appear for trial in the recorder's court when required and immediately returned to Canada. On December 10th, 1896, he voluntarily appeared in the state of Michigan, of his own motion, and not upon the order of the recorder's court, or at the instance of his bail, and while in this district was arrested."

Messrs. **E. H. Sellers** and *Cassius Hollenbeck* for appellant:

The treaty of 1889 expressly limits the surrender to one offense and the trial of the accused on that offense, and no other, until he shall have had an opportunity of returning to the country of his asylum on regaining his liberty.

United States v. *Rauscher*, 119 U. S. 407, 30 L. ed. 425; *Com.* v. *Hawes*, 13 Bush. 697, 26 Am. Rep. 242; *State* v. *Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431; *Blandford* v. *State*, 10 Tex. App. 627; *United States* v. *Watts*, 14 Fed. Rep. 130; *Ex parte Hibbs*, 26 Fed. Rep. 431; *Ex parte Coy*, 32 Fed. Rep. 917; *Re Reinitz*, 39 Fed. Rep. 204, 4 L. R. A. 236; *People, Young*, v. *Stout*, 81 Hun, 336; *Re Rowe*, 40 U. S. App. 516, 77 Fed. Rep. 165, 23 C. C. A. 103.

The trial of appellant for another offense was in violation of the faith and honor of the government, as well as of an express law of Congress.

People v. *Cross*, 135 N. Y. 540; *Re Cooper*, 143 U. S. 501, 36 L. ed. 242; *Re Cannon*, 47 Mich. 486; *State* v. *Hall*, 40 Kan. 345; *Re Robinson*, 29 Neb. 137, 8 L. R. A. 398; *Ex parte McKnight*, 48 Ohio St. 588, 14 L. R. A. 128.

Mr. **John K. Richards,** Solicitor General, for appellee:

A fugitive from justice acquires from that fact alone no right of asylum in a foreign country, which exempts him from trial here if he falls within the clutches of the law.

Ex parte Brown, 28 Fed. Rep. 653; *Ker* v. *Illinois*, 119 U. S. 436, 30 L. ed. 421; *Mahon* v. *Justice*, 127 U. S. 700, 32 L. ed. 283; *Lascelles* v. *Georgia*, 148 U. S. 537, 37 L. ed. 549; *Cook* v. *Hart*, 146 U. S. 183, 36 L. ed. 934.

[66] *Mr. Chief Justice **Fuller,** delivered the opinion of the court:

Article three of the Extradition Convention between the United States and Great Britain, promulgated March 25, 1890 (26 Stat. at L. 1508), and section 5275 of the Revised Statutes, are as follows:

"Art. III. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other [67] *than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

"Sec. 5275. Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land and naval forces of the United States, or of the militia thereof, as may be necessary for the safekeeping and protection of the accused."

Cosgrove was extradited under the treaty, and entitled to all the immunities accorded to a person so situated; and it is admitted that the offense for which he was indicted in the district court was committed prior to his extradition, and was not extraditable. But it is insisted that although he could not be extradited for one offense and tried for another, without being afforded the opportunity to return to Canada, yet as, after he had given bail, he did so return, his subsequent presence in the United States was voluntary and not enforced, and therefore he had lost the protection of the treaty and rendered himself subject to arrest on the capias and to trial in the district court for an offense other than that on which he was surrendered; and this although the prosecution in the state court was still pending and undetermined, and Cosgrove had not been released or discharged therefrom.

Conceding that if Cosgrove had remained in the state of Michigan and within reach of his bail, he would have been exempt, the argument is that, as he did not continuously so remain, and, during his absence in Canada, his sureties could not have followed him there and compelled his return, if his appearance happened to be required according to the exigency *of the bond, which the facts [68] stated show that it was not, it follows that when he actually did come back to Michigan he had lost his exemption.

But we cannot concur in this view. The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited, and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the state prosecution in any way. *United States* v. *Rauscher*, 119 U. S. 407, 433 [30: 425, 434].

The mere fact that he went to Canada did not in itself put an end to the prosecution or to the custody in which he was held by his bail, or even authorize the bail to be forfeited, and when he re-entered Michigan he was as much subject to the compulsion of his sureties as if he had not been absent.

In *Taylor* v. *Taintor*, 16 Wall. 366, 371

[21: 287, 290], Mr. Justice Swayne, speaking for the court, said: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In [*Anonymous*] 6 Mod. 231 it is said: 'The bail have their principal always up on a string, and may pull the string whenever they please, and render him in their own discharge.' The rights of the bail in civil and criminal cases are the same. They may doubtless permit him to go beyond the limits of the state within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee."

We think the conclusion cannot be maintained on this record that, because of Cosgrove's temporary absence, he had waived or lost an exemption which protected him while he was subject to the state authorities to answer for the offense for which he had been extradited.

The case is a peculiar one. The marshal initiated the prosecution in the state courts, and some weeks thereafter the indictment was found in the district court for the same act on which the charge in the state courts was based. The offenses, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he could be arrested on process from the district court before the prior proceeding had terminated and he had had opportunity to return to the country from which he had been taken. Or, rather, whether the fact of his going to Canada pending the state proceedings deprived him of the immunity he possessed by reason of his extradition so that he could not claim it though the jurisdiction of the state courts had not been exhausted; he had come back to Michigan; and he had had no opportunity to return to Canada after final discharge from the state prosecution.

[69] *We are of opinion that, under the circumstances, Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained.

Final order reversed and cause remanded with a direction to discharge petitioner.

AMERICAN REFRIGERATOR TRANSIT COMPANY, *Plff. in Err.*, [70]
v.
FRANK HALL, Treasurer of Arapahoe County, Colorado.

(See S. C. Reporter's ed. 70-82.)

Tax on railroad cars.

The state may tax the average number of refrigerator cars used by railroads within the state, but owned by a foreign corporation which has no office or place of business within the state, and employed as vehicles of transportation in the interchange of interstate commerce.

[No. 226.]

Argued and Submitted March 16, 17, 1899. Decided April 24, 1899.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment of that court reversing the judgment of the District Court of Arapahoe County in that State and dismissing a suit in equity brought by the American Refrigerator Transit Company, plaintiff, against Frank Hall, Treasurer of said County to restrain defendant from enforcing payment by plaintiff of certain taxes assessed upon refrigerator cars owned by it and used for transportation over various lines of railroad. *Judgment of Supreme Court affirmed.*

See same case below, 24 Colo. 291.

Statement by Mr. Justice **Shiras:**

In March, 1896, the American Refrigerator Transit Company, a corporation organized under the laws of the state of Illinois, filed, in the district court of Arapahoe county, state of Colorado, against Frank Hall, treasurer of said county, a bill of complaint seeking to restrain the defendant from enforcing payment by the said transit company of certain taxes assessed upon refrigerator cars owned by the company, and used for the transportation of perishable freight over various lines of railroad throughout the United States. The bill alleged that the business in which said cars were engaged was exclusively interstate commerce business; that the company has and has had no office or place of business within the state of Colorado, and that all the freight transported in plaintiff's cars was transported either from a point or points in a state outside of the state of Colorado to a point within that state, or from a point in the state of Colorado to a point without said state, or between points wholly outside of said state; that said cars had no taxable situs within said state; that said assessment of taxes upon said cars was without authority of *law and void and that complainant had no plain or adequate remedy at law. [71]

A demurrer to the complaint was overruled and answer was filed denying some and admitting other allegations of the bill.

At the trial the parties agreed to and filed the following stipulation:

"1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the state of Illinois, with its principal office in the city of East St. Louis, in said state; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff received a mileage of three fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not, and never has had, any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the state of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the state of Colorado, and that all the freight transported in plaintiff's cars in or through the state of Colorado, including the cars assessed, was transported in such cars either from a point
[72] or points in a state of the United *States outside of the state of Colorado to a point in the state of Colorado, or from a point in the state of Colorado to a point outside of said state, or between points wholly outside of said state of Colorado, and said cars never were run in said state in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the state of Colorado, except as engaged in such business aforesaid, and then only transiently present in said state for such purposes.

"That, owing to the varying and irregular demand for such cars, the various railroad companies within the state of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

"That it is necessary for the railroad companies operating within the state of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

"2d. That the average number of cars of the plaintiff used in the course of the business aforesaid within the state of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such state of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said state for the purposes of taxation.

"3d. That said company is not doing business in this state, except as shown in this stipulation and by the facts admitted in the pleadings.

"4th. That in case it be found by the court under the undisputed facts set forth in the pleadings and the facts herein stipulated that the authorities of the state of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the *plaintiff for the relief prayed; otherwise [73]
judgment shall be entered for the defendants.

"The following constitutional and statutory provisions are referred to in the opinion:

"'All corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal, and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax.' (§ 10, art. 10, State Const.)

"'Sec. 3765. (M. A. S.) All property, both real and personal, within the state, not expressly exempt by law, shall be subject to taxation. . . .'

"'Sec. 3804. . . . It shall be the duty of said board (the board of equalization) to assess all the property in this state owned, used, or controlled by railway companies, telegraph, telephone, and sleeping or palace car companies.

"'Sec. 3805. The president, vice president, general superintendent, auditor, tax agent, or some other officer of such railway, sleeping, or other palace car, or telegraph or telephone company, or corporation, owning, operating, controlling, or having in its possession in this state any property, shall furnish said board on or before the fifteenth day of March, in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the thirty-first day of December preceding.'

"5th. A full list of rolling stock belonging to or operated by such railway company, setting forth the number, class, and value of all locomotives, passenger cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars, and all other kinds of cars owned or used by said company. The statement shall show the actual proportion of the rolling stock in use on the company's

road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the state during the year for which the statement is made. The said statement shall also show the actual proportion of rolling stock of said company used upon leased lines and lines
[74] operated with others within the *state, the mileage so leased and operated, and the location thereof. . . .

"7th. . . . Whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation by which it is owned or to which it belongs. But every such corporation shall, in the statement to said board, set forth what property belonging to or owned by any other corporation is used or controlled by the corporation making the statement."

The cause having come on to be heard, judgment was entered on behalf of the plaintiff, awarding a perpetual injunction as prayed for in the bill of complaint. Thereupon an appeal was taken to the supreme court of the state, from whose decision, reversing the judgment of the trial court and directing the dismissal of the bill, an appeal was taken to this court.

Messrs. **Judson Harmon** and *Percy Werner*, for plaintiff in error:

The cars of the plaintiff in error, under the agreed facts, acquired no *situs* in Colorado for the purpose of taxation.

Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Pullman Southern Car Co.* v. *Nolan*, 22 Fed. Rep. 276; *Central R. Co.* v. *State Bd. of Assessors*, 49 N. J. L. 11; *Bain* v. *Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 299, 3 Inters. Com. Rep. 149; *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94; *Morgan* v. *Parham*, 16 Wall. 471, 21 L. ed. 303; *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715; *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745; *Robinson* v. *Longley*, 18 Nev. 71; *State* v. *State Board* (unreported) (Mo.) Dec. 1898.

A state cannot tax the vehicles employed exclusively in the business of interstate commerce, where such vehicles have no *situs* within the state.

Pullman's Palace Car Co. v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Philadelphia & S. S. Co.* v. *Pennsylvania*, 122 U. S. 346, 30 L. ed. 1205, 1 Inters. Com. Rep. 308; *Corfield* v. *Coryell*, 4 Wash. C. C. 379; *Erie R. Co.* v. *State*, 31 N. J. L. 531, 86 Am. Dec. 226; *Brown* v. *Maryland*, 12 Wheat. 449, 6 L. ed. 689; *Passenger Cases*, 7 How. 458, 12 L. ed. 775; *State Tax on Railway Gross Receipts*, 15 Wall. 292, 21 L. ed. 167; *Fargo* v. *Michigan*, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51.

Mr. **Alexander B. McKinley**, for defendant in error:

The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce.

Adams Exp. Co. v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 166 U. S. 185, 41 L. ed. 965; *Adams Exp. Co.* v. *Indiana*, 165 U. S. 255, 41 L. ed. 707; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 171, 41 L. ed. 960; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595.

The fact that cars and other vehicles are employed in interstate commerce does not in the least abridge the right of a state to tax them.

The right of a state to tax all subjects within its jurisdiction is unquestionable, and this right may, in the discretion of the legislature, be exercised over all the property coming temporarily within its territory.

Union P. R. Co. v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Lane County* v. *Oregon*, 7 Wall. 71, 19 L. ed. 101.

The courts of the United States adopt and follow the decisions of the highest court of a state in questions which concern merely the Constitution or laws of that state.

Bucher v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165; *Merchants' & Mfrs. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 237.

*Mr. Justice **Shiras** delivered the opinion [74]
of the court:

In this record we again meet the problem, so often presented, how to reconcile the rightful power of a state to tax property within its borders with its duty to obey those provisions of the Federal Constitution which forbid the taking of property without due process of law, and the imposition of burdens upon interstate commerce.

The frequency with which the question has arisen is evidence both of its importance and of its difficulty. The vast increase of commerce throughout the country, and the consequent necessary increase of the means whereby such commerce is carried on, have been the occasion of many of the cases in which this court has been called upon to consider the *subject. The expense involved in [75]
the manufacture of some of the common articles in daily use and in their transportation is so great as to be beyond the means of individuals, and has rendered necessary the aggregation of capital in the form of corporations. Usually such corporations, though organized under the law of one state, make their profits by doing their business in several or all of the states, and, while so doing receive the protection of their laws. When the taxpayers of one state perceive that they are subjected to competition by the importation of articles made in another, or that they are contributing continually to the prosperity of foreign corporations, what more natural than that they should demand that some share of the public burdens should be put upon such corporations? The difficult

task of the lawmaker is to meet that natural and proper demand without infringing upon the freedom of interstate commerce, or depriving those engaged therein of the equal protection of the laws.

In the case before us we do not need to go far in search of the principles which determine it. We think they may be found in the cases of *Western Union Teleg. Co.* v. *Atty. Gen. of Massachusetts*, 125 U. S. 530 [31: 790]; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]; and *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194 [41: 683].

In the first of those cases was involved the question of the validity of a law of Massachusetts, which imposed on the Western Union Telegraph Company, a corporation of the state of New York, a tax on account of the property owned and used by it within the state of Massachusetts, the value of which was to be ascertained by comparing the length of its lines in that state with the length of its entire lines. This court held that such a tax is essentially an excise tax, and not forbidden by the commerce clause of the Constitution.

In *Pullman's Palace Car Co.* v. *Pennsylvania* the nature of the case and the conclusion were thus stated by Mr. Justice Gray:

"The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of
[76] their being so*employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicil, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.

"The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran its cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

Adams Express Co. v. *Ohio State Auditor* was a case wherein was drawn in question the validity of a law of the state of Ohio imposing an assessment upon an express company whose business was carried on through several states. The statute required a board of assessors "to proceed to ascertain and assess the value*of the property of express, tel- [77]
egraph, and telephone companies in Ohio, and in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

It was contended, on behalf of the express company, that the law in question was invalid because it sought to impose taxes on property beyond the territorial jurisdiction of Ohio; because the assessments therein provided for were an invasion of the constitutional guaranty of the equal protection of the laws, and because the assessments imposed a burden upon interstate commerce. But this court held otherwise. Portions of the opinion of Mr. Chief Justice Fuller may be appropriately quoted:

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government.

"As to railroad, telegraph, and sleeping-car companies, engaged in interstate commerce, it has been often held by this court that their property, in the several states through with *their lines or business ex- [78]
tended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a

proportion of the whole fairly and properly ascertained might be taxed by the particular state without violating any Federal restriction.

"The valuation was thus not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; or the cars of the sleeping-car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on—a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (*Pittsburgh, C. C. & St. L. Railway Co.* v. *Backus*, 154 U. S. 421 [38: 1031)], or taking in the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (*Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]), or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state. *Western Union Teleg. Co.* v. *Taggart*, 163 U. S. 1 [41: 49].

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate
[79] cars did not bear a direct relation to *the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated."

On a petition for a rehearing, the questions were again fully argued, and the conclusions reached on the first hearing were reaffirmed. *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 186 [41: 185]. From the opinion denying the rehearing, delivered by Mr. Justice Brewer, a few extracts may be quoted as applicable to the case in hand:

"Where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000, and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise, or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant or corporate power by the state which incorporated it or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises,*and [80]
privileges into a single unit of property, and this state contributes to that aggregate value, not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continue to own all its tangible property within each of those states, but unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle. . . . In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no finespun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

The Constitution of the state of Colorado provides that all corporations in the state or doing business therein shall be subject to taxation on the real and personal property owned or used by them within the territorial limits of the authority levying the tax, and its statutes provide for a board of equalization, whose duty it shall be to assess all the property in the state owned, used, or controlled by railway companies, telegraph, telephone, and sleeping or palace car companies; and that whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the

same, or to the corporation to which it belongs.

The American Refrigerator Transit Company is a corporation of the state of Illinois, engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States, and receives
[81] as compensation for the use of its cars a*mileage of three fourths of a cent per mile from each railroad company over whose lines said cars are run.

The receiver of the Union Pacific, Denver, & Gulf Company reported to the board of equalization that he had on the line of the railroad which he was operating within the state of Colorado forty-two refrigerator cars belonging to the American Refrigerator Transit Company on December 31, 1894. The board thereupon assessed to the Transit Company said forty-two cars, at a valuation of two hundred and fifty dollars each, and distributed said assessment to the different counties through which the line of said railroad extended.

It was stipulated in the trial court "that it is necessary for the railroad companies operating within the state of Colorado, and which are required to carry over their lines perishable freight, to have such character of cars wherein they can safely transport such freight; and that, owing to the varying and irregular demands for such cars, the various railroad companies within the state of Colorado have not deemed it profitable to build or own cars of such character, and therefore rely upon securing such cars when needed from the Transit Company, or corporations doing a like business."

It was further stipulated "that the average number of cars of the plaintiff used in the course of the business aforesaid within the state of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceeds the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such state, then the amount for which such cars, the property of the plaintiff, is assessed by said state board of equalization is just and reasonable, and not in excess of the value placed upon other like property within said state for the purposes of taxation.

Applying the reasoning and conclusions of the cases hereinbefore cited to those admitted facts, we have no difficulty in affirming the judgment of the supreme court of Colorado sustaining the validity of the taxation in question.

The state statutes impose no burdens on the business of the plaintiff in error, but con-
[82] template only the assessment and *levy of taxes upon the property situated within the state; and the only question is whether it was competent to ascertain the number of the cars to be subjected to taxation by inquiring into the average number used within the state limits during the period for which the assessment was made.

It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. *Marye* v. *Baltimore & O. R. R. Co.* 127 U. S. 123 [32: 96]; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595].

The judgment of the Supreme Court of the State of Colorado is accordingly affirmed.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

OLIVER WENDELL HOLMES, Jr., *Appt.,*
v.
GEORGE D. HURST.

(See S. C. Reporter's ed. 82-90.)

Serial publication in monthly magazine vitiates subsequent copyright of whole book.

The serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same, within the meaning of the act of Congress of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

[No. 124.]

Argued and Submitted January 16,17, 1899. Ordered for Reargument January 23, 1899. Reargued March 3, 1899. Decided April 24, 1899.

ON APPEAL from a decree of the United States Circuit Court of Appeals for the Second Circuit affirming the decree of the Circuit Court of the United States for the Eastern District of New York dismissing a suit in equity brought by Oliver Wendell Holmes, Jr., as executor of the will of the late Oliver Wendell Holmes, to obtain an injunction against the infringement of the copyright of a book written by plaintiff's testator, entitled "The Autocrat of the Breakfast Table." *Affirmed.*

See same case below, 76 Fed. Rep. 757, and 51 U. S. App. 271.

Statement by Mr. Justice **Brown:**

*This was a bill in equity by the executor [83]
of the will of the late Dr. Oliver Wendell

Holmes, praying for an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table."

The case was tried upon an agreed statement of facts, the material portions of which are as follows:

Dr. Holmes, the testator, was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson, & Company, of Boston, in twelve successive numbers of the Atlantic Monthly, a periodical magazine published by them, and having a large circulation. Each of these twelve numbers was a bound volume of 128 pages, consisting of a part of "The Autocrat of the Breakfast Table," and of other literary compositions. These twelve parts were published under an agreement between Dr. Holmes and the firm of Phillips, Sampson, & Company, whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured, either by the author or by the firm or by any other person, in any of the twelve numbers so published in the Atlantic Monthly; but on November 2, 1858, after the publication of the last of the twelve numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the district court of the district of Massachusetts, wherein the author resided, which copy the clerk recorded. The book was published by Phillips, Sampson, & Company in a separate volume on November 22, 1858, and upon the same day a copy of the same was delivered to the clerk of the district court. The usual notice, namely, "Entered according to act of Congress, 1858, by Oliver Wendell Holmes, in the Clerk's Office of the District Court of the District of Massachusetts," was printed in every copy of every edition of the work subsequently published, with a slight variation in the edition published in June, 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time; sent a printed copy of the title to the Librarian of Congress, who recorded the same in a book kept for that
[84] purpose,*and also caused a copy of this record to be published in the Boston Weekly Advertiser; and in the several copies of every edition subsequently published was the following notice: "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the twelve numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold or disposed of a notice appeared that the same was taken from the said twelve numbers of the Atlantic Monthly.

The case was heard upon the pleadings and this agreed statement of facts, by the circuit court for the eastern district of New York, and the bill dismissed. (76 Fed. Rep. 757.) From this decree an appeal was taken to the circuit court of appeals for the second circuit, by which the decree of the circuit court was affirmed. (51 U. S. App. 271.) Whereupon plaintiff took an appeal to this court.

Mr. **Rowland Cox** for appellant, on both arguments.

Mr. **Andrew Gilhooly** for appellee, on both arguments.

*Mr. Justice **Brown** delivered the opinion [84]
of the court:

This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken toward securing a copyright, is such a publication of the same within the meaning of the act of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill-defined that from an early period legislation was adopted to regulate and limit
such right. The earliest recognition of*this [85]
common-law right is to be found in the charter of the Stationers' Company, and certain decrees of the Star Chamber promulgated in 1556, 1585, 1623, and 1637, providing for licensing and regulating the manner of printing, and the number of presses throughout the Kingdom, and prohibiting the publication of unlicensed books. Indeed, the Star Chamber seems to have exercised the power of search, confiscation, and imprisonment without interruption from Parliament, up to its abolition in 1641. From this time the law seems to have been in an unsettled state —although Parliament made some efforts to restrain the licentiousness of the press—until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from fourteen to twenty-eight years. Notwithstanding this act, however, the chancery court continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed as late as 1769 by the court of King's bench in the very carefully considered case of *Millar* v. *Taylor*, 4 Burr. 2303, in which the right of the author of "Thomson's Seasons" to a monopoly of this work was asserted and sustained. But a few years thereafter the House of Lords, upon an equal division of the judges, declared that the common-law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. *Donaldson* v. *Becket*, 4 Burr. 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by Congress in 1790, and the construction put upon the latter in *Donaldson* v. *Becket* was followed by this court in *Wheaton* v. *Peters*, 8 Pet. 591 [8: 1055]. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be con-

sidered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute.

[86] *The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas. Or, as Lord Mansfield describes it, "an incorporeal right to print a set of intellectual ideas, or modes of thinking, communicated in a set of words and sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever." 4 Burr. 2396. The nature of this property is perhaps best defined by Mr. Justice Erle in *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 867: "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined; nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

The right of an author to control the publication of his works, at the time the title to the "Autocrat" was deposited, was governed by the act of February 3, 1831 (4 Stat. at L. 436, chap. 16), wherein it is enacted:

"Sec. 1. That from and after the passing of this act, any person or persons, being a citizen or citizens of the United States, or resident therein, who shall be the author or authors of a book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, . . . shall have the sole right and liberty of printing, reprinting, publishing, and vending such book or books, . . . in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed."

"Sec. 4. That no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book or books . . . in the clerk's office of the district court of the

[87] district wherein the author *or proprietor shall reside, etc. And the author and proprietor of any such book . . . shall, within three months from the publication of said book, . . . deliver or cause to be delivered a copy of the same to the clerk of said district."

The substance of these enactments is that, by section one, the author is only entitled to a copyright of books not printed and published; and by section four, that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is, that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the twelve parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the twelve parts printed as they were printed in the Atlantic Monthly, and that while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the twelve parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title "The Autocrat of the Breakfast Table;" (2) deposit a copy of the book "The Autocrat of the Breakfast Table;" and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manuscript until the book was completed and then taking the copyright, this copyright is valid. His position briefly is that no one of the twelve copyrights, if each chapter were copyrighted, nor*all of them combined, could be held to be [88]
a copyright, in the sense of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section four could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel

for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively; but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions or "the order of his words," but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts—a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the mo-
[89] nopoly of the *author thus abandoned, we do not see how it could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright act covers the process of aggregation as well as that of intellectual production. The contrary is the fact.

If the patent law furnishes any analogy in this particular—and we see no reason why it may not—then there is nothing better settled than that a mere aggregation of familiar elements, producing no new result, is not a patentable combination. (*Hailes* v. *Van Wormer*, 20 Wall. 353 [22: 241]; *Reckendorfer* v. *Faber*, 92 U. S. 347 [23: 719]; *Pickering* v. *McCullough*, 104 U. S. 310 [26: 749]; *Richards* v. *Chase Elevator Co.* 158 U. S. 299 [39: 991].) But if there were anything more than mechanical skill involved in the collocation of the several parts of this work, it would be the exercise of inventive genius and the subject of a patent rather than a copyright. If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an invention which he deliberately abandons to the public—and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes, and the word "book" as used in the statute is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or *en bloc*.

If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for, and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be "before publica-
[90] tion;" *and if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. *Henderson* v. *Maxwell*, L. R. 4 Ch. Div. 163; *Bradbury* v. *Sharp*, W. N. (1891) 143.

We have not overlooked the inconvenience which our conclusions will cause if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or instalment as it may appear in a periodical; nor the danger and annoyance it may occasion to the librarian of Congress with whom copyrighted articles are deposited, if he is compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly (since those numbers were never copyrighted), even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below must therefore be *affirmed.*

ROBERT M. WHITE, *Plff. in Err.*, [91]
v.
AUGUST F. LEOVY, Robert J. Leovy. and Henry J. Leovy.

(See S. C. Reporter's ed. 91-96.)

Federal question—review of state decision.

1. A decision by a state court as to the title to lands claimed by both parties under patents from the state, and holding that the lands are embraced in one of the patents, but not in the other, is but the interpretation of the written instruments, and not the decision of a Federal question, and cannot be reviewed by this court.
2. A writ of error to a state court will be dismissed when the decision was based on a local or state question, and it is unnecessary to decide any Federal question.

[No. 232.]

Submitted April 3, 1899. Decided April 24, 1899.

IN ERROR to the Supreme Court of the State of Louisiana to review a decision of that court in an action of slander of title brought by Robert M. White, plaintiff, against August F. Leovy *et al.* On motion to dismiss for want of jurisdiction on the ground that no Federal question was decided. *Dismissed.*

See same case below, 49 La. Ann. 1660.

The facts are stated in the opinion.

Messrs. **Alexander Porter Morse, Henry J. Leovy,** and **Victor Leovy** for defendants in error in favor of motion to dismiss.

Mr. **E. Howard McCaleb** for plaintiff in error in opposition to motion to dismiss.

[91] *Mr. Justice **McKenna** delivered the opinion of the court:

This is an action of jactitation or slander of title, and is here on error from the supreme court of the state of Louisiana. A motion is made to dismiss for want of jurisdiction in this court on the ground that no Federal question was decided. We think the motion should be granted.

Both parties, who were respectively plaintiff and defendant in the court below, derive title from the state of Louisiana by patents which were issued in execution of the grant to it of swamp and overflowed lands. Plaintiff's patent was prior in time to that of defendant, and it is claimed that by the issue of the latter the state "has attempted to impair the obligations of the contract between the state of Louisiana and the said Robert M. White, plaintiff herein, and deprive him of his property without due process of law, in violation of the Constitution and laws of the United States."

The title of the state must be assumed, and the contest is by which patent that title
[92] passed. It seems almost inevitable* that the questions hence arising would be state ones, and that the decision of the supreme court was confined to such a question is manifest from its opinion. 49 La. Ann. 1660.

After defining the action under the Louisiana laws, and stating upon whom the burden of establishing title devolved, it said:

"The description of the land which was purchased by the plaintiff which was evidenced by the patent which issued to the plaintiff, is of the following tenor, *viz.:* 'All the unsurveyed marsh west of lots fronting on the right bank of the Mississippi, except section No. sixteen (16), in township twenty-two (22) south, of range thirty-one (31) east, in the southeastern west of the river land district, containing thirty-eight hundred and forty (3,840) acres, according to the official plat of the survey of said lands in the state land office.'

"The number of the patent is 4058, and it states that the purchase was made with certificate No. 2251, N. S. L."

The plaintiff's petition, original and supplemental, contained the same description.

"The answer of the defendant H. J. Leovy," the opinion further says, "is to the effect that the land claimed by the plaintiff and called for by his patent 'was entered according to an official plat or survey made by G. F. Connelly in 1836, (and) . . . was all within a distance of less than two miles of the Mississippi river, and all territory to the west of that was at the date of that survey, and by the plat by which White claims to have bought, West bay.

'That a few years after Connelly made said survey the Jump outlet broke through, and the accumulation on the seaward side of said marsh and in said bay gradually raised the bed of said bay until the whole of said West bay became marsh land, connecting with swamp land to the westward, and at the time of said lands being transferred to the state, in 1849 and 1850, by Congress, it was not a navigable bay or part of the sea.'

"The answer then charges that the plaintiff, well knowing all these facts, and endeavoring to perpetuate a fraud upon the state, 'entered the lands originally allotted by Connelly, and*under his patent 4058 is [93]
endeavoring to claim over sixteen thousand (16,000) more acres in said township' than he is entitled to claim thereunder, and by 'a malicious suit now seeks to cast a cloud upon the title of others who have entered the western lands in said township . . . honestly and according to law, and who are in the peaceable and undisturbed possession of the same.'"

The answer of the other defendant was similar. And further—

"In *limine litis* plaintiff's counsel filed an exception and motion to strike out a portion of the defendant's answers on the ground that the official plat of survey of G. F. Connelly, U. S. surveyor, made in 1836, and on which his patent was based, cannot be questioned or impeached by the defendant, and this court is wholly without jurisdiction to determine whether same is or not erroneous, and that the said patent cannot be questioned or impeached by the defendant for fraud or error.

"That the United States government, as the owner of the sea marsh adjacent to the seashore and to West bay, 'acquired all the alluvion made by accretion to said lands between the years 1836 and 1850; and when said lands were granted by the United States government to the state of Louisiana,' same passed to the state by the granting act of Congress, and that same passed to the plaintiff as patentee thereof, and 'that he acquired all of said lands as well as the accretions which were added thereto, as they were at the time they were granted by the United States to the state of Louisiana,' said granting act passing a fee simple title *in præsenti* to the state, not only as the land was at the time of the survey by Connelly in 1836, but as it was at the date of the grant, and that the whole was acquired by the plaintiff as patentee.

"His additional representation is that the plaintiff as patentee 'acquired *all of said lands* in township No. 22 south, range No. 31 east, on the southeastern west of the river land district, *according to the official survey of said lands in the state land office as they were at the time they were granted by the United States* to the state of Louisiana.'"

*The decision of the district court was in [94]

favor of the motion, and after comment on the ruling the supreme court said:

"Reduced to a last analysis, the pleadings present for our consideration and decision a purely petitory action, in which the defendant holds the affirmative side of the controversy and is bound to succeed on the strength of his own title, and in deciding the question of title we are to determine whether the patents which the state issued to H. J. Leovy, in 1893, reflect a title which is superior and paramount to the patent which the state issued to the plaintiff in 1890, to the extent that they conflict.

"This controversy is not so much with regard to the character or strength of the respective parties as it is with regard to the area or domain which the state actually and really conveyed to the plaintiff; for it is quite true and cannot be denied that the state was wholly without power to convey to the defendant H. J. Leovy any land in 1893 which she had previously sold to the plaintiff in 1890, without trenching upon the issues of error or fraud which were excluded from consideration. In other words, we are to determine from the evidence before us whether the plaintiff's patent covers and includes all the land in township twenty-two south, of range thirty-one east, in the southeastern land district west of the Mississippi river; for if it does, in fact, the patents which were subsequently issued to the defendant H. J. Leovy do not reflect a paramount title thereto."

The court then gave elaborate consideration to the views of the district court, expressing its dissent from them; also at great length reviewed the evidence and the land laws of the state and the descriptions of the respective patents, and concluded as follows:

"As, in our opinion, this controversy is quite similar to the one presented in *Buras* v. *O'Brien* [42 La. Ann. 528], that is to say, one for the determination of the area of sea marsh which is covered by a state patent—our conclusion is that the plaintiff's patent 4058 does not extend to nor include the land which is called for by the patents which were
[95] subsequently issued by *the state to the defendant H. J. Leovy, and that consequently there is no conflict between them.

"Under the jurisprudence and statutes of this state governing the sale and entry of swamp and marsh lands, we think it our duty to consider all the provisions and recitals of patents issued therefor and to give same effect according to their tenor; and thus considering the patent of the plaintiff, we regard it as evidencing a sale by measure and not by estimation of quantity. We consider the words thereof 'containing 3,840 acres' as limiting the words preceding, 'all the unsurveyed marsh west of lots fronting on the right bank of the Mississippi,' and that the reference made therein to 'the official plat of the survey of said lands in the state land office' was intended to verify and confirm the statement as to the character and extent of the area of land which was actually conveyed to the patentee.

"We are of the opinion that inasmuch as the plaintiff's patent 4058 calls for 'all the unsurveyed marsh west of lots fronting on the Mississippi, except section sixteen in township twenty-two,' he is not entitled to survey, select, and appropriate all the dry land or swamp land above overflow in said township in order to make out the quantity of '3,840 acres' he purchased.

"We are of opinion that inasmuch as the patent conveys 'all the unsurveyed marsh west of the lots fronting on the Mississippi,' those lots must be taken as the initial point from which the area is to be computed, same being the only fixed and definite boundary mentioned in the patent.

"Thus considering the law and the evidence, we are of opinion that there should be judgment in favor of the defendant H. J. Leovy maintaining his patents as reflecting the paramount title to the lands which are therein described, and perpetuating his writ of injunction."

It is manifest no Federal question was passed on by the court. Its decision was put upon an independent ground involving no Federal question and of itself sufficient to support the judgment. It merely determined the extent of the grant to the state and, interpreting the contending patents *as [96]
conveyances, decided that the lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace them. This was but the interpretation of written instruments, and if it were even apparent to us to be wrong, which we cannot say, we should nevertheless be without power to review it.

In *Remington Paper Co.* v. *Watson* [173 U. S. 443], *ante*, p. 762, we had occasion to repeat and affirm the rule announced in *Eustis* v. *Bolles*, 150 U. S. 370 [37: 1113], "that when we find it unnecessary to decide any Federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error."

The writ of error is dismissed.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, *Plff. in Err.*,

v.

W. T. MATTHEWS and M. L. Trudell, Copartners as Matthews & Trudell.

(See S. C. Reporter's ed. 96-125.)

Fires set by locomotives—Fourteenth Constitutional Amendment—Kansas statute as to fires set by railroad companies.

1. The legislature has power to provide a penalty for the failure of a railroad company to prevent the escape of fire from its locomotive, without prescribing any specific duty, but leaving to the corporation the selection of the means it deems best therefor.
2. The equal protection of the laws, which is guaranteed by the Fourteenth Amendment of the Constitution, does not forbid classification. The fact of inequality produced by classification does not determine its constitutionality.
3. The Kansas statute which provides that in an action against a railroad company for damages by fire caused by operating the rail-

road. the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof shall be prima facie evidence of negligence on the part of the railroad, and that the plaintiff, if he recover, shall also be allowed a reasonable attorney's fee,—is not in conflict with the Fourteenth Amendment to the Federal Constitution as denying the equal protection of the laws to such company, and is valid.

[No. 147.]

Submitted January 18, 1899. Decided April 17, 1899.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court affirming the judgment of the District Court of Cloud County in said State in favor of W. T. Matthews *et al.*, plaintiffs, against the Atchison, Topeka, & Santa Fe Railroad Company for $2,094 damages, and $225 attorneys' fees, for damages by fire caused by the operating of such railroad. *Affirmed.*

See same case below, 58 Kan. 447.

The facts are stated in the opinion.

Messrs. **Robert Dunlap** and **E. D. Kenna** for plaintiff in error.

No counsel for defendant in error.

[97] *Mr. Justice **Brewer** delivered the opinion of the court:

In 1885 the legislature of Kansas passed the following act:

"An Act Relating to the Liability of Railroads for Damages by Fire.

"Sec. 1. *Be it enacted by the Legislature of the State of Kansas:* That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad): *Provided,* That in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." Sess. Laws 1885, chaps. 155, 258.

Under it an action was brought in the district court of Cloud county which resulted in a judgment against the railroad company, plaintiff in error, for $2,094 damages and $225 attorney's fees. This judgment having been affirmed by the supreme court of the state, the company brought the case here on error.

All questions of fact are settled by the decision of the state courts. (*Hedrick* v. *Atchison, T. & S. F. R. R. Co.* 167 U. S. 673, 677 [42:320, 322], and cases cited in the opinion), and the single matter for our consideration is the constitutionality of this statute. It is contended that it is in conflict with the Fourteenth Amendment to the Federal Constitution, and this contention was distinctly ruled upon by the supreme court of the state adversely to the railroad company. In support of this contention great reliance is placed upon *Gulf, Colorado, & Santa Fé Ry. Co.* v. *Ellis,* 165 U. S. 150 [41: 666]. In that case a statute of Texas allowing an attorney fee to the plaintiffs in actions against railroad corporations on claims not exceeding in *amount $50, for personal services ren- [98]
dered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the supreme court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive.

But while there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is "caused by the operating" of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Missouri Pac. Ry. Co.* v. *Humes,* 115 U. S. 512 [29: 463]. And yet its purpose is not different. Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather, see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damages it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed. It *has been frequently before the [99]
supreme court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. In *Missouri Pac. Ry. Co.* v. *Merrill,* 40 Kan. 404, 408, it was said:

"The objection that this legislation is special and unequal cannot be sustained. The

dangerous element employed and the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised."

And in the opinion filed in the present case that court observed:

"Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court, which we see no reason for changing. (*St. Louis & San Francisco Ry. Co.* v. *Snaveley*, 47 Kan. 637; *St. Louis & S. F. R. Co.* v. *Curtis*, 48 Kan. 179; *St. Louis & S. F. R. Co.* v. *McMullen*, 48 Kan. 281; *Missouri Pac. R. R. Co.* v. *Henning*, 48 Kan. 465)".

It is true that the *Ellis Case* was one to recover damages for the killing of a colt by a passing train. And so it might be argued that the protection of the track from straying stock and the protection of stock from moving trains would, within the foregoing principles, uphold legislation imposing an attorney's fee in actions against railroad corporations. We were not insensible to this argument when that case was considered, but we accepted the interpretation of the statute and its purpose given by the supreme court of Texas, as appears from this extract from our opinion (p. 153 [41: 667]): "The supreme court of the state considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a stat-
[100]ute imposing a penalty *upon railroad corporations for a failure to pay certain debts." And again, referring specifically to this matter (p. 158 [41: 667]): "While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state." Indeed, the limit in amount ($50), found in that statute, made it clear that no police regulation was intended, for if it were the more stock found on the track the greater would be the danger and the more imperative the need of regulation and penalty.

So that, according to the interpretation placed upon the Texas statute by its supreme court, its purpose was generally to compel the payment of small debts, and the fact that among the debts so provided for was the liability for stock killed was not sufficient to justify us in separating the statute into fragments and upholding one part on a theory inconsistent with the policy of the state; while on the other hand, the purpose of this statute is, as declared by the supreme court of Kansas, protection against fire—a matter in the nature of a police regulation.

It may be suggested that this line of argument leads to the conclusion that a statute of one state whose purpose is declared by its supreme court to be a matter of police regulation will be upheld by this court as not in conflict with the Federal Constitution, while a statute of another state, precisely similar in its terms, will be adjudged in conflict with that Constitution if the supreme court of that state interprets its purpose and scope as entirely outside police regulation. But this by no means follows. This court is not concluded by the opinion of the supreme court of the state. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366 [30: 220, 225]. It forms its own independent judgment as to the scope and purpose of a statute, while of *course leaning to any interpretation which has been [101]
placed upon it by the highest court of the state. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as conclusive, but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment.

That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do, at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken (and sometimes in spite of such care), scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. It early attracted the attention of its legislature, and in 1860—long before any railroads were built in the state—this statute was passed (Laws 1860, chap. 70, sec. 2; Comp. Laws, chap. 101, sec. 2): "If any person shall set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action." As held in *Emerson* v. *Gardiner*, 8 Kan. 452, its effect was to change the rule of the common law, which gave redress only when the person setting the fire did so wantonly or through negligence, whereas by this statute the mere fact of setting fire to woods, marshes, or prairies gave a right to the party injured to recover damages. And in the years after the railroads began to be constructed, and prior to the passage of the act before us, the reports of the supreme court of that state show that nearly a score of actions had been brought to that court for consideration, in some of which great damage had been done by fire escaping from moving trains. Fire catching in the dry grass often runs for miles, destroying not merely crops but houses and barns. Indeed, in one case (*Atchison, T. & S. F. R. Co.* v. *Stanford*, 12 Kan. 354 [15 Am. Rep. 362]), it appeared that the fire escaping had swept across the

prairies for over four miles, and one ground of objection to the recovery was that the distance of the property destroyed from the railroad track was so great, and the fire had passed over so many intervening farms, that
[102]it could*not rightfully be held that the proximate cause of the injury was the escape of fire from the locomotive. No other work done, or industry carried on, carries with it so much of danger from escaping fire.

In 1887 the legislature of the state of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. *St. Louis & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1 [41: 611]. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire.

While, as heretofore noticed, no special act of precaution was required, no statutory duty imposed upon railroad corporations in respect to protection against escaping fire, and a similar omission in the legislation of Texas was referred to in the opinion in the *Ellis Case* as strengthening the argument that no police regulation was intended, yet we are of opinion that such omission is not conclusive upon the question of the validity of the statute. We have no right to consider the wisdom of such legislation. Our inquiry runs only to the matter of legislative power. If, in order to accomplish a given beneficial result—a result which depends on the action of a corporation—the legislature has the power to prescribe a specific duty and punish a failure to comply therewith by a penalty, either double damages or attorney's fees, has it not equal power to prescribe the same penalty for failing to accomplish the same result, leaving to the corporation the selection of the means it deems best therefor? Does the power of the legislature depend on the method it pursues to accomplish the result? As individuals we may think it better that the legislature prescribe the specific duties which the cor-
[103]porations must *perform; we may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire prima facie evidence of negligence; but, clearly, as a court we may not interpose our personal views to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts.

Many cases have been before this court, involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power, are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the laws which is guaranteed by the Fourteenth Amendment does not forbid classification. That has been asserted in the strongest language. *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]. In that case, after in general terms declaring that the Fourteenth Amendment designed to secure the equal protection of the laws, the court added (pp. 31 and 32 [28: 925]):

"But neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning *streets, [104]
opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. It is also clear that the legislature (which has power in advance to determine what rights, privileges, and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend, or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. *St. Louis, I. M. & S. Railway Company* v. *Paul* [173 U. S. 404] *ante*, 746. It is also a maxim of

constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corpo-
[105] ration is subjected to the same rule.*Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. *Yick Wo* v. *Hopkins, supra,* forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carrying on the laundry business, was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.

While cases on either side and far away from the dividing line are easy of disposition, the difficulty arises as the statute in question comes near the line of separation. Is the classification or discrimination prescribed thereby purely arbitrary or has it some basis in that which has a reasonable relation to the object sought to be accomplished? It is not at all to be wondered at that as these doubtful cases come before this court the justices have often divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. Without attempting to cite all the cases it may not be amiss to notice, in addition to those already cited, the following: *Missouri* v. *Lewis,* 101 U. S. 22 [25: 989]; *Hayes* v. *Missouri,* 120 U. S. 68 [30: 578]; *Duncan* v. *Missouri,* 152 U. S. 377, 382 [38: 485, 487]; *Marchant* v. *Pennsylvania R. R. Co.* 153 U. S. 380, 389 [38: 751, 756]; *Chicago, K. & W. R. R. Co.* v. *Pontius,* 157 U. S. 209 [39: 675]; *Lowe* v. *Kansas,* 163 U. S. 81, 88 [41: 78, 81]; *Plessy* v. *Ferguson,* 163 U. S. 537 [41: 256]; *Covington & L. Turnpike Co.* v. *Sandford,* 164 U. S. 578, 597 [41: 560,567]; *Jones* v. *Brim,* 165 U. S. 180 [41: 677]; *Western U. Teleg. Co.* v. *Indiana,* 165 U. S. 304 [41: 725]; *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 257 [41: 979, 992]; *Holden* v. *Hardy,* 169 U. S. 366 [42: 780]; *Savings & L. Society* v. *Multnomah County,* 169 U. S. 421 [42: 803]; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300 [42: 1037, 1045]; *Tinsley* v. *Anderson,* 171 U. S. 101 [*ante,* 91]. In some of them the *court was unanimous. [106]
In others it was divided; but the division in all of them was, not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line.

It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay, not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the othe hand, if it should sue an individual for destruction of its livestock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and *the judgment of the Supreme Court of Kansas is affirmed.*

Mr. Justice **Harlan** dissenting:

*The statute of Kansas, the validity of [107]
which is involved in the present case, provides in its first section that in all actions against a railway company to recover damages resulting from fire caused by the operating of its road, it shall only be necessary for the plaintiff to establish the fact that the fire complained of "was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad): *Provided,* that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration." The second and only other section provides that "if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

Manifestly, the statute applies only to suits against railroad companies, and only to causes of action arising from fire caused by

operating a railroad. It establishes against a defendant railroad company a rule of evidence as to negligence that does not apply in any other suit for damages arising from the negligence of a defendant, whether a corporate or natural person. It does more. It imposes upon the defendant railroad corporation, if unsuccessful in its defense, a burden not imposed upon any other unsuccessful defendant sued upon a like or upon a different cause of action. That burden is the payment of an attorney's fee as a part of the judgment. Even if it appears that the railway company was not guilty of any negligence whatever or that the plaintiffs were guilty of contributory negligence preventing any recovery in their favor, no such fee nor any sum beyond ordinary costs is taxed against them.

In *Gulf, Colorado, & Santa Fé Railway* v. *Ellis*, 165 U. S. 150 [41: 666], we had before us a statute of Texas declaring, among other things, that any person in that state having "claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railroad corporation operating a railroad in this state, and the amount of such claim does not exceed
[108] $50, may present the same, verified *by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and *in addition thereto all reasonable attorney's fees*, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue."

That was an action against the railway company to recover damages for the killing of an animal. Judgment was entered against the company, and it included a special attorney's fee. That judgment was sustained by the state court.

The question to be decided was whether within the meaning of the Fourteenth Amendment and in the cases specified the Texas statute did not deny to a railroad corporation the equal protection of the laws in that it required the corporation, if unsuccessful in the suit, to pay, in addition to the ordinary costs taxable in favor of a successful litigant, a special attorney's fee, but gave it no right if successful to demand a like fee from its adversary.

After observing that only against railway companies and only in certain cases was such exaction made, and considering the statute as a whole, this court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished and no other corporations. The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff;*if it terminates in their [109]
favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the court upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits therefore to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

Referring to the previous decisions of this court holding that corporations were persons within the meaning of the Fourteenth Amendment of the Constitution of the United States, this court also said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to the artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

In response to the argument made in that case, that it was competent for the legislature to make a classification of corporations enjoying special privileges, the court said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the particular business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512 [29: 463]. But this and all *kindred cases proceed upon the [110]
theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is im-

material. It is all done in the exercise of the police power of the state and with a view to enforce just and reasonable police regulations. While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the state has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for nonperformance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the supreme court of the state." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

[111] *If the opinions in the *Ellis Case* and in this case be taken together, the state of the law seems to be this:

1. A state may not require a railroad company sued for negligently killing an animal to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, when it does not allow the corporation when its defense is sustained to recover a like attorney's fee from the plaintiff.

2. A state may require a railroad company sued for and adjudged liable to damages arising from fire caused by the operation of its road, to pay to the plaintiff, in addition to the damages proved and the ordinary costs, a reasonable attorney's fee, even if it does not allow the corporation when successful in its defense to recover a like attorney's fee from the plaintiff.

The first proposition arises out of a suit brought on account of the killing by the railroad of a colt. The second proposition arises out of a suit brought on account of the destruction of an elevator and the property attached to it by fire caused by operating a railroad.

Having assented in the *Ellis Case* to the first proposition, I cannot give my assent to the suggestion that the second proposition is consistent with the principles there laid down. Placing the present case beside the former case, I am not astute enough to perceive that the Kansas statute is consistent with the Fourteenth Amendment, if the Texas statute be unconstitutional.

In the former case we held that a railroad corporation, sued for killing an animal, was entitled to enter the courts upon equal terms with the plaintiff, but that that privilege was denied to it when the Texas statute required it to pay a special attorney's fee if wrong, and did not allow it to recover any fee if right in its defense; and yet allowed the plaintiff to recover a special attorney's fee if right, and pay none if wrong. Upon these grounds it was adjudged that the parties did not stand equal before the law, and did not receive its equal protection. In the present case the Kansas statute is held to be constitutional, although the parties in*suits embraced by its provisions are [112]
not permitted to enter the courts upon equal terms, and although the defendant railroad corporation is not allowed to recover an attorney's fee if right, but must pay one if found to be wrong in its defense; while the plaintiff is exempt from that burden if found to be wrong.

In the former case it was adjudged that a state had no more power to deny to corporations the equal protection of the law than it had to individual citizens. In the present case it is adjudged that in suits against a railroad corporation to recover damages arising from fire caused by the operation of the railroad, a rule of evidence may be applied against the corporation which is not applied in like actions against other corporations or against individuals for the negligent destruction of property by fire.

In the former case it was held that as the killing of the colt was not attributable to a failure upon the part of the railroad to perform any duty imposed upon it by statute, there could be no penalty for nonperformance. In the present case it is adjudged that the statute may impose a penalty upon the defendant corporation for nonperformance, although the negligence imputed to it was not in violation of any statutory duty.

Suppose the statute in question had been so framed as to give the railroad corporation a special attorney's fee if successful in its defense, but did not allow such a fee to an individual plaintiff when successful. I cannot believe that any court, Federal or state, would hesitate a moment in declaring such an enactment void as denying to the plaintiff the equal protection of the laws. If this be true, it would seem to follow that a statute that accords to the plaintiff rights in courts that are denied to this adversary should not be sustained as consistent with the doctrine of the equal protection of the laws. This conclusion, it seems to me, is inevitable unless the court proceeds upon the theory that a corporate person in a court of justice may be denied the equal protection of the laws when such protection could not be denied under like circumstances to natural persons. But we said in the *Ellis***Case* that [113]

"a state has no more power to deny to corporations the equal protection of the laws than it has to individual citizens," and that corporations are denied a right secured to them by the Fourteenth Amendment if "they cannot appeal to the courts as other litigants under like conditions and with like protection."

There is another aspect in which the Kansas statute may be viewed. Taken in connection with the principles of general law recognized in that state, that statute, although not imposing any special duties upon railroad companies, in effect says to the plaintiffs, Matthews and Trudell, the owners of the elevator property—indeed it says in effect to every individual citizen, and for that matter to every corporation in the state: "If you are sued by a railroad corporation for damage done to its property by fire caused by *your* negligence or in the use of *your* property, the recovery against you shall not exceed the damages proved and the ordinary costs of suit. But if your property is destroyed by fire caused by the operation of the railroad belonging to the same corporation, and you succeed in an action brought to recover damages, you may recover, in addition to the damages proved and the ordinary costs of suit, a reasonable attorney's fee; and if you fail in the action no such attorney's fee shall be taxed against you." In my judgment, such discrimination against a litigant is not consistent with the equal protection of the laws secured by the Fourteenth Amendment.

I submit that any other conclusion is inconsistent with *Gulf, Colorado, & Santa Fé Railway* v. *Ellis*, as well as with many other well-considered decisions. A reference to a few adjudged cases will suffice.

The principles which in my judgment should control the determination of cases like the present one are well stated by the supreme court of Michigan in *Wilder* v. *Chicago & W. M. Railway Company*, 70 Mich. 382. That case involved the validity of a provision in a statute of that state authorizing an attorney's fee of $25 to be taxed against a railroad company against which judgment should be rendered in an action for injuries to stock. The court said: "But the imposing of the attorney fee of $25 as costs cannot be upheld.
[114]*The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of $25 if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the $10 and an additional penalty of $25; for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist. 'The genius, the nature and the spirit of our state government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them.' *Durkee* v. *City of Janesville*, 28 Wis. 464, 468 [9 Am. Rep. 500]; *Calder* v. *Bull*, 3 Dall. 386, 388 [1: 648, 649]. Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties in the disguise of costs upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts
*when suits are brought against them.' [115]
These principles were reaffirmed in *Lafferty* v. *Chicago & W. M. Railway Co.* 71 Mich. 35, and *Grand Rapids Chair Co.* v. *Runnells*, 77 Mich. 104, 111.

The validity of a statute of Alabama requiring a reasonable attorney's fee, not exceeding a named amount, to be taxed as part of the costs in certain actions, was involved in *South and North Alabama R'd Co.* v. *Morris*, 65 Ala. 193, 199. The supreme court of Alabama, referring to the Fourteenth Amendment as well as to the state Constitution, said: "The clear legal effect of these provisions is to place all persons natural and corporate as near as practicable upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as may be otherwise provided in the Constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and openhanded to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit

of the foregoing constitutional provisions. . . . The section of the Code under consideration (§ 1715) prescribes a regulation of a peculiar and discriminative character, in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but it is confined to such as own or control railroads only; and it varies from the general law of the land, by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee, not to exceed twen-
[116]ty dollars. A law *which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel, would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every state Constitution of the various commonwealths of the American government. We think this section of the Code is antagonistic to these provisions of the state Constitution, and is void. *Durkee* v. *City of Janesville*, 28 Wis. 464 [9 Am. Rep. 500]: *Gordon* v. *Winchester Bldg. & Accumulating Fund Association*, 12 Bush. 110 [23 Am. Rep. 713]; *Greene* v. *Briggs*, 1 Curt. C. C. 327; Cooley, Const. Lim. 3d ed. § 393. The section in question is also violative of that clause in section 1, article XIV. of the Constitution of the United States, which declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' This guaranty was said by Justice Bradley in *Missouri* v. *Lewis*, 101 U. S. 22, 30 [25: 989, 992], to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person or class of persons should be denied the same protection which is enjoyed by other persons, or other classes, in the same place and under like circumstances.' The same court, in *United States* v. *Cruikshank*, 92 U. S. 542, 555 [23: 588, 592], per Waite, Ch. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there.' *Ward* v. *Flood*, 48 Cal. 36 [17 Am. Rep. 405]."

Hocking Valley Coal Company v. *Rosser*, 53 Ohio St. 12, 22-24 [29 L. R. A. 386] involved the validity of a section of the Revised Statutes of Ohio providing that "if the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee
[117]as the court may allow, but *not in excess of $5, for his attorney; but no such attorney fee shall be taxed in the costs unless said wages shall have been demanded in writing, and not paid within three days after such demand; if the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of $15 for his attorney as the court may allow." The supreme court of Ohio said: "Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds which he wilfully or arbitrarily or even carelessly refused to apply to pay his debt, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him. Whether the debtor interposes or shows a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case the statute denounces against him a penalty called an attorney fee if an action is brought on the claim and judgment recovered for the sum demanded. . . . The right to protect property is declared as well as that justice shall not be denied and everyone entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property." Again: "Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will, while the other party or another class of citizens does so at the peril of being mulcted in an attorney fee if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon *one citizen or [118]
class of citizens only denies to him or them the equal protection of the law."

In *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641, 646, 647, 650-652, which involved the validity of a statute authorizing an attorney's fee to be taxed against the appellant, "whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation," the supreme court of Mississippi said: "All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances. There may be different rules for appeals and their incidents in different classes of cases, determined by their nature and subjects, but not with respect to the person by or against whom they are instituted. The subjection of

every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions, will be equally free from objection on the ground of its discriminating character; but to say that where certain persons are plaintiffs and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally, is to deny the equal protection of the law to the party thus discriminated against. It is to debar certain persons from prosecuting a civil cause before the appellate tribunals of this state. It is an unwarrantable interference with the 'due course of law' prescribed for litigants generally. . . . It is doubtless true that the act was designed for the relief of citizens who became litigants in actions against corporations, because it applies only when a citizen is plaintiff, and it was assumed that the corporation would be appellant, and to avoid discrimination between parties to the same action it was made to operate on either party as appellant, but it
[119] sometimes occurs, and may very *often, that the citizen plaintiff is an appellant, and in such cases the discrimination may operate oppressively on him. The supreme court of Alabama declared its act violative of the Constitution of that state and of the United States, because of its unjust discrimination in establishing peculiar rules for a particular occupation, *i. e.*, 'such as own or control railroads.' Our objection to the act under consideration is broader, as shown above, embracing in its scope the right of the citizen who sues a corporation, for whom we assert the right to appeal on the same terms granted to the plaintiffs in like cases, *i. e.*, actions for damages against whomsoever brought. The act was intended to deter from the appellate court corporations against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in hostility to citizens as plaintiffs or corporations as defendants in such actions. In either view it is partial and discriminating against classes of litigants, denying them access to the appellate courts on the same terms and with the same incidents as other litigants who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it. . . . An act 'which is partial in its operations, intended to affect particular individuals alone or to deprive them of the benefit of the general laws, is unwarranted by the Constitution and is void.' 'A partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general laws of the land, is unconstitutional and void.'"

Cases almost without number could be cited to the same general effect. I refer to the following as bearing more or less upon the general inquiry as to the scope and meaning of the clause in the Fourteenth Amendment prohibiting any state from denying to any person within its jurisdiction the equal protection of the laws. *Jolliffe* v. *Brown*, 14 Wash. 155; *Randolph* v. *Builders and Painters Supply Co.* 106 Ala. 501; *New York Life Ins. Co.* v. *Smith* (Tex. Civ. App.) 41 S. W. 680; *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 49 Ark. 492; *Denver & R. G. Railway Co.* v. *Outcalt*, 2 Colo. App. 395; *Atchison & Neb. R. R. Co.* v. *Baty*, 6 Neb. 37 [29 Am. Rep. 356]; *O'Connell* v. **Menominee Bay* [120]
Shore Lumber Co. [113 Mich. 124] 71 N. W. 449; *San Antonio & A. P. Ry. Co.* v. *Wilson* (Tex. App.) 19 S. W. 911; *City of Janesville* v. *Carpenter*, 77 Wis. 288 [8 L. R. A. 808]; *Pearson* v. *City of Portland*, 69 Me. 278; *Burrows* v. *Brooks* [113 Mich. 307] 71 N. W. 460; *Middleton* v. *Middleton*, 54 N. J. Eq. 692 [36 L. R. A. 221]; *State* v. *Goodwill*, 33 W. Va. 179 [6 L. R. A. 621]. These adjudications rest substantially upon the grounds indicated by this court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 [30: 220, 226], where it was said that "the equal protection of the laws is a pledge of the protection of equal laws."

I do not think that the adjudged cases in this court, to which reference has been made, sustain the validity of the statute of Kansas.

In *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512, 522 [29: 463, 466], this court sustained a statute of Missouri requiring every railroad corporation to erect and maintain fences and cattle guards on the sides of its roads, and for failure to do so subjecting it to liability in double the amount of damages occasioned thereby. The court said: "The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the state receives them . . . The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase *in [121]
many cases double, in some cases treble, and even quadruple the actual damages. . . . The objection that the statute of Missouri violates the clause of the Fourteenth Amendment. which prohibits a state to deny to any

person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances."

In *Missouri P. Railway Co.* v. *Mackey*, 127 U. S. 205, 209 [32: 107, 109], this court held not to be unconstitutional a statute of Kansas making every railroad company liable for all damages done to one of its employees in consequence of any negligence of its agents or by any mismanagement of its engineers or other employee, to any person sustaining such damage. This court said: "Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

In *Minneapolis & St. Louis Railway Co.* v. *Emmons*, 149 U. S. 364, 367 [37: 769, 772], the court held to be valid a statute of Minnesota requiring railroad companies within a named time to build or cause to be built good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of their respective roads, and that failure by any company to perform that duty should be deemed an act of negligence, for which it should be liable in treble the amount of damage sustained. This court said: "The extent of the obligations and
[122]duties *required of railroad corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the states. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect."

In *St. Louis & San Francisco Railway Co.* v. *Mathews*, 165 U. S. 1, 26 [41: 611, 621], this court upheld a statute of Missouri providing that every railroad corporation owning and operating a railroad in that state should be responsible in damages to the owner of any property injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon its railroad —the railroad company being, however, authorized to procure insurance on the property upon the route of its railroad. It was there said: "The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over or interest in those instruments. The very statute now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf; and it may obtain insurance upon all such property generally, without specifying any *particular property." Observe, that the Mis-[123]
souri statute gave the railroad company for its protection against the new liability imposed upon it the right to insure the property likely to be destroyed by fire.

I do not perceive that the judgment now rendered finds support in any adjudication by this court. The above cases proceed upon the general ground that in the exercise of its police powers a state may by statute impose additional duties upon railroad corporations, with penalties for the nonperformance of such duties, and that such legislation is not, because of its special character, a denial of the equal protection of the laws. It is said to be of the essence of classification that "upon the class are cast duties and burdens different from those resting upon the general public." But here the state does not prescribe any additional duties upon railroad companies in respect of the destruction of property by fire arising from the operating of their roads. It simply imposes a penalty which it does not impose upon other litigants under like circumstances. It only prescribes a punishment for assuming to contest a claim of a particular kind made against it for damages. The railroad company can escape the punishment only by failing to exercise its privilege of resisting in a court of justice a demand which it deems unjust. Undoubtedly, the state may prescribe new duties for a railroad corporation and impose penalties for their nonperformance. But, under the guise of exerting its police powers, the state may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the court in the *Ellis Case*, "arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency." Ar-

bitrary selection cannot, we said in the same case, "be justified by calling it classification." There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the *Ellis Case* was exactly in point, namely, "as no duty is imposed there can be no penalty for nonperformance." Instead of prescrib-
[124]ing some penalty for the *neglect of the railroad company of duties specifically enjoined upon it, the state attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the *Ellis Case* was secured by the Constitution, namely, the right to "appeal to the courts as other litigants, under like conditions and with like protection."

Some stress is laid upon the fact that the statute under consideration was passed by a state in which fires caused by the operating of railroads may often cause and are likely to cause widespread injury to grass, crops, houses, and barns. What, in the light of the authorities, the state may constitutionally do in order to protect its people against dangers of that character, I need not stop to consider. The only question here is whether, in the absence of any statutory regulation prescribing what a railroad corporation shall or shall not do in order to guard property against destruction by fire arising from the operating of its road, the state can deny to such a corporation, when defending a suit brought against it to recover damages on the ground of negligent destruction of property, a privilege which it accords to its adversary in the trial of the issues joined. May the state meet the railroad corporation at the doors of its courts of justice and say to it, "If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful"? Nothing has ever heretofore fallen from this court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind accorded to its opponent. If there is one place under our system of government where all should be in a position to have equal and exact justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta.

In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general prin-
[125]ciples *of law applicable to all alike that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws. I dissent from the opinion and judgment.

Mr. Justice **Brown**, Mr. Justice **Peckham,** and Mr. Justice **McKenna** concur in this dissent.

H. F. AUTEN, as Receiver of the First National Bank of Little Rock, Arkansas, *Plff. in Err.*,

v.

UNITED STATES NATIONAL BANK OF NEW YORK.

(See S. C. Reporter's ed. 125-149.)

Judgment of circuit court of appeals not final in an action against receiver of national bank—rediscounting by bank— notice to bank discounting paper.

1. An action against a receiver of a national bank appointed by the comptroller of the currency is one arising under the laws of the United States, in which the judgment of the circuit court of appeals is not final.
2. The rediscounting of paper by one bank with another cannot be held, as a matter of law, to be out of the usual course of business, so as to charge everybody connected with it with knowledge that it may be in excess of authority.
3. Notice of the want of authority of the president of a bank to rediscount paper with another bank, or that the indorsement by the bank was merely for accommodation, is not shown by the fact that the indorsements of the bank were made by the president, and not by the cashier, and that the indorsement of the president of the bank was made above that of the bank, where the paper was rediscounted in the usual course of business and was solicited by the cashier.

[No. 206.]

Argued March 9, 1899. Decided April 24, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the United States Circuit Court for the Eastern District of Arkansas in favor of the plaintiff, the United States National Bank of New York, against H. F. Auten, receiver, etc., for the amount of certain promissory notes. *Affirmed.*

See same case below, 27 U. S. App. 605, and 49 U. S. App. 67.

Statement by Mr. Justice **McKenna:**

*Two of the parties to this action in the court below were national banks, one located at New York, the other located at Little Rock, Arkansas. Sterling R. Cockrill, as receiver of the latter bank, was also a party. He resigned and plaintiff in error was appointed. The banks will be denominated respectively the New York bank and the Little Rock bank. [126]

The complaint contains the necessary jurisdictional allegations, and that "on December 7, 1892, the City Electric Street Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the state of Missouri, its

three promissory notes, each for five thousand dollars, payable four months after date, with interest at the rate of ten per cent per annum from maturity until paid. Said Brown and Allis afterwards indorsed and delivered said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted, and delivered said notes to plaintiff. That on December 7, 1892, the McCarthy & Joyce Company, a corporation resident in the city of Little Rock, Pulaski County, Arkansas, and organized and doing business under the laws of Arkansas, executed and delivered to James Joyce, a citizen of the state of Missouri, its two promissory notes, each for five thousand dollars, payable to his order at four and five months respectively after date, with interest from maturity at the rate of ten per cent per annum until paid. Said Joyce afterwards indorsed said notes to the defendant First National Bank, and said bank before maturity and for a valuable consideration indorsed, rediscounted, and delivered said notes to plaintiff. Said notes were each at maturity presented at the First National
[127]Bank in Little Rock, Arkansas,*for payment, and payment being refused, they were each duly protested for nonpayment, the fees for which, amounting to twenty-five dollars, were paid by plaintiff. Copies of said notes, with the indorsements thereon, are hereto attached, marked 1 to 5 inclusive, and made part hereof. No part of said notes has been paid, and the same have been presented to the receiver of said bank for allowance, which he has refused to do."

Judgment was prayed for the debt and other relief.

Three of said notes are in the following form:

$5,000. 34131

Little Rock, Ark., Dec. 7th, 1892.

Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

City Electric St. R'y Co.
H. G. Bradford, P't.
W. H. Sutton, Sec'y.
No. A, 73485. Due Apr. 7-10, '93.

The following indorsement appears on each: "Geo. R. Brown, H. G. Allis, First National Bank, Little Rock, Arkansas; H. G. Allis, P't."

Two of the notes were in the following form:

$5,000. 34128.

Little Rock, Ark., Dec. 7, 1892.

Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity, at the rate of ten per cent per annum, until paid.

McCarthy & Joyce Co.
Geo. Mandlebaum, Sec'y & Treas.
A, 73477. No. 2. Due Ap'l 7-10, '93.

They were indorsed as follows: "James Joyce, H. G. Allis, First National Bank, Little Rock, Ar.; H. G. Allis, P't."

*The receiver only answered, and his an- [128]
swer as finally amended denied that "either of the notes described in the plaintiff's complaint was ever indorsed and delivered to the First National Bank; he denies that either of said notes was ever the property of or in the possession of said bank; and denies that the said bank ever indorsed or delivered either of said notes to the plaintiff; he denies that said bank ever received any consideration from said plaintiff or any indorsement or delivery of said notes to it:" and averred "that the name of the defendant bank was indorsed on said notes by H. G. Allis for his personal benefit without authority from said bank; that the said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money, which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; if said transaction created an indebtedness against the defendant bank, then the total liability of said defendant bank to the plaintiff by virtue thereof exceeded one tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business which either the plaintiff or the defendant bank was authorized to carry on; that the plaintiff is not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank." Also that "at the date of the suspension of the First National Bank the United States National Bank was indebted to it in the sum of $467.86, that sum then being on deposit in the said United States National Bank to the credit of the First National Bank of Little Rock; and that the same has never been paid."

The receiver prayed that "he be discharged from all liability upon the notes sued on herein, and that he have judgment *against [129]
the plaintiff for the said sum of $467.86, and interest from the 1st day of February, 1893."

The plaintiff bank denied the indebtedness of $467.86, and averred "that at the time said First National Bank failed it was indebted to plaintiff in a large amount, to wit, the notes sued upon herein, and plaintiff applied said $467.86 as a credit upon said indebtedness."

The issues thus made up were brought to

trial before a jury. Upon the conclusion of the testimony the court, at the request of the plaintiff bank, instructed the jury to find a verdict for it, which the court did, and denied certain instructions requested by the defendant. The jury found for the plaintiff, as instructed, for the full amount of the notes sued, less the amount of the set-off, and judgment was entered in accordance therewith.

A writ of error was sued out to the circuit court of appeals, which affirmed the judgment, and the case was brought here.

There had been two other trials. The rulings in which and the action of the circuit court of appeals are reported in 27 U. S. App. 605, and 49 U. S. App. 67.

The defendant assigns as error the action of the circuit court in instructing the jury to find for the plaintiff bank and in refusing the instructions requested by the defendant. The latter were nineteen in number, and present every aspect of the defendant's defense and contentions. They are necessarily involved in the consideration of the peremptory instruction of the court, and their explicit statement is therefore not necessary.

The evidence shows that the New York bank solicited the business of the Little Rock bank by a letter written by its second assistant cashier, directed to the cashier of the Little Rock bank, and dated June 21, 1892.

Among other things the letter stated: "If you will send on $50,000 of your good, short-time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent."

The reply from the Little Rock bank came, not from its cashier, but from its president, H. G. Allis, who accepted the offer and inclosed notes amounting to $50,728, among
[130] which *were three of the City Electric Railway Company, the maker of three of the notes in controversy. When first forwarded they were not indorsed, and had to be returned for indorsement. They were indorsed, and the letter returning them was signed by Allis. To the letter forwarding them the New York bank replied as follows:

New York, June 27th, 1892.

H. G. Allis, Esq., President, Little Rock, Ark.

Dear Sir: We have this day discounted the following notes contained in favor of the 24th inst., and proceeds of same placed to your credit.

The notes were enumerated, their amounts calculated and footed up and discount at 4 per cent deducted, and the proceeds, amounting to $50,216.48, placed to the credit of the Little Rock bank.

On July 6, 1892, the following telegrams were exchanged:

New York, July 6th, 1892.

First National Bank, Little Rock, Ark.:

Will give you additional fifty thousand on short time, well rated bills discounted at five per cent. Money rates are little firmer. Answer if wanted. U. S. Nat. Bank.

Little Rock, Ark., July 6, 1892.

United States Nat. Bank, N. Y.:

We can use fifty thousand additional at five per cent; will send bills to-morrow.

First Nat. Bank.

In accordance with the proposition thus made and accepted, H. G. Allis, as president, wrote on the 9th of July, 1892, to the New York bank a letter, inclosing what he denominated "prime paper, amounting to $50,301.88," and requested proceeds to be placed "to our credit and advise." These notes were discounted and acknowledged. Their proceeds, less discount, amounted to $49,641.68.

On July 26, 1892, the New York bank telegraphed:

*New York, July 26th, 1892. [131]

First National Bank, Little Rock, Ark.:

Can take fifty thousand more of your well-rated bills discounted at five per cent.

U. S. Nat. Bank.

To this H. G. Allis, as president, answered as follows:

Little Rock, Ark., July 29, 1892.

United States National Bank, New York City.

Gentlemen: Your telegram of the 26th, saying you could take $50,000 more short-time, well-rated paper, I placed before our board to-day.

While it is two weeks earlier than we need it, on account of the rate we will take it now, and I inclose herein paper as listed below; amount, $50,089.93.

Yours very truly,

H. G. Allis, President.

We hold collaterals subject to your order; see (pencil) notations on paper for rating.

H. G. Allis, Pr.

In the list of notes were two by the City Electric Street Railway Company and two by the McCarthy & Joyce Co., who were the makers of two of the notes in controversy. There was one by N. Kupferle for $5,000, "due Nov. 8, 1892." The significance of this will be stated hereafter.

These notes were discounted and the fact communicated to H. G. Allis, Esq., president, Little Rock, Ark.

The next letter contains notes for discount from the Little Rock bank, sent by its cashier, W. C. Denney. The proceeds amounted to $24,413.05, acknowledgment of which was made.

The next communication was about the notes in controversy. It was dated November 25, 1892, and was signed by W. C. Denney, cashier. The letter, however, inclosing the notes was sent by H. G. Allis, as president. The correspondence is as follows:

The First National Bank of Little Rock, Ark.

Nov. 25, 1892.

United States National Bank, New York City.

[132] Gentlemen: Kindly advise us if you can give us $25,000 more *in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

Yours very truly,
W. C. Denney, Cashier.

New York, Nov. 28, 1892.

Mr. W. C. Denney, Cashier, Little Rock, Ark.

Dear Sir: Yours of the 25th is to hand.

We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6 per cent.

Yours very truly,
H. C. Hopkins, Cashier.

Little Rock, Ark., Dec. 13, 1892.

United States Nat. Bank, New York City.

Gentlemen: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying $175,000 in demand loans on cotton, which we may have to carry two or three months longer.

We inclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

Yours very truly,
H. G. Allis, President.

Dickenson Hardware Co., due March 3	$2,500 00
Dickenson Hardware Co., due April 6	5,000 00
City Electric St. R'y Co., due April 10	5,000 00
[133] *City Electric St. R'y Co., due April 10	5,000 00
City Electric St. R'y Co., due April 10	5,000 00
McCarthy & Joyce Co., due May 10	5,000 00
McCarthy & Joyce Co., due April 10	5,000 00
	$32,500 00

We hold all collaterals recited subjected to your order and for your account.

New York, Dec. 16th, 1892.

H. G. Allis, Esq., Pres't, Little Rock, Ark.

Dear Sir: We have this day discounted the following notes contained in your favor of the 13th inst., and proceeds of same placed to your credit:

Dickinson Hardware Co. due M'ch 3, '93	$2,500	disc't	$32 08
Dickinson Hardware Co. due Ap'l 6, '93	5,000	"	92 50
City Electric St. R'y Co. due Ap'l 10, '93	5,000	"	95 83
City Electric St. R'y Co. due Ap'l 10, '93	5,000	"	95 83
City Electric St. R'y Co. due Ap'l 10, '93	5,000	"	95 83
McCarthy & Joyce Co. due Ap'l 10, '93	5,000	"	95 83
McCarthy & Joyce Co. due May 10, '93	5,000	"	120 83
Amount of notes	$32,500		
Less discount at 6%	628 73		
Proceeds	$31,871 27		

We inclose herewith note of Dickenson Hardware Co. $5,000 due Ap'l 6th for insertion of amount in body and return to us.

Yours truly, Jno. J. McAuliffe,
Ass't Cashier.

New York, December 17, 1892.

First National Bank, Little Rock, Arkansas:

Letter thirteen received notes discounted proceeds credited account.

United States National Bank.

*The First National Bank of Little Rock, Ark. [134]
Dec. 20, 1892.

United States National Bank, New York City.

Gentlemen: We have your favor of the 16th inst., inclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with $31,871.27, proceeds of $32,500.00 of discounts.

Yours very truly,
W. C. Denney, Cashier.

In the subsequent correspondence Allis takes part but once, and sent the following telegram December 21, 1892:

Little Rock, Ark., Dec. 21, 1892.

U. S. Nat'l Bank, N. Y.:

Can you discount thirty thousand country banks' paper secured by cotton thirty days no renewal desire to carry over holidays answer day message.

H. G. Allis, President.

Henry C. Hopkins, cashier of the New York bank, was called as a witness in its behalf, and after explaining the letters and telegrams which were sent by the banks, and the transactions which they detailed, testified that the dealings between the banks were such as take place between banks carrying on legitimate banking business, in the usual course of business, and that the notes were not discounted in any other way, and that the bank had no notice or intimation that the notes had not been regularly received by

the First National Bank or offered by it in the regular course of business or for the benefit of any person other than the bank or interested in the proceeds, and that the United States National Bank in its correspondence and dealings did not recognize H. G. Allis, W. C. Denney, or S. S. Smith personally or in any capacity than as representing the First National Bank; and that the transactions were solely with the First National Bank; and that the correspondence and transactions were usual for the president and
[135]cashier of a United States *national bank to carry on; and that the proceeds of the various discounted notes were withdrawn by the Little Rock bank in the regular course of business by its officers.

There was a detailed statement of the transactions between the banks attached to Hopkins's deposition which is not in the record, but instead thereof there appears the following:

"The account current here referred to began June 27, 1892, and continued until the suspension of business of the First National Bank. It shows almost daily entries of debit and credit. It shows that the several notes discounted by the United States National Bank and referred to in the depositions of the officers of that bank, being forty-nine in number, were charged against the account of the First National Bank by the United States National Bank at the several dates of their maturity. In two thirds of the instances where such charges were made the balance to the credit of the First National Bank on the books of the United States National Bank was sufficient to cover the charge. In other instances the balance to the credit of the First National Bank was insufficient to meet the charge at the time of the entry, and in the other instances the account of the First National Bank was in overdraft as shown by the books of the United States National Bank at the time the charge was made.

"The account shows that at the time of the suspension of the First National Bank the latter bank had a credit of $467.86 upon the books of the United States National Bank. Against this balance the notes in suit with protest fees were charged on the account April 17 and May 15, 1893, making the account show a balance in favor of the United States National Bank of $24,558.03.

"This is the paper marked '77' referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman and John J. McAuliffe, hereto annexed."

The record also shows that "J. H. Parker, president, Joseph W. Harriman, second assistant cashier, and John J. McAuliffe, assistant cashier, each testified to identically the same facts in the identical language as Henry C. Hopkins, and it is agreed that the depositions of Hopkins shall be treated as
[136]the deposition *of each of the said witnesses without the necessity of copying the deposition of each witness."

There was proof made of the protest of the notes.

There was testimony on the part of the plaintiff showing that it was the custom of the banks at Little Rock to rediscount through their presidents and cashiers until after a decision in the National Bank case of Cincinnati in January, 1893; after that it was done by resolution of the board of directors, and the banks of New York and other commercial cities commonly require that now.

By a witness who was cashier of the Little Rock bank from November, 1890, to October, 1891, Allis then being president, it was shown that it was the custom of the bank as to rediscounting notes for the cashier or assistant cashier to refer them to the president, and the president generally directed what amount and where to send them. Whether they were referred to the board of directors, the witness was unable to say.

On cross-examination the witness testified that when the discounts were determined on, the cashier or assistant cashier transacted the business. He, however, only remembered sending off one lot of discounts, Mr. Denney, the assistant cashier, usually carrying on the correspondence. He did not remember that the president ever did anything of that kind. "Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send to."

There were introduced in evidence "the reports or statements by the bank to the Comptroller of the Currency, showing the rediscounts and business of the bank, of date May 17, 1892, and July 12, 1892, as follows: The report of May 17 was sworn to by W. C. Denney, cashier, and attested by James Joyce, E. J. Butler, and H. G. Allis, directors, and showed 'notes and bills rediscounted, $16,-132.40.' The report of July 12th was sworn to by H. G. Allis, president, and attested by Charles T. Abeles, E. J. Butler, and John W. Goodwin, directors, and showed notes and bills rediscounted, $81,748.80."

The testimony on the part of the plaintiff in error showed* (we quote from brief of de-[137]
fendant in error) that "the notes never belonged to the First National Bank; that the three notes of the Electric Street Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the company to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted; that neither of the notes was ever passed upon by the discount board of the bank or appeared on the books of the bank; that after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes ($25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of $10,679.44; that Allis was at that time indebted to the Little Rock bank on individual notes for at least $50,000, and was continuously thereafter indebted to the bank until its failure."

As to the power of the president to direct rediscounts or to indorse the notes of the bank, E. J. Butler, N. Kupferle, and C. T. Abeles, who were directors of the bank at

the time of the transactions between it and the New York bank, testified respectively as follows:

(Butler): Was a pretty regular attendant at the board meetings during the year—at nearly all the meetings.

Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

A. Never that I knew of. I knew that when Colonel Roots was president he asked and received authority from the board to make rediscounts, but I do not know that Mr. Allis ever asked, and the board, when I was present—he never was given any authority to make rediscounts for the bank.

Q. Did he have authority from the bank to indorse its papers for rediscount?

A. No, sir; never that I was aware of.

On cross-examination he testified that he did not recollect of Allis asking for authority; that the question never came before the board as to discounts. He knew that there
[138] were discounts *made, but did not recollect any particular ones, but in case there were he would suppose they were on the authority of the board, given in his absence, but did not remember that the question was brought up at all.

Q. There are a couple of statements made by the bank (being the statements heretofore introduced by the plaintiff) of May 17, 1892, and July 12, 1892, to which you as a director certify, which show, one of May 17 shows rediscounts, $16,172.40, and the one of July 12, 1892, shows rediscounts, $81,748.-88. Did you sign these?

A. I couldn't say without referring to the original reports.

Q. These are the published reports, are they not?

A. They purport to be the published report, but I do not know anything about it. I was one of the directors at that time.

Q. That is one of the usual forms of the reports published in the papers, isn't it?

A. Yes, sir.

Q. You now tell the jury that you do not know anything about the extent of rediscounts made by it?

A. No, sir; I cannot remember.

Mr. Denney was cashier in 1892, and he supposed that Denney transacted the business as to indorsements and rediscounting, but did not know and did not recollect that Allis did. Did not hear of him indorsing the notes in suit until after the bank failed.

(Kupferle): Mr. Allis did not have the power from the board of directors of the bank to indorse its paper for rediscount.

Cross-examination: There was nothing said in the board about such power. The question was not brought before the board. The bank during that time rediscounted paper. The cashier generally attended to that. I knew that the bank was discounting paper. I recall once where the president requested of the board that the bank should borrow some money. That was in the fall of 1892. I knew that the bank had been discounting paper long before that and borrowing money before*that, and no authority had [139]
been asked of the board to do it. I knew that they were borrowing money and rediscounting paper continually.

Redirect: We had eleven or thirteen members of the board of directors; I forget which. Never less than eight or nine. There was seldom a meeting when all were present—a majority present.

Q. Did they at any time rediscount, or authorize the rediscounting of paper? Did they have that authority?

A. No, sir; that was not their business.

Q. Theirs was to discount paper for customers of the banks?

A. The daily offerings, yes, sir.

Did not know of Mr. Allis indorsing the name of the bank upon the paper for the purpose of rediscounting it.

Q. Did you, as a member of the board of directors, or otherwise, have any information that Mr. Allis was using the name of the bank upon his, or other people's paper, for accommodation?

A. No, sir, I never did.

Cross-examination:

Q. You didn't know he was using the name of the bank on the bank's paper?

A. No, sir.

Q. You knew he was discounting paper?

A. No, sir; it was not his place.

Q. Didn't the correspondence there show he was sending the paper for discount all over the country?

A. No, sir; I don't know anything about that.

Q. Wasn't it your business to know it?

A. I do not know.

Q. You was vice president and one of the directors?

A. Yes, sir. I never knew anything about it until the failure of the bank—that he ever used the bank's name."

(Abeles): Not while I was there (at the meetings of the board) was authority given to Allis as president to indorse or rediscount the notes of the bank. I do not think it was ever mentioned. I knew of the bank rediscounting paper, and*somebody was [140]
transacting that part of the business. I think I inquired of some of the directors who it was, and was told that the authority vested in the cashier. I do not recollect that I inquired of Allis or Denney.

(Cohn): Was not a director in 1892—was for ten years prior to that time, and Allis was president in 1891, but did not recollect that he had authority from the board to indorse its paper or to rediscount it.

Cross-examination: Knew that rediscounting was being done, but supposed it was being done by the cashier—didn't stop to inquire.

Redirect:

Q. Who was authorized in the bank to perform that duty?

A. I understood the cashier.

Cross-examination:

Q. How was he authorized?

A. By law.

Q. You are simply giving your legal opinion?

A. Well, I understood that was his authority.

Other facts are stated in the opinion of the court.

Upon filing the record the defendant in error made a motion to dismiss, which was postponed to the consideration of the merits.

Mr. **Sterling R. Cockrill** for plaintiff in error.

Messrs. **John Fletcher** and *W. C. Ratcliffe* for defendant in error.

In this case briefs were also allowed to be submitted in *David Armstrong, Receiver of the Fidelity National Bank of Cincinnati, Ohio, Appt.,* v. *Chemical National Bank of New York,* No. 279, by *Messrs. John W. Herron* and *Francis F. Oldham* for appellant and by *Messrs. William Worthington, George H. Yeaman,* and *George C. Kobbe* for appellee.

[140] *Mr. Justice **McKenna,** after making the above statement, delivered the opinion of the court:

1. To sustain the motion to dismiss, it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the circuit court of appeals is final. But one of the defendants (plaintiff in error), though a citizen of a different state from the plaintiff in the
[141] action* (defendant in error), is also a receiver of a national bank appointed by the Comptroller of the Currency and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy* v. *Gibson,* 8 Wall. 498 [19: 476]; *Re Chetwood,* 165 U. S. 443 [41: 782]; *Sonnentheil* v. *Christian Moerlein Brewing Co.* 172 U. S. 401 [*ante,* 492]. It is however, urged that such appointment was not shown. It was not explicitly alleged, but we think that it sufficiently appeared, and the motion to dismiss is denied.

2. Against the correctness of the action of the circuit court in instructing a verdict for the New York bank, it is urged that the discounting of the notes in controversy was for the personal benefit of Allis, and that the New York bank was charged with notice of it because of the nature of the transaction, the form of the notes and the order of the indorsements, and also because notice was a question of fact to be decided by the jury on the evidence.

It is also contended that the receiver was entitled to a judgment on the set-off. We will examine each of the propositions.

1. The argument to sustain this is that the facts detailed constitute borrowing money, and that borrowing is out of the usual course of legitimate banking business; and one who loans must at his peril see that the officer or agent who offers to borrow for a bank has special authority to do so. But is borrowing out of the usual course of legitimate banking business?

Banking in much, if not in the greater part of its practice, is in strict sense borrowing, and we may well hesitate to condemn it as illegitimate, or regard it as out of the course of regular business, and hence suspicious and questionable. "A bank," says Morse (sec. 2, Banks and Banking), "is an institution usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit to form a joint fund that shall be used by the institution *for its own benefit,* for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign, and domestic*bills of exchange, coin, [142]
bullion, credits, and the remission of money; or with both these powers, and with the privileges in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business."

This defines the functions: what relations are created by them? Manifestly those of debtor and creditor—the bank being as often the one as the other.

A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. "The first business of a banker is not to lend money *to* others but to collect money *from* others." Macleod, Banking, vol. 1, 2d ed. pp. 109, 110. And Gilbart defines a banker to be "a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another." Gilbart, Banking, vol. 1, p. 2.

The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons "to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand." And it had effect until 1772 (about thirty years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created—the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned.

But it may be said these views are elementary and do not *help to a solution of the [143]
question presented by the record, which is not what relation a bank has or what power its officers may be considered as having in its transactions with the general public, but what is its relation and what power its officers may be considered as having in its trans-

actions with other banks. Indeed, the question may be even narrower—not one of power, but one of evidence. If so, the views expressed are pertinent. They show the basis of credit upon which banks rest, and the necessity of having power to support it; maybe to extend it. Borrowing is borrowing, no matter from whom. Discounting bills and notes may require rediscounting them; buying bills and notes may require selling them again. Money may not be equally distributed. It is a bank's function to correct the inequality. The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis* v. *Leavitt*, 15 N. Y. 1; *First National Bank* v. *National Exchange Bank*, 92 U. S. 122 [23: 679]; *Cooper* v. *Curtis*, 30 Me. 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities.

It is claimed, however, that *Western National Bank* v. *Armstrong*, 152 U. S. 346 [38: 470], establishes the contrary, and decides the proposition contended for by the plaintiff in error. We do not think it does. Some of its language may seem to do so, but it was used in suggestion of a question which might be raised on the facts of the case, without intending to authoritatively decide it. The facts of that case are different from the facts of the pending one, and in response to its citation we might rest on the difference. But plaintiff in error urges the case so earnestly and confidently that we have
[144] considered *it better to answer the argument on which it is asserted to be based and remove misapprehension of the extent of the decision.

2. Did the form of the notes or the order of indorsements charge the New York bank with inquiry of Allis's authority or with knowledge of his use of them for his personal benefit?

It may be conceded that an individual negotiating for the purchase of a bill or note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself. These principles are established by *West St. Louis Savings Bank* v. *Shawnee County Bank*, 95 U. S. 557 [24: 490]; *Central Bank of Brooklyn* v. *Hammett et al.*, 50 N. Y. 158; *New York Iron Mine* v. *First Nat. Bank*, 39 Mich. 644; *Lee* v. *Smith*, 84 Mo. 304 [54 Am. Rep. 101]; *Park Hotel Co.* v. *Fourth National Bank* [58 U. S. App. 674], 86 Fed. Rep. 742; *Claflin* v. *Farmers' & C. Bank*, 25 N. Y. 293.

But it is not meant that circumstances may not explain the notes or may not relieve the taker from the obligation of inquiry. If the order of indorsements and Allis's official position and his relation to the notes were circumstances to be considered, they were not necessarily controlling against all other circumstances, and compelled inquiry as a peremptory requirement of law.

3. In judging of the conduct and rights of the New York bank the question is not what actual authority Allis had, but what appearance of authority he had, or rather what appearance of authority he was given or permitted by the directors.

In the inquiry there is involved the two preceding propositions as questions of fact, or of mixed law and fact. The first—the power of a bank to rediscount its paper—as to what the course of dealing of the contending banks was; the second—the form of the notes and their order of indorsements as notice—whether relieved by the circumstances which attended them and the transactions which preceded them.

The evidence shows that it was not only the custom of the defendant bank to rediscount its paper but that it was *the [145]
custom of the other banks at Little Rock to do so, and the officers of the New York bank testified as follows:

Q. Were there any of the dealings between said banks (the parties to this action) other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

A. No.

Q. Were the correspondence and transactions carried on by H. G. Allis and W. C. Denney, as you have disclosed, such as are usual for the president and cashier of a United States national bank to carry on and exercise?

A. Yes.

This testimony certainly has very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks rediscounting paper was in the usual course of their business, and that besides it was the usual course of business in their respective localities. Therefore the discounting of the notes in controversy carried the sanction of such business.

It is contended that the notes gave notice of the want of authority to rediscount them because the indorsement of the bank followed that of Allis, and hence showed that the bank was an accommodation indorser, and because the indorsement of the bank was by its president and not by its cashier.

The order of indorsements did not necessarily import that the Little Rock bank was an accommodation indorser. The order was a natural one if the notes had been discounted in the regular course of business. It is not contended that a want of power precluded the bank from discounting the notes of its officers. It had been done for one of the directors, and his note was rediscounted by the New York bank. It had an example therefore in the dealings of the parties, and,

besides, was neither wrong nor unnatural of itself. But it was further relieved from question, and any challenge in the indorsements was satisfied by the circumstances.

It is to be remembered that the discounting the notes in controversy was not the only transaction between the banks. It was one of many transactions of the same kind.
[146] They *justified confidence, and it was confirmed by the manner in which the notes were presented. It is conceded that the cashier had the power to rediscount the bank's paper, and it was he who solicited the accommodation on account of which the notes were sent to the New York bank. The notes themselves, it is true, were sent by Allis, but expressly on the part of the bank, and subsequent correspondence about them was conducted with the cashier, as we have seen. And there could have been no misunderstanding. The letter of the New York bank which the cashier of the Little Rock bank answered was specific in the designation of the notes, their sum and the proceeds of the discount, and returned one of the notes not in controversy to be corrected. To this the cashier replied:

Dec. 20, 1892.

United States National Bank, New York City.

Gentlemen: We have your favor of the 10th inst., inclosing the Dickenson Hardware Company note for completion, which we herewith return.

We charge your account with $31,871.27 proceeds of $32,500.00 of discounts.

Yours very truly,
W. C. Denney, Cashier.

Notice was therefore brought to him and to the bank of the transaction and almost inevitably of its items. Was he deceived as to the notes which had been sent? It is not shown nor is it suggested how such deception was possible, and a presumption of ignorance cannot be entertained. Therefore, if the discounts he wrote about in his letter of the 20th of December were not in pursuance of those he had requested in his letter of November 25, he ought to have known and ought to have so said. If he had so said, the New York bank could have withdrawn the credit it had given, and Allis's wrong could not have been committed.

The strength of these circumstances cannot be resisted. Against them it would be extreme to say that the New York bank was put to further inquiry. Of whom would it have inquired? Not of Allis, the president
[147] of the Little Rock *bank, because his authority would have been the subject of inquiry. Then necessarily of the cashier; but from the cashier it had already heard. He began the transaction: he acknowledged its close, accepting the credit which had been created for the bank of which he, according to the argument, was the executive officer. We can discover no negligence on the part of the New York bank. The dealing with the notes in controversy came to it with the sanction of prior dealings with other notes. It was conducted with the same officers. It was no more questionable. The relation of Allis to it, we have seen, was not unnatural, and if the indorsement of other notes was not shown to be by him, it was not shown not to have been by him. The testimony of the officers of the New York bank was that the notes were received and discounted in the regular course of business, and in no way different from the other notes discounted by it for the Little Rock bank, and that they knew the notes were properly indorsed by one of the duly authorized officers of the First National Bank; but as the notes were not in their possession, they were unable to state the name of the officer. The testimony opposed to this, if it may be said to be opposed, is negative and of no value. Some of the directors testified that Allis did not have the power nor did they know of his having indorsed the bank's paper for rediscount. They knew, however, that the bank's paper was rediscounting in large amounts, and that money was borrowing continually, but they scarcely made an inquiry, and one of them testified that only in a single instance did Allis request the board for power to borrow money. The instance is not identified, except to say that it was in the fall of 1892. Of whom, in what amount, whether the request was granted or denied, what inquiry was made, what review of the business of the bank was made, there was absolute silence about. They surrendered the business absolutely to the president and cashier, and intrusted the manner of the execution to them. This court said by Mr. Justice Harlan, in *Martin* v. *Webb*, 110 U. S. 15 [28: 52]: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on *around them. It is their duty to use [148]
ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declaration of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Under section 5136, Revised Statutes, it was competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank, and, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and executed as authorized. *Briggs* v. *Spaulding*, 141 U. S. 132 [35: 662]; *People's Bank* v. *Manufacturers' National Bank*, 101 U. S. 181 [25: 907]; *Davenport* v. *Stone*, 104 Mich. 521; *First National Bank of Kalamazoo* v. *Stone*, 106 Mich. 367; *Houghton* v. *The First National Bank of Elkhorn*, 26 Wis. 663 [7 Am. Rep. 107]; *Thomas* v. *City National Bank of Hastings*, 40 Neb. 501 [24 L. R. A. 263].

4. Set-off is the discharge or reduction of one demand by an opposite one. That of plaintiff in error was so applied and the amount due on the notes reduced. He was entitled to no other relief.

Scott v. *Armstrong*, 146 U. S. 499 [36: 1059], does not apply. In that case it was held that a debtor of an insolvent national bank could set off against his indebtedness to the bank, which became payable after the bank's suspension, a claim payable to him before the suspension. And it was further held that the set-off was equitable, and therefore not available in a common-law action.

But in this case the plaintiff in error pleaded the set-off. His right to do so was derived from the law of Arkansas, and that law provided: "If the amount set off be equal to the plaintiff's demand, the plaintiff shall recover nothing by his action; if it be less than the plaintiff's demand, he shall
[149]have *judgment for the residue only." (Gould's Arkansas Digest of Statutes, 1020.) The law was complied with.

It follows that the Circuit Court did not err in instructing the jury to find for the plaintiff (defendant in error), and *judgment is affirmed.*

UNITED STATES, *Plff. in Err.*,

v.

ONE DISTILLERY *et alia* and Henry Wolters, William Helm, R. H. Austin, and J. H. Coffman, Claimants.

(See S. C. Reporter's ed. 149-152.)

When judgment dismissing an information will be affirmed—proof that the property was forfeited.

1. A judgment dismissing an information for the forfeiture of property, upon the ground that the answer is admitted to be true, will be affirmed if a sufficient ground is disclosed in the record, although the ground of dismissal was insufficient.
2. Where there was no proof of the fraudulent acts forfeiting the property, alleged in the information and denied in the answer, the judgment of dismissal will be affirmed.

[No. 190.]

Argued April 6, 1899. Decided April 24, 1899.

IN ERROR to the Circuit Court of the United States for the Southern District of California to review a judgment of that court affirming a judgment of the District Court of the United States for the Southern District of California dismissing an information filed in the last-named court to obtain a decree that certain real and personal property which had been seized by a collector of internal revenue was forfeited to the United States. *Judgment of the Circuit Court affirmed.*

See same case below, 43 Fed. Rep. 846.

The facts are stated in the opinion.

Mr. **James E. Boyd,** Assistant Attorney General, for the plaintiff in error.

Messrs. **Samuel G. Hilborn,** and *Frederic W. Hall* for defendant in error.

[149] *Mr. Justice **Harlan** delivered the opinion of the court:

This was an information filed November 13, 1888, in the district court of the United States for the southern district of California to obtain a decree declaring that certain real and personal property which had been seized by a collector of internal revenue was forfeited to the United States.

The information was based upon sections 3257, 3281, 3305, 3453, and 3456 of the Revised Statutes.

The property in question once belonged to the Fruitvale Wine & Fruit Company, a corporation of California. The acts that were set forth as constituting the grounds of forfeiture *were recommitted, if at all, while [150]
that corporation owned the property. Subsequently, June 9, 1888, the property was purchased by Wolters, Helm, Austin, and Coffman at a public sale thereof by the assignee of the company—the consideration, $7,700, being paid in cash to the assignee. They appeared and filed a demurrer to the original information. The demurrer was confessed, and an amended information was filed January 11, 1889.

Wolters, Helm, Austin, and Coffman on the 19th day of April, 1889, filed an answer to the amended information, controverting its material allegations. The answer contained these among other averments: "That they [the claimants] have not sufficient information in regard to the several wrongful acts alleged to have been perpetrated by said corporation on which to found a belief; they therefore, on behalf of said corporation, deny all and singular the alleged fraudulent acts charged in said information as having been done and performed by said corporation."

On the 21st day of August, 1890, the claimants filed an amendment of their original answer, in which they averred that in December, 1888, W. Moore Young, who was secretary of the Fruitvale Wine & Fruit Company, and one of the owners of the property in question when the acts complained of in the original and amended information were committed, was indicted in the same court, and was convicted and sentenced to imprisonment for one year in the county jail. The claimants further averred that the acts complained of in this case were the same as those relied on by the government in its prosecution against Young, and that because of the proceedings and judgment against Young the United States ought not to maintain its present action. The amended answer concluded: "These claimants aver the foregoing in addition to their answer already on file herein, and expressly rely, not only upon this, but upon all of the allegations and denials contained in said original answer. And having fully answered, they pray as they have heretofore prayed in said original answer."

The demurrer to the amended answer was overruled by an order entered October 20, 1890, and an exception was taken *by the [151]
United States to the action of the court. 43 Fed. Rep. 846. On the next day the following decree was entered: "This cause came on regularly for trial before the court, sitting without a jury, a jury trial having been expressly waived in writing, the United

States being represented by Willoughby Cole, Esq., United States attorney, and the claimants by Messrs. Brousseau and Hatch, and Henry C. McPike, Esq. Whereupon the United States attorney announced to the court that the facts set forth in the amended and supplemental answer heretofore filed by the claimants in this action, and to which a demurrer had been interposed by the United States and overruled by the court, might be considered by the court and taken as true for the purposes of this trial, as if the said facts had been proved by competent witnesses, but that they were insufficient in law to constitute a defense to this action. Thereupon the United States, by their said attorney, and the claimants by their attorneys aforesaid, submitted the cause to the court for its decision upon the pleadings in said cause and the said amended and supplemental answer, the facts as to the matter, as already stated, being taken as true, the court, after considering the same, orders and decrees that the libel herein be, and the same is hereby, dismissed."

The case was carried to the circuit court, and was pending there at its January term, 1891. On the 23d day of February, 1897, the judgment of the district court was affirmed.

It is contended on behalf of the government that the amended and supplemental answer did not present a valid defense, and therefore that the circuit court erred in affirming the judgment of the district court. But if, independently of the particular question raised by the amended and supplemental answer, the judgment of the district court dismissing the information was right upon any ground disclosed upon the record, the judgment of the circuit court affirming the judgment of the district court should not be held to have been erroneous.

It cannot be doubted that by the information and the original answer the distinct is-
[152] sue was presented, whether the property *in question was forfeited to the United States by reason of the wrongful and fraudulent acts specified in the information. The answer put the government upon proof of those acts. No proof was however made by the government to establish the alleged grounds of forfeiture. Nevertheless, *the cause* was submitted for *decision*, not only upon the facts set forth in the amended and supplemental answer, taking them to be true, but *upon the pleadings*. So that even if the district court had been of opinion that the amended and supplemental answers were insufficient in law, it still remained for it to determine the rights of the parties upon the information and the original answer. As the original answer controverted the material allegations of the information, and as the cause was submitted for decision upon the pleadings, without any proof to sustain the allegations of fraudulent acts forfeiting the property, the final order dismissing the information was proper. If the claimants had withdrawn their denials of such allegations of the information as set forth the grounds upon which the government asserted the forfeiture of the property in question, it would then be necessary to consider whether the conviction of Young precluded the United States from proceeding by information against the property. But the claimants did not take that course. They were careful in the amended and supplemental answer to say, not only that the facts therein alleged were in addition to those set forth in their original answer, but that they relied upon the denials contained in the original answer.

Without considering the merits of the question raised by the amendment of the answer, we affirm the judgment of the circuit court upon the ground that there was no proof in the case to overcome the denials in the original answer or the averments of the information, and to show, as against the claimants, that the property had been forfeited. *Affirmed.*

AMEDEE D. MORAN *et al.*, Purchasing Trustees, *Petitioners*, [153]
v.
CHARLES DILLINGHAM.

(See S. C. Reporter's ed. 153-158.)

When judge before whom cause is heard is disqualified to sit on appeal.

A judge who appointed a receiver in a foreclosure suit, and made an order allowing him a monthly sum for services, and also rendered the final decree of foreclosure and decrees for delivery of possession, is disqualified, by the act of Congress of March 3, 1891, chap. 517, § 3, to sit in the circuit court of appeals, on an appeal from the decree of another judge concerning the monthly compensation of the receiver after a certain compromise between him and the purchasers on the foreclosure.

[No. 243.]

Submitted April 17, 1899. Decided May 1, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree of that court sustaining exceptions to the master's report, and reversing the decree of the Circuit Court of the United States for the Northern District of Texas, etc. *Decree of Circuit Court of Appeals set aside and quashed*, and the case remanded to that court to be heard and determined by a bench of competent judges.

See same case, 52 U. S. App. 425, and 169 U. S. 737.

The facts are stated in the opinion.

Mr. **L. W. Campbell** for petitioners.

Messrs. **George Clark** and *D. C. Bolinger* for respondent.

*Mr. Justice **Gray** delivered the opinion of the court: [153]

This is a writ of certiorari heretofore granted by this court under the act of March 3, 1891, chap. 517, § 6, to review a decree made by Judge Pardee and Judge Newman

in the circuit court of appeals for the fifth circuit upon an appeal to that court from the circuit court of the United States for the northern district of Texas.

The leading question presented by the writ of certiorari is whether Judge Pardee was disqualified to sit at the hearing of that appeal by the provision of § 3 of that act, "that no justice or judge before whom a cause or question may have been tried or heard in a district court or existing circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals." 26 Stat. at L. 827.

If Judge Pardee was so disqualified, the decree in which he took part, even if not absolutely void, must certainly be set aside and quashed, without regard to its merits.
[154]*American *Construction Co.* v. *Jacksonville, T. & K. W. Railway Co.* 148 U. S. 372, 387 [37: 486, 492].

The material facts bearing upon the question of his disqualification, as appearing by the record now before this court, are as follows:

Upon a bill in equity, filed April 2, 1885, in the aforesaid circuit court of the United States, by the Morgan's Louisiana & Texas Railroad & Steamship Company against the Texas Central Railway Company, to foreclose a mortgage of its railroad and other property, Judge Pardee, on April 4, 1885, made an order, appointing Benjamin G. Clark and Charles Dillingham joint receivers of the property, and appointing John G. Winter special master as to all matters referred or to be referred to him in the cause.

Upon a petition filed in that cause by Dillingham, representing that he had been the active receiver for seventeen months, and praying for an allowance for his services as such, Judge Pardee, on December 4, 1886, made an order "that the receivers be authorized and directed to place Charles Dillingham upon the pay roll of the receivers for the sum of one hundred and fifty dollars per month, as an allowance upon his compensation as receiver in this cause; this allowance to date from the possession of the receivers, and to continue while Mr. Dillingham gives his personal attention to the business of the company or until the further order of the court."

On April 12, 1887, Judge Pardee made a final decree in the cause, for the foreclosure of the mortgage; for the sale of the mortgaged property by auction; and for the payment by the purchasers of "all the indebtedness of the receivers incurred by them in this cause, including all the expenses and costs of the receivers' administration of the property," "and also the compensation of the receivers and their solicitors;" appointing Dillingham and Winter special master commissioners to make the sale, and to execute and deliver a deed to the purchasers; and reserving the right to any party to the cause, as well as to the receivers and master commissioners, to apply to the court for orders necessary to carry that decree into execution. Appeals from that decree were taken by the
[155]Morgan's *Louisiana & Texas Railroad & Steamship Company and by the Texas Central Railway Company to this court, which on November 24, 1890, affirmed that decree. 137 U. S. 171 [34: 625].

Pursuant to that decree, on April 22, 1891, all the property mortgaged, except some not immediately connected with the railroad, was sold to Moran, Gold, and McHarg, trustees for bondholders. On their petition filed in the cause, Judge Pardee, on August 28, 1891, made a decree directing Dillingham and Clark, receivers, to execute and deliver a deed, and to deliver possession, to the purchasers, of all the property, real and personal, of the Texas Central Railway Company, in the state of Texas, used for and pertaining to the operation of its railway; and providing "that nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties; such litigation shall continue to determination in the name of said receivers, with the right reserved to said purchasers, should they be so advised, to appear and join in any such litigation; and nothing in this decree contained is intended to affect, or shall be construed as affecting, the receivership of any of the property of the defendant railway company other than the property so transferred to said purchasers, possession of which said property other than that so transferred is retained for further administration, subject to the orders of this court;" and "that said purchasers or said receivers may apply at the foot of this decree for such other and further relief as may be just." The property was accordingly delivered to the purchasers in September, 1891. On November 6, 1891, on like petition of the purchasers, Judge Pardee made a similar decree, except in directing the deed to the purchasers to be executed and delivered by Dillingham and Winter, special master commissioners, and in other particulars not material to be mentioned.

Dillingham afterwards, and until April, 1895, continued to draw and pay to himself the sum of $150 a month, and returned quarterly accounts to the master crediting himself with those sums. On August 25, 1891, he presented a petition, entitled in the cause, to the master, praying him to "make *to him such an allowance for his services as [156]
receiver in the above-entitled cause, from the date of his appointment until his discharge, as to said master may seem just and proper." About the same time, a compromise was made between him and the purchasers, pursuant to which he was paid, in addition to the allowance of $150 a month for the past, the sum of $20,000 for services as receiver; and he signed a paper, entitled in the cause, acknowledging that he had received from them the sum of $20,000 "in full of my fees and charges as receiver of the Texas Central Railway Company, as per agreement." At the hearings before the master upon Dillingham's accounts it was contested between him and the purchasers whether he was entitled to $150 monthly since the compromise. The master reported that he was; and exceptions by the purchasers to his report were referred

on April 8, 1895, by order of Judge McCormick, to Abner S. Lathrop, as special master, who by his report, filed September 26, 1896, found that Dillingham was entitled to the monthly allowance of $150 until April, 1893, but was not entitled to it from April, 1893, to April, 1895. That report, on exceptions taken by the purchasers and by Dillingham, was confirmed by the decree of Judge Swayne on December 5, 1896; and from that decree Dillingham took an appeal to the circuit court of appeals.

All the proceedings above stated were filed in and entitled of the cause of *Morgan's Louisiana & Texas Railroad & Steamship Company* v. *Texas Central Railway Company.*

The appeal of Dillingham was heard in the circuit court of appeals by Judge Pardee and Judge Newman, who, for reasons stated in their opinion, delivered by Judge Newman, sustained Dillingham's exceptions to the master's report, reversed the decree of Judge Swayne, and remanded the cause to the circuit court "with instructions to overrule and discharge the motions attacking the receiver's accounts." 52 U. S. App. 425, 432. Moran, Gold, and McHarg, the purchasing trustees, thereupon applied for and obtained this writ of certiorari. 169 U. S. 737.

The intention of Congress, in enacting that
[157] no judge before *whom "a cause or question may have been tried or heard," in a district or circuit court, "shall sit on the trial or hearing of such cause or question," in the circuit court of appeals, manifestly was to require that court to be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the court of the first instance. Whatever may be thought of the policy of this enactment, it is not for the judiciary to disregard or to fritter away the positive prohibition of the legislature.

The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. And, as "a cause," in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part, in the circuit court of appeals, at the hearing and decision of the cause or of any question arising therein. But, however that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question, in the same cause, which involves in any degree matter upon which he had occasion to pass in the lower court.

In the present case, all the decrees and orders of Judge Pardee in the circuit court, as well as the decree of Judge Swayne from which the appeal in question was taken, were made in and entitled of the original cause of the bill in equity to foreclose the mortgage of the Texas Central Railway Company. The order appointing Dillingham and Clark receivers upon the filing of the bill, the order allowing Dillingham for his services as receiver the sum of $150 a month from his taking possession and "while he gives his personal attention to the business of the company or until the further or-
der of the *court," the final decree of fore- **[158]**
closure and sale, and the decrees for delivery of possession to the purchasers, were all made by Judge Pardee; and the appeal, in the hearing and decision of which he took part, from the decree of another judge concerning the compensation of Dillingham as receiver, involved a consideration of the scope and effect of his own order allowing that receiver a certain sum monthly.

The necessary conclusion is that Judge Pardee was incompetent to sit on the appeal in question, and the decree in which he participated was not made by a court constituted as required by law; and therefore this court, without considering whether that decree was or was not erroneous in other respects, orders the—

Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.

MAUDE E. KIMBALL, *Plff. in Err.*,
v.
HARRIET A. KIMBALL, John S. James, and Harriet I. James.

(See S. C. Reporter's ed. 158–163.)

When writ of error to state court will be dismissed—this court will not decide moot questions.

1. Where one claiming to be the widow applied to be appointed administratrix of the estate of a deceased person and to revoke letters of administration issued to others, and the surrogate decided that she was not the widow of the intestate, and that her marriage was void by reason of the invalidity of a decree of divorce rendered in another state purporting to dissolve a former marriage, and the surrogate's decision was affirmed by the appellate courts of the state, a writ of error from this court to the state court will be dismissed, if a will of the deceased is subsequently found, which is admitted to probate, and letters testamentary issued thereon by the surrogate, and the letters of administration revoked, although such dismissal will leave plaintiff in error bound by the adjudication of the state courts that she was not the widow of the deceased.
2. This court cannot decide moot questions; and neither laches nor consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief.

[No. 248.]

Argued April 19, 1899. Decided May 1, 1899.

IN ERROR to the Surrogate's Court of the County of Kings, State of New York, to review a decree of that court adjudging that Maude E. Kimball was not the widow of Edward C. Kimball, nor entitled as such to letters of administration of his estate, and dismissing her petition praying that such letters of administration be issued to her, etc. There was also a motion to dismiss. *Writ of error dismissed.*

See same case below, 18 App. Div. 320, and 155 N. Y. 62.

The facts are stated in the opinion.

Messrs. **George Bell**, *Waldegrave Harlock*, and *Henry W. Scott* for plaintiff in error.

Mr. **Lemuel H. Arnold** for defendants in error.

[159] *Mr. Justice **Gray** delivered the opinion of the court:

This action was begun December 18, 1896, by a petition of Maude E. Kimball, claiming to be the widow of Edward C. Kimball (who resided in Brooklyn, and died there, without issue, on November 9, 1896) to the surrogate's court of the county of Kings in the state of New York, praying that letters of administration granted by that court on November 10, 1896, to his mother and his brother-in-law, upon a petition representing that he died intestate and unmarried. be revoked, and that this petitioner be appointed administratrix.

The administrators previously appointed, being cited to show cause why the prayer of her petition should not be granted, filed an answer, denying that she was the widow of the deceased.

At the hearing in the surrogate's court, it was proved and admitted that Edward C. Kimball and the petitioner went through the ceremony of marriage at Brooklyn on June 29, 1895; that she had been married on May 12, 1885, to James L. Semon in the city of New York; that on September 25, 1890, she commenced a suit against Semon in a court of the state of North Dakota for a divorce on the ground of his desertion; that the summons in that suit was not served upon him in North Dakota, but was served upon him in the state of New York on October 15, 1890; that on January 26, 1891, that court rendered a decree of divorce against him as upon his default; that she was living in North Dakota from June 5, 1890, to February 5, 1891; that when she brought her suit for divorce, and ever since, Semon was a resident of the state of New York; and that on December 16, 1896, that court, upon his application and after notice to her, amended the decree of divorce by striking out the statement of his default. and by stating, in lieu thereof, that he had appeared and answered in the suit. Copies of the record of the proceedings for divorce were produced; and the principal matter contested in the surrogate's court was the validity of the divorce.

[160] *The surrogate's court held that the decree of divorce and the marriage of the petitioner to the intestate were absolutely void at the time of his death, and were not rendered valid by the subsequent amendment of the decree of divorce; and by a decree dated March 8, 1897, adjudged that the petitioner was not the widow of Edward C. Kimball, nor entitled as such to letters of administration of his estate; and further adjudged that her petition be dismissed. On April 5, 1897, the petitioner appealed from that decree to the appellate division of the supreme court of the state of New York, which on June 22, 1897, affirmed the decree. *Re Kimball*, 18 App. Div. 320. From the decree of affirmance, the petitioner on August 19, 1897, appealed to the court of appeals of the state of New York; and that court, on February 4, 1898, affirmed the decree, and ordered the case to be remitted to the surrogate's court. 155 N. Y. 62.

The petitioner sued out this writ of error, and assigned for error that the courts of New York had not given due faith and credit to the decree of the court of North Dakota.

The writ of error was entered in this court on February 21, 1898. On March 22, 1898, the defendants in error moved to dismiss the writ of error, because of the following facts, proved by them, and admitted by the plaintiff in error, namely: On March 25, 1897, on a petition of the mother and sister of Edward C. Kimball, representing that his last will and testament, dated July 7, 1890, devising and bequeathing to them all his property, real and personal, and appointing them executrices thereof, had just been found, the surrogate's court, upon due proof of its execution and attestation, entered a decree admitting the will to probate, ordering letters testamentary to be issued to the executrices, and revoking the letters of administration which had been granted to the mother and the brother-in-law on November 10, 1896. The entry of the decree of March 25, 1897, was notified by the counsel of the present defendants in error to the counsel of the plaintiff in error on the day on which it took place.

The motion to dismiss was opposed by the plaintiff in error, upon the grounds that the judgment below involved a Federal *question [161]
within the jurisdiction of this court; that a dismissal of the writ of error would leave the plaintiff in error bound by the adjudication below that she was not the widow of the deceased; that the admission of the will to probate had no bearing on the question before this court; and that the defendants in error had been guilty of laches in not sooner making a motion to dismiss.

The consideration of the motion to dismiss the writ of error was postponed until the hearing upon the merits, and now presents itself at the threshold.

The rule which must govern the disposition of this motion has been often stated and acted on by this court.

In a comparatively recent case, pending a writ of error to reverse a judgment for a railroad corporation in an action against it by a state to recover sums of money for taxes, it was shown that the defendant had

made a tender of those sums to the state, and a deposit of them in a bank to its credit, which by statute had the same effect as actual payment and receipt of the money. Stipulations had been made in other similar cases that they should abide the judgment of this court in this case; and the Attorney General of the state contended that a determination of the question whether the tax was valid was of the utmost importance to the people of the state. But this court dismissed the writ of error, saying: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard." *California* v. *San Pablo & Tulare Railroad Co.* 149 U. S. 308, 314 [37: 747, 749].

[162] *Again, in a still more recent case, this court, upon a review of the previous decisions, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Mills* v. *Green,* 159 U. S. 651, 653 [40: 293, 294].

From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden,* 113 U. S. 222, 225, 226 [28: 981, 982]; *Mills* v. *Green,* above cited.

The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a circuit court of the United States, on which the jurisdiction of this court extends to the whole case. The rule was applied to a writ of error to the court of errors and appeals of the state of New Jersey in *Little* v. *Bowers,* 134 U. S. 547 [33: 1016].

In the present case, the subject-matter of the petition to the surrogate's court, and the only relief which could be granted upon that petition, were the revocation of the letters of administration previously issued to the mother and the brother-in-law of the deceased, and the grant of new letters of administration to the petitioner. The decree admitting the will to probate, in terms, revoked the former letters of administration, and, by its legal effect, superseded the necessity and the possibility of granting any letters of administration as of an intestate estate to the petitioner or to anyone *else. New [163]
York Code of Civil Procedure, §§ 2476, 2626, 2684. The whole subject-matter of the writ of error is thus withdrawn, and the writ of error must be dismissed for want of anything upon which it can operate. *Chicago D. & Vincennes Railroad Co.* v. *Fosdick,* 106 U. S. 47, 84 [27: 47, 65]; *San Mateo County* v. *Southern Pacific Railroad Co.* 116 U. S. 138 [29: 589]; *Washington Market Co.* v. *District of Columbia,* 137 U. S. 62 [34: 572].

The question whether the petitioner was or was not the widow of the deceased, whatever importance it may have in the determination of other controversies in which she may be interested, is a moot question in this case in the present condition of things; for, however that question should be decided, the petitioner cannot obtain letters of administration, and the letters of administration granted to other persons have been revoked.

The objection of laches is of no weight. No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief. *Little* v. *Bowers,* 134 U. S. 558, 559 [33: 1021]; *California* v. *San Pablo & Tulare Railroad Co.* above cited. The probate of the will was granted, and was known to both parties to this suit, ten days before the petitioner appealed from the decree of the surrogate's court. Yet neither party appears to have requested the surrogate to modify the form of his decree against the petitioner. Had the probate of the will been brought to the notice of either of the appellate courts of the state of New York. that court might probably have dismissed the case, for the reason that its decision could not be made effectual by a judgment. *People* [*ex rel. Kingsland*], v. *Clark,* 70 N. Y. 518, 520. The neglect of both parties to bring that fact to the notice of those courts affords no reason for this court's assuming to decide a question, the decision of which cannot affect the relief to be ultimately granted in this case.

Writ of error dismissed.

SAMUEL NELSON, *Plff in Err.,* [164]
v.
DENNIS MOLONEY.

(See S. C. Reporter's ed 164-168.)

Error in remanding case to state court.

Error of a circuit court in remanding a case to a state court is not a ground for a writ of error to review the subsequent decision of the case by the state court.

[No. 767.]

Submitted April 17, 1899. Decided May 1, 1899.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court for the foreclosure of a mortgage in an action brought by Dennis Moloney against Samuel Nelson and others, after its affirmance by the Appellate Division and the Court of Appeals of the State. On motion to dismiss or affirm. *Dismissed.*

See same case below, 158 N. Y. 351.

Statement by Mr. Chief Justice **Fuller:**

This was a suit brought by Dennis Moloney against Samuel Nelson, Albert J. Adams, and others, in the supreme court of New York, city and county of New York, to foreclose a mortgage on real estate given Moloney by Nelson to secure a bond for ten thousand dollars in indemnification of Mo-
[165] loney against *loss by reason of becoming bail for one O'Brien. The judge before whom the case was tried found the facts as follows:

"I do find that in the month of October, 1891, one Thomas O'Brien was under arrest and confined in Albany county jail, charged with the crime of grand larceny in the first degree, and that on the 16th day of October, 1891, he was discharged from custody on giving a certain bail bond or recognizance in the sum of ten thousand dollars executed by himself, the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, conditioned that the said Thomas O'Brien should appear and answer the said charge in whatever court it may be prosecuted.

"That the defendant, Samuel Nelson, in order to induce the plaintiff to enter into said recognizance, agreed to indemnify him against liability thereunder, and the plaintiff relying upon said agreement and not otherwise entered into and executed the same as aforesaid and the said defendant, Samuel Nelson, immediately thereafter and in fulfilment of said agreement, did execute and deliver to the plaintiff, Dennis Moloney, the bond and mortgage set up in the complaint in this action, which said mortgage was thereafter and on the 17th day of October, 1891, duly recorded in the office of the register of the city and county of New York.

"That thereafter and on the 2d day of November, 1891, the said Thomas O'Brien was called upon in the county court of Albany county to appear and answer the indictment above referred to, but did not appear and the bail bond or recognizance executed by said O'Brien, the plaintiff, Dennis Moloney, and the defendant, Samuel Nelson, was, on said 2d day of November, 1891, declared forfeited.

"That thereafter and before the commencement of this action, an action was brought by the people of the state of New York against the plaintiff, Dennis Moloney, and the defendant, Samuel Nelson, to recover upon said forfeited bail bond or recognizance, and on the 8th day of December, 1891, judgment in said action was duly entered in favor of the people of the state of New York against the defendant, Samuel Nelson, and the plaintiff, Dennis Moloney, for the sum of ten thousand and twenty-seven 13-100 ($10,027.13) dollars, and the judgment roll *duly [166]
filed in the office of the clerk of Albany county on said date.

"That thereafter executions upon said last-mentioned judgment were duly issued to the sheriff of Albany county and the plaintiff's property was sold under said execution, and the entire amount of said judgment paid wholly by the plaintiff.

"That no part of the sum of ten thousand dollars secured by said bond and mortgage has been paid to the plaintiff, and defendants agreed and consented on the trial of this action that interest upon said sum of ten thousand dollars should be computed from the 5th day of June, 1893."

And thereupon judgment of foreclosure and sale for the amount due and for payment of any deficiency was entered.

Before this suit was commenced Moloney had brought a similar suit against Nelson and recovered judgment, which was reversed by the general term of the supreme court on the ground that it had been prematurely brought, because Moloney had not then paid anything on account of the judgment entered on the forfeiture of the criminal recognizance. *Moloney* v. *Nelson*, 70 Hun, 202. From that judgment Moloney prosecuted an appeal to the court of appeals, entering into the usual stipulation that if the judgment appealed from was affirmed, judgment absolute might be rendered against him. The judgment was affirmed and judgment absolute entered. *Moloney* v. *Nelson*, 144 N. Y. 182. After that this action was commenced, but in the meantime Nelson had transferred the property mortgaged to defendant Adams.

From the judgment of the trial court in this suit Nelson alone appealed to the appellate division of the supreme court in the first department, by which it was affirmed. Nelson then carried the cause to the court of appeals, and the judgment of affirmance was affirmed. *Moloney* v. *Nelson*, 158 N. Y. 351. The record having been remitted to the supreme court, this writ of error was allowed, and motions to dismiss or affirm submitted.

Mr. **Abram J. Rose** for defendant in error in favor of motion to dismiss or affirm.

Messrs. **William H. Newman** and *Albert J. Adams, Jr.*, for plaintiff in error in opposition to motion.

*Mr. Chief Justice **Fuller** delivered the [167]
opinion of the court:

It is stated in the opinion of the court of appeals, by Chief Judge Parker, that the defenses interposed by Nelson "upon the trial, and relied upon here, are: (1) The stipulation given by the plaintiff on the appeal to this court in a prior action brought to foreclose the mortgage is a bar to the recovery in this action. (2) The bond and mortgage having been given to indemnify bail in a criminal case, they are void because contrary to public policy."

The court of appeals ruled that the contention that the stipulation given on appeal to that court operated to prevent a recovery was "without support in authority or reason;" and as to the second ground relied up-

on to defeat the action, that it was not a part of the public policy of the state of New York to insist upon personal liability of sureties and forbid bail to become indemnified. These conclusions involved no Federal question, nor can we find on this record that any title, right, privilege, or immunity under the Constitution or the laws of the United States was specially set up or claimed in the state courts, and that the decision of the highest court of the state in which a decision could be had was against any title, right, privilege, or immunity so set up or claimed. But it is said that Nelson filed his petition and bond for the removal of the cause from the supreme court of the state of New York to the United States circuit court for the southern district of New York on the ground that, at the time of the commencement of the action, he was a citizen of New Jersey and Moloney was a citizen of the state of New York, and that the action taken thereon raised a Federal question. It appeared that Moloney, and Adams, the holder of the record title to the property mortgaged, were both citizens of the state of New York, and it is not claimed that the state court denied the peti-
[168]tion, but, on the contrary, conceded that *the record was transmitted to the circuit court, and that that court, on motion, remanded the cause to the state court because there was no separable controversy wholly between citizens of different states. This being so, the proceedings in relation to the removal of the cause afforded no ground for the issue of the writ of error.

In *Missouri Pacific Railway Co.* v. *Fitzgerald,* 160 U. S. 556, 582 [40: 536, 543], we held that, "if the circuit court remands a cause and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment. A state court cannot be held to have decided against a Federal right, when it is the circuit court, and not the state court, which has denied its possession. . . . As under the statute a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of a circuit court remanding such cause shall be allowed.' And it is entirely clear that a writ of error cannot be maintained under section 709 in respect of such an order where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the circuit court."

Writ of error dismissed.

WALTER M. McCAIN *et al., Appts.,*
v.
CITY OF DES MOINES, *et al.*

(See S. C. Reporter's ed. 168-181.)

When suit does not arise under the Federal Constitution — jurisdiction of United States circuit court—unfounded allegation.

1. The claim of plaintiffs, that their property is about to be taken from them by the authorities of a city without due process of law, and in violation of the Federal Constitution, because the statute of the state under which the proceedings were taken violates the Constitution of the state, does not involve the construction of, nor make the suit one arising under, the Federal Constitution.
2. In order to confer jurisdiction upon the United States circuit court on the ground that the suit arises under the Constitution or laws of the United States, there must be a real and substantial dispute as to the effect or construction of such Constitution or laws, upon the determination of which the recovery depends.
3. Where the allegation that the suit arises under the Federal Constitution is palpably unfounded, it does not constitute even color for the jurisdiction of the United States circuit court.

[No. 238.]

Submitted April 5, 1899. Decided May 1, 1899.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Iowa certifying the question of jurisdiction of that court in a suit in equity brought by Walter M. McCain *et al.* against the city of Des Moines *et al.* to obtain an injunction restraining the city and its officers and agents from exercising over the territory of the town of Greenwood Park any function of government for the purpose of taxation, and for other relief. *Decree dismissing the suit affirmed.*

See same case below, 84 Fed. Rep. 726.

Statement by Mr. Justice **Peckham:**

*The bill in this case is filed against the [169]
city of Des Moines, its board of public works, the Des Moines Brick Manufacturing Company, and the incorporated town of Greenwood Park, to obtain an injunction restraining, among other things, the city of Des Moines and its officers and agents from exercising over the territory of the incorporated town of Greenwood Park any function of municipal government for the purpose of taxation or for works of internal improvements or otherwise, and for other relief.

The bill makes the following allegations: The complainants own in severalty lands within the incorporated town of Greenwood Park; and the lands so owned by each of the complainants are worth more than $2,000; adjoining the town is the city of Des Moines, a municipal corporation created under the laws of the state of Iowa. In 1890 the legislature passed an act purporting to extend the limits of the city of Des Moines so as to include therein the town above named. The Constitution of the state prohibits the passing of special acts for the incorporation of cities; the act of 1890 was a special act incorporating a city and therefore prohibited by the Constitution, and as a consequence entirely void. The incorporated town has never been dissolved, and is entitled to exercise all the functions of government and taxation, but it has ceased to exercise them over the territory; that notwithstanding the act of

1890 is wholly void and of no effect, the defendant, the city of Des Moines, pretended and undertook to exercise the functions of government and the power of taxation over the territory of Greenwood Park; that the only warrant for the city to act in the premises is the void act of the legislature of 1890, and the city is assuming to levy assessments and to exercise the power of taxation and to perform all the other functions of municipal government under that act; that the suit herein is one of a civil nature arising under the laws and Constitution of the Unit-
[170]ed States; and the sum in controversy *exceeds $2,000. It appears on the face of the bill that all the parties are citizens of the state of Iowa.

The bill further alleges that the city made a contract with the defendant, the Des Moines Brick Manufacturing Company, to pave a public highway in the town, the expense of which was to be assessed upon the property abutting thereon, including the lands of the complainants, and the work was all done under color of the act mentioned, and that it was all illegal for want of authority; that at the time of the passage of the act and the taking of jurisdiction by the city, the town was exclusively an agricultural community, and there was no advantage in or necessity for the annexation of the town to the city of Des Moines, and none of the land in the town had been plotted into lots by laying out streets or alleys therein, and the highways within it were under the control and jurisdiction of the officers of Polk county, and that to subject the lands of complainants or the other lands within the town to the taxes and assessments threatened by the city of Des Moines is to take their property under color of authority from the void act of 1890, and contrary to the amendment of the Constitution of the United States, section 1, article 14.

Further allegations were made, not material to be stated.

In addition to asking for an injunction to restrain the city of Des Moines from exercising jurisdiction over the town of Greenwood Park, the complainants ask that the town "be enjoined to exercise for its own future benefits under the statutes of Iowa all functions of municipal government and taxation and works of internal improvement in the same manner and to the same extent as the said functions have been exercised by said defendant prior to March 3, 1890." The bill further prayed that the city and the board of public works should be enjoined from making any levy upon the property of the complainants to pay the expense of paving the highway, and that the city be restrained from issuing to the Des Moines Brick Manufacturing Company any assessment certificates on account of paving, and for other relief.

The defendant, the Des Moines Brick Man-
[171]ufacturing *Company, demurred to the bill on the ground, among others, that it appeared on the face of complainants' bill that all the parties to the suit were citizens of the state of Iowa, and that this suit does not involve any question arising under the Constitution or laws of the United States, and therefore the circuit court had no jurisdiction in the case.

The circuit court sustained the demurrer on the ground of want of jurisdiction, and pursuant to section 5 of the act of 1891, organizing the circuit courts of appeals (26 Stat. at L. 826), it has certified the question of jurisdiction alone for decision by this court.

The opinion of the district judge, in dismissing the bill, is reported in 84 Fed. Rep. 726.

Messrs. **William E. Mason** and *William G. Clark* for appellants.

Messrs. **N. T. Guernsey**, *H. T. Granger*, and *Arthur C. Graves* for appellees.

*Mr. Justice **Peckham**, after stating the [171]
facts, delivered the opinion of the court:

The jurisdiction of the circuit court depends upon the act approved August 13, 1888 (25 Stat. at L. 433, chap. 866), a part of which reads as follows: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States. . . ."

As it appears upon the face of the bill that all the parties are citizens of Iowa, the circuit court had no jurisdiction on the ground of diverse citizenship.

Is the suit one arising under the Constitution or laws of the United States? As was said in the court below, the material question is whether the exercise of jurisdiction by the city of Des Moines over the territory purporting to be annexed by the act of 1890 is lawful. To answer that question it
is*necessary only to refer to the Constitution [172]
and law of the state of Iowa.

The supreme court of the state decided in the *State of Iowa* [*ex rel. West*], v. *City of Des Moines*, 96 Iowa, 521 [31 L. R. A. 186], that the act of 1890 was void because it violated the constitutional provision in regard to special legislation. That was an action of quo warranto brought to test the right of the defendant city to exercise corporate authority over the added territory under the act of 1890. From the report of the facts in that case it appears that the city was by that act extended two and a half miles in each direction from its then present boundary, and it was provided by the same act that the corporate character of any annexed territory within the extended boundaries should cease and determine upon the passage of the act. Other sections of the act provided for the payment of the indebtedness of the city so enlarged and of the indebtedness of the cities within the annexed territory, and for the exemption from taxation for any city purpose of lands included within the extended limits which had not been laid off into lots of ten acres or less, or which should not subsequently be divided into parcels of ten acres or less by the extension of streets and alleys or otherwise, and also of lands occupied and used in good faith for agricul-

tural or horticultural purpose; for the reorganization of the wards of the cities and for elections therein. It appeared from the census of 1885 that only the city of Des Moines was affected by the act of 1890, and that in the added territory were one city and seven incorporated towns. The provisions of the act by which the municipal governments, other than the city of Des Moines, were to become extinct, and the entire territory to become one corporation and municipality were observed, so that in April, 1890, the change was complete, since which time the city of Des Moines has been thus constituted and has exercised throughout the territory the rights and functions of a city government, including the levy and collection of taxes, establishing, opening, vacating, changing, and improving streets, the making of contracts, and the creating and payment of debts.

These details, while appearing in the re-
[173]port in 96 Iowa, are *not set up in the complainant's bill, but their substance is shown in the allegations therein made, that the town has ceased to exercise all the functions of government and taxation, and the city of Des Moines and the board of public works are themselves exercising the functions of government over the town territory.

After the court in the quo warranto case had determined that the act was local legislation, and of that class prohibited by the Constitution, and therefore void, the opinion therein continues as follows:

"It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, make it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed, after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which before the annexation were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the city and towns annexed, and the delivery of all public records and property to the officers chosen for the city so enlarged. For four years taxes have been levied, collected, and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving, and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from *a judgment [174]
dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case."

The court then cited several cases in which the doctrine of laches had been applied to sustain a municipal government where the organization, as attempted, was illegal. See *State* v. *Leatherman*, 38 Ark. 81; *Jameson* v. *People*, 16 Ill. 257 [63 Am. Dec. 304]; *People* v. *Maynard*, 15 Mich. 463; and also the following from Cooley on Constitutional Limitations (page 312, 4th ed.):

"In proceedings where the question of whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the state as such. . . . And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter any question of regularity. And the state itself may justly be precluded on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition."

Continuing with its own opinion, the court stated:

"This, it is true, is a direct proceeding by the state. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the state directly. The learned writer sustains this text by a reference to *People* v. *Maynard*, *supra*, *Rumsey* v. *People*, 19 N. Y. 41, and *Lanning* v. *Carpenter*, 20 N. Y. 447. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color *of law. 'Color of [175]
law' does not mean actual law. 'Color,' as a modifier, in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.' (Kin. Law Dict. & Gloss). In some of the cases the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term 'irregularity' is oftener applied to forms or rules of procedure in practice than to a nonobservance of the law in other ways, but it has application to both. It is defined as a 'violation or nonobservance of established rules and practices.' The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The

most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or nonobservance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited."

And again on page 536, in speaking of the invalidity of the act of 1890, the court said:

"Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays, and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have served as a color of law inducing the proceedings for annexation."

And lastly, in speaking of the consequences to be apprehended from a judgment of ouster, the learned court said:

"Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void."

It will thus be seen that while the supreme court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional
[176] provision *in regard to special and local legislation, yet the court also held for the reasons stated that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality of the present city organization was for those reasons sustained. It is the same organization that the complainants now ask to have enjoined in this suit from exercising any function of government in the annexed district, and the former organization in the annexed district, which the complainants allege has ceased to exercise those functions, they now ask the court in this suit to enjoin it "to exercise for its own future benefits under the statutes of Iowa."

To grant the relief demanded would quite effectually overrule the decision of the state court upon a question relating purely to the local law of the state.

The claim of the complainants is based solely and wholly upon the allegation that the act of 1890 was void as in violation of the Constitution of Iowa. Their counsel lay that down in so many words in their brief. They say that their claim is "that under a law declared to be void and unconstitutional by the supreme court of the state of Iowa, the city of Des Moines is still exercising municipal control and jurisdiction over the complainants' property." There is an allegation in the bill that the land of the town was agricultural, but it is not asserted that the act was a violation of the Federal Constitution because it included such lands. No such question is made by the bill.

In their brief counsel urge that the act was void because, among other things, it was a violation of the Constitution of Iowa in bringing agricultural lands, under the circumstances and to the extent mentioned, into the control and limits of the city. The act itself in the third section exempts such lands from taxation for any city purpose, when they shall in good faith be occupied and used for agricultural or horticultural purposes.

It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be*taken from [177]
them by the city authorities without due process of law and in violation of the Constitution of the United States, because the act of 1890 violates the Constitution of Iowa. That is a question of law, depending for its solution upon the law of Iowa, and as to what that law is the Federal courts are bound in such a case as this by the decision of the state tribunal. There is no construction of the Federal Constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said upon such facts that any question arises under the Constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other. *Starin* v. *New York*, 115 U. S. 248 [29: 388]. There is no dispute about construction in any way whatever; the only question is as to the validity of the city organization, which, as stated, is a matter of state law.

The case is, however, made still stronger by the fact that the validity of the present organization of the city government and the lawfulness of its exercise of jurisdiction over the territory mentioned has been already decided by the state court, and had been so decided when this suit was commenced. It is not important upon what ground the state court proceeded in arriving at its judgment, whether it was because the act of 1890 was valid, or, that being invalid, the lawfulness of the organization could not be inquired into for the reasons stated in the opinion of the court above quoted. The complainants however argue that the state supreme court in the quo warranto case did not decide upon the validity of the city organization, but only that the relator, being a nonresident of the city and paying taxes in a town in the nominal sum of a dollar a year, would not be heard upon a question which might disturb the peaceful relations that existed in the territory, and which might also overturn the municipal authority of the city of Des Moines therein. Counsel allege that these complainants do not attempt to test the corporate existence *of the city of Des [178]
Moines, but simply to test the right of that corporation to levy taxes for certain purposes upon the property of the complainants.

The last assertion, so far as concerns the testing of the corporate existence of the city in the territory mentioned, is clearly an er-

ror, because the bill asks relief in the way of a perpetual injunction to restrain the city of Des Moines, its officers and agents, from the exercise of any function of municipal government or authority or jurisdiction for the purpose of taxation or for works of internal improvement in the town of Greenwood Park, and it asks that the city officers be perpetually restrained from interfering with the officers of the town or from obstructing them in the administration of the municipal affairs of the town; and that the town "be authorized and enjoined to exercise for its own future benefits under the statutes of the state of Iowa all functions of municipal government, taxation, and works of internal improvement, in the same manner and to the same extent as the said functions have been exercised by defendant prior to the 3d day of March, 1890." This prayer for relief seeks to test pretty substantially the corporate existence of the city of Des Monies in the territory in question. It does, of course, also seek to test the right of the corporation to levy taxes for the purposes named in the bill and upon the property of the complainants; but the right to levy these taxes depends entirely upon the legality of the city organization, so that if the organization is not lawful, the taxation is equally invalid.

The commencement of this suit is plainly an attempt to overturn the decision of the state court in the quo warranto case. In our opinion the complainants take much too narrow a view of the decision of the state court in that case. The facts of the nonresidence of the relator and the smallness of his interest were spoken of, but they formed only an insignificant part of other and more important facts upon which the reasoning of the court was based. Those other facts were of a public nature, and the court, in its opinion, gave great weight to the public interests that were involved and the great injury that would fall upon all public as well as pri-
[179] vate *interests by overturning an authority that had lasted four years, and which had been initiated under color and by reason of an act of the legislature. The court in truth decided that the legality of the city organization could not be inquired into, even in a direct proceeding brought by the state to test the validity of the act, or, in other words, the validity must be sustained for the following, among other, stated reasons: The lapse of time; the actions of the authorities of both city and town in taking and yielding possession and jurisdiction; the delivery of all public records and the closing of all public offices by the officers in all the abandoned municipal governments; the levying, collection, and expenditure of taxes; the public improvements made after the passage of the act; the bonds that had been recalled by the city and others issued in their place; the general recognition of the validity of the municipal government by all classes of the community; the color of law under which the organization of the city government had been practically effected in the territory; and the inextricable confusion into which the whole affairs of the city and town would be thrown as the necessary result of holding that the city government did not extend over the territory mentioned. For these public considerations the court refused to permit the inquiry to be made, even by the state, into the validity of the municipal government of the city as enlarged under color of the act of 1890. That no collateral inquiry would be permitted the opinion takes as unquestionably plain.

For the purpose probably of meeting the argument arising from acquiescence, as set forth in the quo warranto case, the complainants allege in the bill herein that they and the citizens of Greenwood Park have not assented to or acquiesced in or agreed to the acts of the city of Des Moines, and that jurisdiction has been exercised over them without their consent, and without permitting the citizens by election or otherwise to determine whether the pretended acts of annexation should be operative or not. These allegations would seem to refer to the state of mind which the complainants and citizens were in during these many years, and the allegation of an absence of *acquiescence would [180]
also seem to have been founded upon the fact that there had been no election by which to determine whether the act should be accepted or not. Neither fact alters the effect to be properly given the opinion in the case mentioned, in the face of the facts actually existing. From the time of the passage of the annexation act up to the commencement of the suit, a period of seven years, there is no allegation of any act on the part of the complainants or any other citizen in the way of an attempt to test the validity of this legislation with the exception of the suit brought by the state upon the relation of a nonresident property owner who paid taxes in the amount of one dollar a year. Otherwise than as above stated there is no allegation tending to show dissatisfaction with the legislation prior to September, 1897, when the brick company defendant entered upon the work which led to the assessment in dispute in this suit. During these years the city authorities have, as the bill alleges, performed all the functions of government in the territory, and taxes have been imposed and collected (presumably from complainants among others), improvements commenced and continued, interest on bonds paid, and no action taken by anyone to prevent these measures or to test their validity. What may have been the secret thoughts of the complainants or other citizens during all this time must be matter wholly immaterial, so long as there was such acquiescence on the part of the public authorities as has been stated in the opinion of the court in the quo warranto case and such as substantially appears by the allegations of the bill in this suit. The particular allegations of nonacquiescence by the complainants do not detract from the strength of the principles laid down by the state court, nor do they in any degree affect the full applicability of those principles to the facts set up in the bill in this suit. The action of the state against the city of Des Moines has been the only thing done towards making any attempt to

test the question of the validity of the legislation prior to the commencement of this suit. In this suit we are bound to take the law of Iowa as it has been decided to be in the quo warranto case. In that case it has been deliberately decided that the validity [181]of the organization*of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by anyone at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport* v. *Cole*, 129 U. S. 36 [32: 589]; *New Orleans* v. *Benjamin*, 153 U. S. 411 [38: 764].

Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a shadow of a Federal question in this suit, for if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretense that the collection of the assessment would be without due process of law.

The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the Circuit Court. That court was therefore right in dismissing the bill, and its decree must be *affirmed*.

---

[182]C. H. BOSWORTH, Receiver of the Chicago, Peoria, & St. Louis Railway Company, *Petitioner*.

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS (*Intervening Petitioner*).

(See S. C. Reporter's ed. 182-190.)

When receiver may appeal—power of receiver to defend claim—costs on affirmance.

1. Where on foreclosure of a mortgage, the receiver of the property is decreed to pay the claim of an intervener, the receiver may appeal, although, prior to the decree, the property had been sold, under decree of sale, and had passed out of his possession.
2. A receiver is the proper party to defend the estate against the claims of an intervener, and can bind the estate in his possession by admission of facts.
3. A dismissal of an appeal when the appellant was the proper party to take the appeal, and was entitled to hearing, cannot be justified by his admission on the appeal as to the merits of the case against him, but the proper judgment in such case is an affirmance.
4. Upon affirmance of a decree from which a receiver has appealed, he should pay the costs of the appellate proceedings, notwithstanding error of an intermediate court in dismissing the appeal instead of affirming it.

[No. 211.]

Submitted January 25, 1899. Decided May 1, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree of that court dismissing the appeal of C. H. Bosworth, Receiver of the Chicago, Peoria, & St. Louis Railway Company, in an intervening petition filed by the Terminal Railroad Association, for labor performed and material furnished for the said railway company in an action brought by the Mercantile Trust Company against said railway company for the foreclosure of a mortgage and the appointment of a receiver. *Decree modified; and* as modified, *affirmed.*

See same case below, 53 U. S. App. 302.

Statement by Mr. Justice **Brewer:**

The facts in this case are briefly these: On September 21, 1893, the Mercantile Trust Company, of New York, filed its bill of complaint in the circuit court of the United States for the southern district of Illinois against the Chicago, Peoria, & St. Louis Railway Company, praying foreclosure of a mortgage and the appointment of a receiver. On the same day an order was entered appointing the present appellant receiver of that road. Among other things the order of appointment*directed the receiver to pay "all [183] claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage traffic balances due from said railroad." The plaintiff, the Mercantile Trust Company, objected to this part of the order, but after argument the objection was overruled. On May 27, 1895, the Terminal Railroad Association of St. Louis filed an intervening petition, claiming that it had performed labor and furnished materials for the defendant railroad company within the six months named in the order of appointment. The receiver answered, denying the claim. The matter was referred to a master, who found in favor of the petitioner, and on July 30, 1896, the following decree was entered:

"It is therefore ordered, adjudged, and decreed by the court that the receiver herein pay to the intervener, the Terminal Railroad Association of St. Louis, the said sum of eight thousand one hundred and sixty-two dollars and eleven cents ($8,162.11) out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged, and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is

hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein."

The receiver appealed from this decree to the court of appeals, but on June 8, 1897, that court dismissed the appeal. 53 U. S. App. 302. Thereafter a certiorari was issued, and under that writ the case was brought to this court.

Messrs. **Bluford Wilson** and **Philip Barton Warren** for petitioner.

Messrs. **J. E. McKeighan, Shepard Barclay, Millard F. Watts,** and **Samuel P. Wheeler** for respondent.

[183] *Mr. Justice **Brewer** delivered the opinion of the court:

[184] *Upon the record as it was filed in the court of appeals, and independently of other considerations, its decision was manifestly erroneous. A claim was presented against the estate in the hands of the receiver, which he disputed. A part of his contention, as appears from the exceptions, was, specifically, that the debt, whatever its amount, was due from the Jacksonville Southeastern line and not from the mortgagor, the Chicago, Peoria, & St. Louis Railway Company. After reference to a master, and his report stating the facts, an order was entered directing the receiver to pay the claim. The reference, the findings, the report of the master, the exceptions of the receiver, were all set forth. So that in the record, as it came to the court of appeals, there was a denial on the part of the receiver of any liability of the estate in his possession to the petitioner, and a decree adversely thereto. That alleged liability he was the proper person to contest, and to contest both in the court which had appointed him receiver, and on appeal in the appellate court. But the court of appeals, in its opinion directing the dismissal, makes this statement of facts:

"The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior tc the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim.' He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company* v. *Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that, within the doctrine declared in *Turner* v. *The Indianapolis, Bloomington, & Western Rail-*
[185] *way Company*, 8 Biss. 315; **Fosdick* v. *Schall*, 99 U. S. 235 [25: 339]; *Union Trust Company* v. *Souther*, 107 U. S. 591 [27: 488]; *Burnham* v. *Bowen*, 111 U. S. 776 [28: 596]; *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U. S. 434 [29: 963]; *Wood* v. *Guarantee Trust & Safe Deposit Company*, 128 U. S. 416 [32: 472]; *Kneeland* v. *American Loan & Trust Company*, 138 U. S. 509 [34: 1052]; *Thomas* v. *Western Car Company*, 149 U. S. 111 [37: 669]; *Farmers' Loan & Trust Company* v. *Green Bay, W. & St. P. Railway Company*, 45 Fed. Rep. 664, before a claim can be deemed to be preferential to the mortgage debt there must be first established a diversion of income from the payment of operating expenses to the payment of interest, and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment out of the income or the *corpus* of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income, and then only to the extent of such diversion."

And again:

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

Even with the change made in the condition of the case by these admissions, we are of opinion that the proper entry should have been an affirmance of the decree rather than a dismissal. A dismissal implies that the receiver had no right to appeal; whereas we are of opinion that he was the proper party to take such appeal, was entitled to a hearing in the court of appeals, and also bound the estate in his possession as receiver by any admission of facts. Such admission in this case went so far as to relieve the appellate court from any *necessity of inquiry as [186]
to the merits of the claim, but it was made after the case had been taken to the appellate court, and did not affect the rightfulness of the appeal.

It becomes important to consider what are the rights and duties of a receiver in respect to claims made against the estate in his possession. It is often said that he is merely the hand of the court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that court, but he is also a custodian of property, and has by virtue of such custody certain obligations to the parties owning or interested therein.

First. A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes, because if valid they are superior to the rights of both parties; in

a case like the present, superior to the rights of mortgagor and mortgagee.

Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. As this is a matter specially pertinent to the present controversy it may be well to consider briefly the scope of this proposition: A suit is brought by a mortgagee to foreclose his mortgage, and a receiver is appointed to take possession of the mortgaged property. The right to have a decree of foreclosure and sale is an absolute right on the part of the mortgagee, flowing from a breach of the conditions in the mortgage. But the appointment of a receiver is a matter resting largely in the discretion of the court—not, of course, an arbitrary but a legal discretion—and depending, not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property out of [187] the *possession of the mortgagor and placing it in the hands of a receiver. In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. A receivership is not essential to a foreclosure and sale, and the court is charged, when an application therefor is made, with the duty of inquiring whether, under all the circumstances, considering the interests of the parties and the public, it is wise and proper to take possession of the property. It may in its judgment be necessary to appoint a receiver without prescribing any terms. It may be that the interests of the parties or the public require that the appointment shall be made subject to certain conditions. Now, these conditions, whatever they may be, are beyond the challenge of the receiver. He may not say directly or indirectly, "I accept the appointment; I take charge of the property, but I repudiate the terms and conditions imposed on the receivership." Whether under the present state of the statutory law in reference to appeals any review can be had of the terms of such an order, it is clear that a receiver, whose rights spring from the appointment, cannot be heard to question them.

Third. Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervener, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver, who represents, so far as the property is concerned, the interests of the parties, may rightfully challenge his claim; provided that in such challenge he does not question any orders* of the court heretofore [188] referred to. Let us take some illustrations: A suit is brought to foreclose a mortgage, a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession, the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property against which a claim is made, can defend; and defend not only in the court appointing him, but also by appeal. In that defense he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession.

Take another case: An intervener presents a claim against the mortgaged property which the mortgagor admits. There is, therefore, no defense to be interposed in behalf of the defendant mortgagor, no protection to be sought for the property, and the only question is whether such claim, admitted by the mortgagor, is to be satisfied out of the mortgaged property prior to the claim of the mortgagee. The latter is the only party who has an antagonistic relation to the intervener. Now, the receiver who represents both mortgagee and mortgagor, both plaintiff and defendant, so far as the custody of the property is concerned, is entitled to defend against this claim of priority made by the intervener, and may defend both in the court appointing him, and also by appeal. It is true in such defense he may not be heard to say that the terms and conditions imposed in the order of his appointment were improper, but he may defend on the proposition that the claim presented does not come within those terms and conditions. Whatever right, if any, the mortgagee plaintiff may have to question, in resisting such claim, the validity of the terms of the appointment, the receiver cannot do so; and the only defense he can make is that the claimed priority has no foundation in the terms of the order; or, if it be a matter entirely outside of those terms, that it has no foundation in any recognized legal or equitable principle.

*In the case at bar one defense, as shown [189] by the exceptions taken to the report of the master, was that the claim of the intervener was not against the estate, but against some third party. That defense the receiver had a right to make. We do not mean that he alone can act; we do not stop to inquire what rights either party to the suit may have in this respect. All we now decide is that the receiver is a proper party to make the defense. And when he alone makes it, when he carries on the litigation in his own

name as receiver, then as the representative and custodian of the estate he can, subject to the supervision of the court, bind it by admissions made in good faith in the progress of the litigation. And as in the appellate court, after the appeal had been perfected, he being the only party to the appeal, admitted that it was a just claim against the mortgagor and within the priority over the mortgage prescribed in the order of appointment, his admission showed that the allowance was right, and that the decree ought to be affirmed. But still, until that admission was made, there was a pending dispute, and he was a proper person to appeal from the allowance.

Fourth. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as for instance to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial court. He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.

Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved from the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and
[190] at *the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial court allowed the appeal must in the appellate court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property.

It seems unnecessary to say more. We have indicated, so far as it can safely be done by general propositions, the powers of a receiver in respect to appellate proceedings. We are of opinion that the decree of the court of appeals should have been one of affirmance, and to that extent it is modified. Under the admissions of the receiver the cost of the appellate proceedings should be paid by him, and this notwithstanding, in our judgment, the formal order of the court of appeals dismissing the case was incorrect. *The judgment of the Circuit Court is affirmed* at the cost of the appellant.

ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries, *Plff. in Err.*,

v.

DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 190-196.)

Sealed verdict rendered in absence of one of the jury.

The absence of the foreman of a jury, who is ill, when the rest of the jury is polled and a sealed verdict, which all signed, is opened, is merely a matter of error, and does not render a judgment entered on the verdict a nullity, or subject to a motion to vacate it at a succeeding term of court.

[No. 230.]

Argued April 4, 1899. Decided May 1, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a decision of that court reversing a decision of the Supreme Court of the District and remanding the case with instructions to vacate the judgment and set aside the verdict and to award a new trial, on the ground that the sealed verdict was not returned in the presence of all the jurors. *Judgment of Court of Appeals reversed*, and case remanded with instructions to affirm the judgment of the Supreme Court of the District of Columbia.

See same case below, 12 App. D. C. 122.

Statement by Mr. Justice **Brewer:**

*This case is before us on error to the court of appeals of the District of Columbia. The [191]
facts are these: On May 22, 1896, the plaintiff in error filed an amended declaration in the supreme court of the district, claiming damages from the defendant, now defendant in error, on account of injuries caused by a defective condition of the bridge between Washington and Anacostia—a condition resulting from the negligence of the defendant. A jury was impaneled, trial had, and the case submitted to it on November 30, with instructions to return a sealed verdict. The instructions and the verdict were returned on the morning of December 1, and were in the following form:

When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it.

Elizabeth M. Humphries vs. The District of Columbia. } No. 38281. At Law.

Dated November 30, 1896.

We, the jurors sworn to try the issue

[192]joined in the above-entitled *cause, find said issue in favor of the plaintiff, and that the money payable to him by the defendant is the sum of seven thousand dollars and — cents ($7,000.00).

All sign:

Michael Keegan.	Lester G. Thompson.
W. H. St. John.	Wm. J. Tubman.
Geo. W. Rearden.	John T. Wright.
James D. Avery.	Jos. I. Farrell.
Bernard F. Locraft.	Isaac N. Rollins.
Geo. W. Amiss.	Thos. J. Giles.

The proceedings on December 1 are thus stated in the record:

"Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening, and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name 'John T. Wright,' signed thereto, is in his handwriting; 'thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises as seven thousand dollars ($7,000).'

"The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assesses her damages by reason of the premises at $7,000."

Upon this verdict a judgment was entered. Proceedings in error were taken, but were
[193] dismissed by the court of *appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the court of appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. 12 App. D. C. 122. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term.

Mr. **Arthur A. Birney** for plaintiff in error.

Messrs. **S. T. Thomas** and **A. B. Duvall** for defendant in error.

[193] *Mr. Justice **Brewer** delivered the opinion of the court:

The single question presented by the record, the right to review which is sustained by *Phillips* v. *Negley,* 117 U. S. 665 [29: 1013], is whether the verdict, returned under the circumstances described, was an absolute nullity, or, at least, so far defective that no valid judgment could be entered upon it. Such is the contention of the defendant. On the contrary, the plaintiff insists that whatever irregularities may have occurred, or be apparent in the proceedings, they are simply matters of error, to be corrected on direct proceedings within the ordinary time, and in the customary manner for correcting errors occurring on a trial. Is the defect or irregularity disclosed a mere matter of error or one which affects the jurisdiction? The opinion of the court of appeals, announced by Mr. Justice Morris, is an exhaustive and able discussion of the question, arriving at the conclusion that the verdict was an absolute nullity, and therefore the judgment, based upon it, one that could be set aside, not merely at the term at which it was rendered, but at any subsequent term.

*While appreciating fully the strength of [194]
the argument made by the learned judge, we are unable to concur in the conclusions reached. That the verdict returned expressed at the time it was signed the deliberate judgment of the twelve jurors cannot be questioned. That it remained the judgment of the eleven at the time it was opened and read is shown by the poll that was taken, and that it was still the judgment of the absent juror at the time he forwarded it to the court is evident from the testimony. So the objection runs to the fact that at the time the verdict was opened and read each of the twelve jurors was not polled, and each did not then and there assent to the verdict as declared. That generally the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. It is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict. Take the case suggested on argument. Supposing the twelve jurors are present, and the defeated party insists upon a poll of the jury and that right is denied, can it be that a verdict returned in the presence of the twelve by the foreman, without dissent, is by reason of such denial an absolute nullity? Is not the denial mere error, and not that which goes to the question of jurisdiction? There are many rights belonging to litigants—rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction or render the proceedings absolutely null and void.

The line of demarcation between those rulings which are simply erroneous and those which vitiate the result may not always be perfectly clear, and yet that such demarcation exists is conceded. This ruling of the trial court, conceding it to be error, is on the hither side of this line, and could only be taken advantage of by proceedings in error.

It is not so vital as to make the verdict a nullity or the judgment entered thereon void. Suppose, after the jury, at the end of a protracted trial, have agreed upon the verdict
[195] and come into *court to announce it, and after it has been read in open court but before a poll can be had one of the jurors is suddenly stricken dead, can it be that the whole proceeding theretofore had become thereby a nullity? Can it be that after each of the jurors has signed the verdict and after it has been returned and each is present ready to respond to a poll, the mere inability to complete the poll and make a personal appeal to each renders the entire proceedings of the trial void? We are unable to assent to such a conclusion. The right to poll a jury is certainly no more sacred than the right to have a jury, and under many statutes a trial of a case, in which a jury is a matter of right, without a waiver thereof, has again and again been held to be erroneous and subject to correction by proceedings in error. But it is also held that an omission from the record of any such waiver is not fatal to the judgment.

"The fourth is to the effect that the judgment in the Kansas court was void because the cause was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error, and cannot be taken advantage of collaterally." *Maxwell* v. *Stewart*, 21 Wall. 71 [22: 564]. See also same case, 22 Wall. 77 [22: 564], in which it was said: "A trial by the court, without the waiver of a jury, is at most only error."

If a trial without a jury, when a jury is a matter of right and no waiver appears of record, is not fatal to the judgment, *a fortiori* the minor matter of failing to poll the jury when it is clear that the verdict has received the assent of all the jurors, cannot be adjudged a nullity, but must be regarded as simply an error, to be corrected solely by direct proceedings in review. See, in reference to the distinction between matters of error and those which go to the jurisdiction, the following cases: *Ex parte Bigelow*, 113 U. S. 328 [28: 1005]; *Re Coy*, 127 U. S. 731 [32: 274]; *Re Belt*, 159 U. S. 95 [40: 88]; *Re Eckart*, 166 U. S. 481 [41: 1085].

We are of opinion that the defect com-
[196] plained of was merely *a matter of error, and does not render the verdict a nullity. *The judgment of the Court of Appeals will therefore be reversed* and the case remanded with instructions to affirm the judgment of the Supreme Court of the District of Columbia.

MARTIN F. MORRIS *et al., Appts.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 196-359.)

Potomac river embraced in original charter of Maryland—the navigable waters and soils under them passed as a public trust—such rights subsequently became vested in the state—confiscation acts of Maryland—valid acts—treaties of 1783 and 1794—equitable obligation—rights of Marshall heirs—resolution of Congress of 1839—Maryland decision—jurisdiction of the Land Office—patent, when void—patent to John L. Kidwell—return of purchase money—when conveyance from trustee will be assumed—riparian rights on the Potomac—riparian rights of Chesapeake & Ohio Canal Company—riparian rights of lotowners—evidence—decree affirmed—Maryland act of 1871—title by adverse possession—title by failure to open Water street—owners of wharves and warehouses, when entitled to compensation—value of wharves and warehouses.

1. The charter granted to Lord Baltimore by Charles I. in 1632, of the Province of Maryland, embraced the Potomac river and the soil under it and the islands therein, to high water on the southern or Virginia shore.
2. By that charter the dominion and propriety in the navigable waters and in the soils under them passed as part of the prerogative rights annexed to the political powers conferred on Lord Baltimore, as a public trust for the common use and benefit of the whole community about to be established, for navigation and fishery, and not as private property to be sold for his own emolument.
3. After the American Revolution the absolute right to all navigable waters and soils under them, within each state, was held by its people for their common use, subject only to the rights since surrendered by the Constitution to the general government.
4. By the confiscation acts of Maryland of 1781 all the property of the then lord proprietary of Maryland, including his rights, if any, in the Potomac river and the soils under it, were confiscated to the use of the state.
5. Such confiscation acts of Maryland were not void as in derogation of the common law or of the Constitution and Bill of Rights of the state, nor because Maryland did not have the power to pass acts of confiscation.
6. The treaties of 1783 and of 1794 and the Maryland act of 1787 making the treaty of 1783 the law of the state did not operate to relieve the lands under the Potomac river from such forfeiture and confiscation.
7. Any equitable obligation of the United States under its treaties to restore the property so confiscated, or to make compensation therefor, is a matter for Congress to consider, but is not for the consideration of the courts in determining the title to property.
8. The heirs of James M. Marshall and of John Marshall have no right, title, or interest in any part of the land or water composing any part of the Potomac river, or its flats, in charge of the Secretary of War.
9. It was not the intention of Congress, by the general resolution of 1839, to subject lands lying beneath the waters of the Potomac river and within the limits of the District of Columbia, and acquired for public purposes, to sale by the methods therein provided.
10. The recent decisions of the courts of Maryland, giving to the statutes of that state a construction at variance with that which prevailed at the time of the cession of the District of Columbia, cannot control the decision

of this court as to the effect of those statutes on the territory within that District.

11. Lands exempted from the jurisdiction of the Land Office in 1839 are not brought within that jurisdiction because the waters of the Potomac river had so far receded in 1869 as to permit some sort of possession and occupancy.

12. Where there is an entire want of authority in the Land Office to grant certain lands held for public purposes, a patent therefor issued under a mistaken notion of the law is void.

13. The patent to John L. Kidwell for the "Kidwell Meadows" did not confer upon him or his assigns any title or interest in the property adverse to the complete and paramount right therein of the United States.

14. Where the invalidity of the patent was not apparent on its face, but was proved by extrinsic evidence in a suit by the United States, and the controversy respecting the title was not abandoned by the defendants, they are not entitled to a decree for the return of the purchase money or for costs.

15. A conveyance from trustees, which ought to have been made, will, after a long lapse of time, be considered by a court of equity as having been made.

16. The holders of lots and squares on the line of Water street in the city of Washington are not entitled to riparian rights, or to rights of private property in the waters or the reclaimed lands between Water street and the navigable channels of the Potomac river, unless they can show valid grants from Congress or from the city under the authority of Congress, or such long and notorious possession of defined parcels as to justify a court, under the doctrine of prescription, in inferring grants; as the intention, never departed from since the first conception of the city, was to establish such a street along the water front for a common access thereto.

17. The Chesapeake & Ohio Canal Company does not, either as to lots procured from private owners, or as to lands occupied under the permission of Congress and of the city authorities, own or possess riparian rights along the line of its canal within the limits of the city.

18. No riparian rights belong to lots north of Water street, between Seventeenth street west and Twenty-Seventh street west, as that street intervenes between such lots and the channels of the river.

19. No effect can be given to the book marked "Register of Squares" as contradicting or overriding the plans of the city as adopted by the President.

20. The decree of the court below as to the claim of the descendants of Robert Peter to certain lands near the Observatory grounds, is affirmed.

21. The Maryland act of December 19, 1791, authorizing licenses for wharves until Congress shall exercise jurisdiction, did not confer any rights to erect and maintain permanent wharves within the waters of the Potomac river and the Eastern Branch.

22. Where lands and waters are owned by the government in trust for public purposes, and are withheld from sale by the Land Department, without any renunciation of, or failure to exercise, jurisdiction and control over them, an adverse possession, however long continued, will not create a title.

23. The failure to construct and open Water street between 13½ street and Maryland avenue does not create any title in the owners of land to the water front for wharfing and other purposes.

24. Owners of expensive wharves and warehouses erected and maintained, under express or implied licenses from the city authorities, on the water front along the Potomac river, are not to be treated as trespassers in taking the premises for a government improvement, but are entitled to compensation for the value of their private interests in the structures.

25. The final determination of all the rights in question, contemplated by the act of Congress of 1886, providing for the determination of interests in the Potomac river flats, should include the determination of the value of wharves and warehouses owned by licensees and standing on lands belonging to the government.

[No. 49.]

Argued October 26, 27, 28, 31, November 1, 2, 3, 4, 7, 1898. Decided May 1, 1899.

ON APPEAL from a decree of the Supreme Court of the District of Columbia in a suit in equity brought by the United States, plaintiff, against Martin F. Morris *et al.*, defendants, under an act of Congress to provide for protecting the interests of the United States in the Potomac river flats in the District of Columbia, approved August 15th, 1886, settling the rights, titles, and interests of defendants in and to the waters in and the soil under the Potomac river in the city of Washington, and District of Columbia, and their riparian rights on said river, in said city.

Decree affirmed as to the claims of the Marshall heirs, and as to the Kidwell patent; and as to the several claims to riparian rights as appurtenant to lots bounded on the south by Water street the case is remanded for further proceedings.

See same case below, 23 Wash. L. Rep. 745.

Statement by Mr. Justice **Shiras:**

*The act of Maryland, entitled "An Act to [198]
Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States," was in the following terms: "Be it enacted by the general assembly of Maryland, that the representatives of this state in the House of Representatives of the Congress of the United States, appointed to assemble at New York on the first Wednesday of March next, be and they are hereby authorized and required, on behalf of this state, to cede to the Congress of the United States any district in this state, not exceeding ten miles square, which the Congress may fix upon and accept for the seat of government of the United States." Kilty's Laws of Maryland, chap. 2, p. 46.

On December 3, 1789, by an act entitled "An Act for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government," Virginia ceded to the Congress and government of the United States a tract of country not exceeding ten

miles square, or any lesser quantity, to be located within the limits of the state, and in any part thereof as Congress may by law direct, in full and absolute right, and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon; providing that nothing therein contained should be construed to vest in the United States any right of property in the soil or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States; and providing that the jurisdiction of the laws of the commonwealth, over the persons and property of individuals residing within the limits of the said concession, should not cease or determine until Congress should accept the cession, and should by law provide for the government thereof under their jurisdiction.

Congress, by an act entitled "An Act for Establishing the Temporary and Permanent Seat of the Government of the United States," approved July 16, 1790, accepted a district of territory, not exceeding ten miles square, to be located on the river Potomac;
[199] and authorized the President *of the United States to appoint commissioners, who should, under the direction of the President, survey, and by proper metes and bounds define and limit, the district, which, when so defined, limited, and located, should be deemed the district so accepted for the permanent seat of the government of the United States. It was further thereby enacted that the said commissioners should have power to purchase or accept such quantity of land on the eastern side of said river, within the said district, as the President should deem proper for the use of the United States, and according to such plans as the President should approve, and that the commissioners should, prior to the first Monday in December in the year 1800, provide suitable buildings for the accommodation of Congress, and of the President, and for the public offices of the government; and that on the said first Monday in December, in the year 1800, the seat of the government of the United States should be transferred to the district and place aforesaid, and that all offices attached to the government should be removed thereto and cease to be exercised elsewhere. The act contained the following proviso: "That the operation of the laws of the state within said district shall not be affected by this acceptance until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." 1 Stat. at L. 130, chap. 28.

On January 22, A. D. 1791, Thomas Johnson and Daniel Carroll, of Maryland, and Daniel Stewart, of Virginia, were appointed by President Washington commissioners to carry the foregoing legislation into effect.

On March 3, 1791, Congress passed an amendatory act, by which, after reciting that the previous act had required that the whole of the district of territory, not exceeding ten miles square, to be located on the river Potomac, should be located above the mouth of the eastern branch, the President was authorized to make any part of the territory below said limit, and above the mouth of Hunting creek, a part of the said district, so as to include a convenient part of the Eastern Branch and of the lands lying on the lower side thereof, and also the town of Alexandria, and that the territory so to be *included [200]
should form a part of the district not exceeding ten miles square for the seat of the government, but providing that nothing contained in the act should authorize the erection of the public buildings otherwise than on the Maryland side of the river Potomac.

On March 30, A. D. 1791, President Washington issued a proclamation describing the territory selected by him for the location of the seat of government as follows:

"Beginning at Jones' Point, being the upper cape of Hunting creek in Virginia, and at an angle, in the outset, of forty-five degrees west of the north, and running in a direct line ten miles for the first line; then beginning again at the same Jones' Point and running another direct line at a right angle with the first across the Potomac ten miles for the second line; then from the terminations of the said first and second lines, running two other direct lines of ten miles each, the one crossing the Eastern Branch aforesaid and the other the Potomac, and meeting each other in a point."

The commissioners were accordingly instructed by the President to have the said four lines run, and to report their action.

In the meantime intercourse was had between the commissioners and the principal owners of property within the district, looking to the sale and conveyance by the latter of land on which a Federal city was to be erected. And the following agreement was signed by the proprietors:

"We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal city laid off upon our lands, do hereby agree and bind ourselves, heirs, executors, and administrators, to convey in trust, to the President of the United States, or commissioners, or such person or persons as he shall appoint, by good and sufficient deed in fee simple, the whole of our respective lands which he may think proper to include within the lines of the Federal city, for the following purposes and on the conditions following:

"The President shall have the sole power of directing the Federal city to be laid off in what manner he pleases. He may retain any number of squares he may think proper for public improvements, or other public uses, and the lots only *which shall be laid [201]
off shall be a joint property between the trustees on behalf of the public and each present proprietor, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be, after the city shall be laid out.

"For the streets the proprietors shall receive no compensation, but for the squares or lands in any form which shall be taken for public buildings or any kind of public improvements or uses, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public. The whole wood on the

land shall be the property of the proprietors, but should any be desired by the President to be reserved or left standing, the same shall be paid for by the public at a just and reasonable valuation exclusive of the twenty-five pounds per acre, to be paid for the land on which the same shall remain.

"Each proprietor shall retain the full possession and use of his land, until the same shall be sold and occupied by the purchasers of the lots laid out thereupon, and in all cases where the public arrangements as to streets, lots, etc., will admit of it, each proprietor shall possess his buildings and other improvements and graveyards, paying to the public only one half the present estimated value of the lands on which the same shall be, or twelve pounds ten shillings per acre. But in cases where the arrangements of the streets, lots, and squares will not admit of this, *and* it shall become necessary to remove such buildings, improvements, etc., the proprietors of the same shall be paid the reasonable value thereof by the public.

"Nothing herein contained shall affect the lots which any of the parties to this agreement may hold in the towns of Carrollsburgh or Hamburgh.

"In witness whereof we have hereto set our hands and seals, this thirteenth day of March, 1791."

Among the signers of this agreement were Robert Peter, David Burns, Notley Young, and Daniel Carroll.

Subsequently, in pursuance of the agreement, the several proprietors executed deeds of conveyance to Thomas Beall and John Mackall Gantt as trustees.

[202] *It will be found convenient, in view of the questions that arise in the case, to have the deeds of David Burns and Notley Young transcribed in full:

"This Indenture, made this twenty-eighth day of June, in the year of our Lord one thousand seven hundred and ninety-one, between David Burns of the state of Maryland, of the one part, and Thomas Beall (son of George) and John Mackall Gantt of the state of Maryland, of the other part, Witnesseth: That the said David Burns, for and in consideration of the sum of five shillings to him in hand paid by the Thomas Beall and John Mackall Gantt, before the sealing and delivery of these presents, the receipt whereof he doth hereby acknowledge and thereof doth acquit the said Thomas Beall and John Mackall Gantt, their executors and administrators, and also for and in consideration of the uses and trusts hereinafter mentioned to be performed by the said Thomas Beall and John Mackall Gantt and the survivor of them, and the heirs of such survivor, according to the true intent and meaning thereof, hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release, and confirm unto the said Thomas Beall and John Mackall Gantt and the survivor of them, and the heirs of such survivor, all the lands of him the said David Burns, lying and being within the following limits, boundaries, and lines, to wit: Beginning on the east side of Rock creek at a stone standing in the middle of the road leading from Georgetown to Bladensburgh, thence along the middle of the said road to a stone standing on the east side of the Reedy Branch of Goose creek, thence southeasterly making an angle of sixty-one degrees and twenty minutes, with the meridian to a stone standing in the road leading from Bladensburgh to the Eastern Branch Ferry, thence south to a stone eighty poles north of the east and west line already drawn from the mouth of Goose creek to the Eastern Branch, thence east parallel to the said east and west line to the Eastern Branch, Potomack river, and Rock creek, to the beginning, with their appurtenances, except all and every lot and lots of which the said David Burns is seised,
or to which he is entitled, lying in *Carrolls- [203]
burgh or Hamburgh. To have and to hold the hereby bargained and sold lands, with their appurtenances, to the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heirs of such survivor, forever, to and for the special trusts following, and no other, that is to say, that all the said lands hereby bargained and sold, or such parts thereof as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a Federal city, with such streets, squares, parcels and lots as the President of the United States for the time being shall approve, and that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the commissioners for the time being appointed by virtue of an act of Congress, entitled 'An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,' and their successors, for the use of the United States forever all the said streets and such of the said squares, parcels, and lots, as the President shall deem proper, for the use of the United States, and that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid off and divided, that a fair and equal division of them shall be made, and if no other mode of division shall be agreed on by the said David Burns and the commissioners for the time being, then such residue of the said lots shall be divided, every other lot alternate to the said David Burns, and it shall on that event be determined by lot whether the said David Burns shall begin with the lot of the lowest number laid out on his said lands or the following number, and all the said lots which may in any manner be divided or assigned to the said David Burns shall thereupon, together with any part of the said bargained and sold lands, if any, which shall not have been laid out in the said city, be conveyed by the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, to him, the said David Burns, his heirs and assigns, and that the said other lots shall and may be sold at any time or times in such manner and on such terms and conditions as the President of the United States for the time being shall direct, and that the said Thomas

[204] *Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, will, on the order and direction of the President, convey all the said lots so sold and ordered to be conveyed to the respective purchasers in fee simple, according to the terms and conditions of such purchasers, and the produce of the sales of the said lots when sold as aforesaid shall, in the first place, be applied to the payment in money to the said David Burns, his executors, administrators, or assigns, for all the part of the lands hereby bargained and sold, which shall have been in lots, squares, or parcels, and appropriated as aforesaid, to the use of the United States, at the rate of twenty-five pounds per acre, not accounting the said streets as part thereof, and the said twenty-five pounds per acre being so paid, or in any other manner satisfied, that the produce of the same sales or what thereof may remain as aforesaid in money or securities of any kind shall be paid, assigned, transferred, and delivered over to the President for the time being, as a grant of money, and to be applied for the purposes and according to the act of Congress aforesaid, but the said conveyances to the said David Burns, his heirs or assigns, as well as the conveyances to the purchasers, shall be on and subject to such terms and conditions as shall be thought reasonable by the President for the time being, for regulating the materials and manner of the buildings and improvements on the lots generally in the said city, or in particular streets or parts thereof for common convenience, safety, and order; provided such terms and conditions be declared before the sale of any of the said lots under the direction of the President and in trusts farther, and on the agreement that he, the said David Burns, his heirs and assigns, shall and may continue his possession and occupation of the said land hereby bargained and sold, at his and their will and pleasure until the same shall be occupied under the said appropriations for the use of the United States as aforesaid, or by purchasers, and when any lots or parcels shall be occupied under purchase or appropriations as aforesaid, then and not till then, shall the said David Burns relinquish his occupation thereon. And in trust also as to the trees, timber, and woods on the premises
[205] that he, *the said David Burns, his heirs or assigns, may freely cut down, take, and use the same as his and their property, except such of the trees and wood growing as the President or commissioners aforesaid may judge proper and give notice shall be left for ornament, for which the just and reasonable value shall be paid to the said David Burns, his executors, administrators, or assigns, exclusive of the twenty-five pounds per acre for the land, and in case the arrangements of the streets, lots, and like will conveniently admit of it, he, the said David Burns, his heirs and assigns, shall, if he so desire it, possess and retain his buildings and graveyard, if any, on the hereby bargained and sold lands, paying to the President at the rate of twelve pounds ten shillings per acre, of the lands so retained, because of such buildings and graveyards to be applied as aforesaid, and the same shall be thereupon conveyed to the said David Burns, his heirs and assigns, with the lots, but if the arrangements of the streets, lots, and like will not conveniently admit of such retention, and it shall become necessary to remove such buildings, then the said David Burns, his executors, administrators, or assigns shall be paid the reasonable value thereof in the same manner as squares or other ground appropriated for the use of the United States are to be paid for. And because it may so happen that by deaths and removals of the said Thomas Beall and John Mackall Gantt, and from other causes, difficulties may occur in fully perfecting the said trust by executing all the said conveyances, if no eventual provision is made, it is therefore agreed and covenanted, between all the said parties, that the said Thomas Beall and John M. Gantt, or either of them, or the heirs of either of them, lawfully may, and they at any time, at the request of the President of the United States for the time being, will, convey all or any of the said lands hereby bargained and sold which shall not then have been conveyed in execution of the trusts aforesaid to such person or persons as he shall appoint in fee simple, subject to the trusts then remaining to be executed, and to the end that the same may be perfected. And it is further agreed and granted between all the said parties, and each of the said parties doth for himself respectively and *for his [206]
heirs covenant and grant to and with the others of them that he and they shall, and will, if required by the President of the United States for the time being, join in and execute any further deed or deeds for carrying into effect the trusts, purposes, and true intent of this present deed.

"In witness whereof, the parties to these presents have hereunto interchangeably set their hands and affixed their seals the day and year first above written."

The deed of Notley Young is in substantially similar terms.

On December 19, 1791, an additional act was passed by Maryland, ratifying the previous act of cession, and reciting that Notley Young, Daniel Carroll of Duddington, and many other proprietors of the part of the land thereinafter mentioned to have been laid out in a city, had come into an agreement, and had conveyed their lands in trust to Thomas Beall and John Mackall Gantt, whereby they subjected their lands to be laid out as a city, given up part to the United States, and subjected other parts to be sold to raise money, as a donation, to be employed according to the act of Congress for establishing the temporary and permanent seat of the government of the United States, under and upon the terms and conditions contained in each of said deeds; that the President had thereafter directed to be laid out upon such lands a city, which has been called the city of Washington, comprehending all the lands beginning on the east side of Rock creek, at a stone standing in the middle of the road leading from Georgetown to Bladensburgh,

thence along the middle of said road to a stone standing on the east side of the Reedy Branch of Goose creek, thence southeasterly, making an angle of sixty-one degrees and twenty minutes with the meridian, to a stone standing in the road leading from Bladensburgh to the Eastern Branch Ferry, thence south to a stone eighty poles north of the east and west line already drawn from the mouth of Goose creek to the Eastern Branch, then east parallel to the said east and west line to the Eastern Branch, then with the waters of the Eastern Branch, Potomac river, and Rock creek, to the beginning.

By section 2, that portion of the "territory
[207] called Columbia," *lying within the limits of the state, there was ceded and relinquished to the Congress and the government "full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon," but providing that nothing therein contained should be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein otherwise than the same shall or may be transferred by such individuals to the United States, and that the jurisdiction of the laws of the state over the persons and property of individuals residing within the limits of the cession should not cease or determine until Congress should by law provide for the government thereof.

By section 3 it was provided that "all persons to whom allotments and assignments of lands shall be made by the commissioners, or any two of them, on consent or agreement, or, pursuant to the act, without consent, shall hold the same in their former estate and interest, and as if the same had been actually reconveyed pursuant to the said deed in trust."

By section 5 it was enacted that "all the lots and parcels which have been or shall be sold to raise money shall remain and be to the purchasers, according to the terms and conditions of their respective purchase"; and that a purchase, when made from one claiming title and, for five years previous to the statute, in possession, either actually or constructively, through those under whom he claimed, was rendered unassailable, and that the true owner must pursue the purchase money in the hands of the vendor.

Section 7 enacted that the commissioners might appoint a clerk of recording deeds of land within the said territory, who shall provide a proper book for the purpose, and therein record, in a strong, legible hand, all deeds, duly acknowledged, of lands in the said territory delivered to him to be recorded, and in the same book make due entries of all divisions and allotments of lands and lots made by the commissioners in pursuance of this act, and certificates granted by them of sales, and the purchase money having been paid, with a proper alphabet in the same book of the deeds and entries aforesaid.

[208] *By section 9 it was enacted that the commissioners "shall direct an entry to be made in the said record book of every allotment and assignment to the respective proprietors in pursuance of this act."

By section 12 it was declared that until the assumption of legislative power by Congress the commissioners should have power to "license the building of wharves in the waters of the Potomack and the Eastern Branch, adjoining the said city, of the materials, in the manner and of the extent they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in the said waters without a license as aforesaid; and if any wharf shall be built without such license, or different therefrom, the same is hereby declared a common nuisance; they may also, from time to time, make regulations for the discharge and laying of ballast from ships or vessels lying in the Potomack river above the lower line of the said territory and Georgetown, and from ships and vessels lying in the Eastern Branch." 2 Kilty, Laws of Maryland, chap. 45.

While the transactions were taking place between the commissioners and the several proprietors, and which culminated in the deeds of conveyance by the latter to Beall and Gantt, negotiations were going on between the President and the commissioners on the one hand, and the owners of lots in Carrollsburgh and Hamburgh on the other. Without following these negotiations in detail, it seems sufficient to say that an agreement substantially similar to the one of March 13, 1791, was reached with those lot-owners, and that the territory of those adjacent villages was embraced in the President's proclamation of March 30, 1791.

By a letter contained in the record, dated March 31, 1791, from President Washington to Thomas Jefferson, Secretary of State, it appears that Major L'Enfant was, after the aforesaid agreements had been reached, directed by the President to survey and lay off the city; and the President further stated in that letter that "the enlarged plan of this agreement having done away the necessity, and indeed postponed *the propriety, of des [209]
ignating the particular spot on which the public buildings should be placed until an accurate survey and subdivision of the whole ground is made," he has left out of the proclamation the paragraph designating the sites for the public buildings.

On August 19, 1791, Major L'Enfant presented to the President his plan of the city, accompanied with a letter, describing the plan as still incomplete, and making several suggestions, particularly one to the effect that sales should not be made till the completion of his scheme for the city and the public buildings should be completed.

On December 13, 1791, the President sent to Congress a communication in the following terms: "I place before you the plan of the city that has been laid out within the district of ten miles square, which was fixed upon for the permanent seat of the government of the United States."

Afterwards, on February 20, 1797, on the occasion of a complaint by Mr. Davidson of certain deviations from this plan by Major Ellicott, who succeeded Major L'Enfant as surveyor, President Washington, in a letter

to the commissioners, said: "Mr. Davidson is mistaken if he supposed that the transmission of Major L'Enfant's plan of the city to Congress was the completion thereof. So far from it, it will appear from the message which accompanied the same that it was given as matter of information to show what state the business was in, and the return of it requested. That neither house of Congress passed any act consequent thereupon. That it remained, as before, under the control of the executive. That afterwards several errors were discovered and corrected, many alterations made, and the appropriations, except as to the capitol and the President's house, struck out under that authority, before it was sent to the engraver, intending that work and the promulgation thereof were to give it the final and regulating stamp."

Subsequently dissensions arose between the commissioners and L'Enfant, which resulted in the dismissal of the latter, and the employment of Andrew Ellicott, who, on February 23, 1792, completed a plan of the city
[210] and delivered it to the *President, who, in a letter to the commissioners dated March 6, 1792, said: "It is impossible to say with any certainty when the plan of the city will be engraved. Upon Major L'Enfant's arrival here, in the latter part of December, I pressed him in the most earnest manner to get the plan ready for engraving as soon as possible. Finding there was no prospect of obtaining it through him, at least not in any definite time, the matter was put into Mr. Ellicott's hands to prepare about three weeks ago. He has prepared it, but the engravers who have undertaken to execute it say it cannot certainly be done in less than two, perhaps not under three, months. There shall, however, be every effort made to have the thing effected with all possible despatch."

This so-called Ellicott's plan was engraved at Boston and at Philadelphia—the engraved plans differing in that the latter did and the former did not show the soundings of the creek and river.

Subsequently, James R. Dermott was employed to make a plan of the city, which he completed prior to March 2, 1797, and on that day President Washington, by his act, requested and directed Thomas Beall and John M. Gantt, the trustee, to convey all the streets in the city of Washington, as they were laid and delineated in the plan of the city thereto attached, and also the several squares, parcels, and lots of ground appropriated to the use of the United States, and particularly described, to Gustavus Scott, William Thornton, and Alexander White, commissioners appointed under the act of Congress.

On July 23, 1798, President Adams, in an instrument alleging that the plan referred to in said request and instruction by President Washington as having been annexed thereto had been omitted, declared that he had caused said plan to be annexed to said writing, and requested the said Thomas Beall and John M. Gantt to convey the streets, squares, parcels, and lots of ground, described in the act of the late President of the United States as public appropriations, to the said Scott, Thornton, and White, and their successors in office as commissioners, to the use of the United States forever.

*Lots and parcels of ground were sold to [211]
private purchasers, from time to time, under all three of these plans, and controversies have arisen as to the comparative authenticity of these plans. The particulars wherein those plans differ are stated and considered in the opinion of the court.

On February 27, 1801, Congress passed the act concerning the District of Columbia and its government, and providing "that the laws of the state of Maryland as they now exist shall be continued in force in that part of the said district which was ceded by that state."

By the act of August 2, 1882 (22 Stat. at L. 198, chap. 375), Congress made an appropriation for "improving the Potomac river in the vicinity of Washington with reference to the improvement of navigation, the establishment of harbor lines, and the raising of the flats, under the direction of the Secretary of War, and in accordance with the plan and report made in compliance with the river and harbor act approved March 3, 1881, and the reports of the Board of Engineers made in compliance with the resolution of the Senate of December 13, 1881."

This act made it the duty of the Attorney General to examine all claims of title to the premises to be improved under this appropriation, and to institute a suit or suits at law or in equity "against any and all claimants of title under any patent which, in his opinion, was by mistake or was improperly or illegally issued for any part of the marshes or flats within the limits of the proposed improvement."

By subsequent acts of Congress further appropriations were made for continuing the improvement, amounting to between two and three millions of dollars, and in the prosecution of the work channels have been dredged, sea walls constructed, and a large area reclaimed from the river.

It appearing that claims to the lands embraced within the limits of the improvement, or to parts of them, were made by the Chesapeake & Ohio Canal Company, and by several other corporations and persons, besides those claiming under the patent referred to in the act of 1882, Congress passed the act approved August 5, 1886 (24 Stat. at L. 335), entitled "An *Act to Provide for Protecting the In- [212]
terests of the United States in the Potomac River Flats, in the District of Columbia."

By the first section of this act it was made the duty of the Attorney General "to institute as soon as may be, in the supreme court of the District of Columbia, a suit against all persons and corporations who may have or pretend to have any right, title, claim, or interest in any part of the land or water in the District of Columbia within the limits of the city of Washington or exterior to said limits and in front thereof toward the channel of the Potomac river, and composing any part of the land and water affected by the improvements of the Potomac river or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto."

By the second section, it was provided that the suit "shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations known to set up or assert any claim or right to or in the land or water in said first section mentioned, and against all other persons and corporations who may claim to have any such right, title, or interest. On the filing of said bill process shall issue and be served, according to the ordinary course of said court, upon all persons and corporations within the jurisdictions of said court; and public notice shall be given by advertisement in two newspapers published in the city of Washington for three weeks successively of the pendency of said suit, and citing all persons and corporations interested in the subject-matter of said suit, or in the land or water in this act mentioned, to appear, at a day named in such notice, in said court, to answer the said bill, and set forth and maintain any right, title, interest, or claim that any person or corporation may have in the premises; and the court may order such further notice as it shall think fit to any party in interest."

The third section gives the court "full power and jurisdiction by its decree to determine every question of right, title, interest, or claim arising in the premises, and to vacate, annul, set aside, or confirm any claim of any character arising or set forth in the premises; and its decree shall be final and
[213] conclusive *upon all persons and corporations, parties to the suit, and who shall fail, after public notice as hereinbefore in this act provided, to appear in said court and litigate his, her, or its claim, and they shall be deemed forever barred from setting up or maintaining any right, title, interest, or claim in the premises."

As to all the defendants, except those claiming under a certain patent issued through the General Land Office to John L. Kidwell, in 1869, the bill states that "the complainant is not sufficiently informed as to the nature and extent of said claims, or any of them, to set them out with particularity; and the complainant leaves them to present their claims in their answer hereto as they may be advised."

As to the claims under said patent, the bill avers the patent to be void upon several grounds, and the claims, therefore, unfounded, and prays that the patent may be canceled and annulled.

The bill further states that "the complainant disclaims in this suit seeking to establish its title to any of the wharves included in the area described in paragraph 3 of this bill, and claims title only to the land and water upon and in which said wharves are built, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, to be decided in any other appropriate proceeding."

The limits of the "land and water" affected by the improvements are specifically set forth in the third paragraph of the bill of complaint. The beginning of said limits is at the southeast corner of square south of square 12, and they proceed thence along the east line of said square and the west line of Twenty-Sixth street to the line of the Chesapeake & Ohio Canal bank; thence, by several courses and distances "along the canal bank, parallel to and about ten feet southwest of a row of sycamore trees," and following the shore line of the river to the southwest line of Virginia avenue between Seventeenth and Eighteenth streets west; thence southeasterly along the southeast line of said avenue to the east line of Seventeenth street west, being the west line of Reservation 3 (known as the Monument Grounds); thence to the crest *of the bank forming the [214]
southwestern boundary of Reservation 3, and along said crest to the southwestern corner of square 233, at the intersection of Fifteenth street west and Water street; thence across Fourteenth street west and Maryland avenue to a point in the middle of E street south; thence to the nearest point in the shore line of the river; thence with said shore line to Greenleaf's Point at the southern extremity of the Arsenal Grounds; the line proceeds thence along the east side of the Washington channel of the Potomac river and across the mouth of the Eastern Branch in a southerly direction to the wharf at Giesboro Point; thence across the main or Virginia channel of the Potomac river in a westerly direction to the west side of that channel; thence along the west side of that channel in a northwesterly direction and following the meanders of the channel to a point opposite the wharf known as Easby's wharf; thence across the channel to the southwest corner of said wharf, and thence along the south side of said wharf to the southwest line of square south of square 12; and thence along said southwest line to the place of beginning at the southeast corner of said square.

The area of actual reclamation of land from the bed of the river within said limits under the above-mentioned legislation amounted to nearly seven hundred and fifty acres.

Claims and pretensions of various kinds to the land and water within said limits, or to portions of the same, are set up in the answers of the parties who were originally made defendants to the bill and of those who have appeared in response to the public notice of the pendency of the suit given in accordance with the terms of the act.

These claims, with respect to the nature of the several issues involved in them, admit of convenient division into classes, *viz.:*

I. The claim made by the heirs of James (M.) Marshall and those of his brother, Chief Justice John Marshall, to the ownership of the entire bed of the river from shore to shore (including therein the reclaimed land) under grants from the Crown of England to Lord Culpeper and others, for what is known as the Northern Neck of Virginia, and the deed from Denny Martin Fairfax, as said Culpeper's successor in title, to said *James (M.) Marshall; and the claim made [215]
by the said heirs of James (M.) Marshall to such ownership under the patent to Lord Baltimore for the province of Maryland, and

the deed to them from Frederick Paul Harford as Lord Baltimore's successor in title.

II. The claims of ownership made to part of the reclaimed land by certain defendants, who assert title under a patent issued by the United States through the General Land Office to John L. Kidwell in the year 1869 for forty-seven and seventy-one one-hundredths (47 71-100) acres and to one hundred and fifty (150) acres of alleged accretion thereto; and to another tract, the area of which is not stated, adjoining the Long Bridge and extending therefrom southwardly between the Washington and Georgetown channels, of which latter tract they claim to be the equitable owners under an application for a patent made by said Kidwell in 1871.

III. The claims made by the Chesapeake & Ohio Canal Company and its lessee, Henry H. Dodge, to riparian rights from Easby's Point to Seventeenth street west.

IV. The claims to riparian rights, right of access to the channel of the river, and to accretions, natural and artificial, made by the owners of lots in squares along the river west of Seventeenth street west, namely, squares 148, 129, 89, 63, 22, and square south of square 12.

V. The claim made by certain of the descendants of Robert Peter, an original proprietor of lands in the city of Washington, to certain land near the public reservation known as the Observatory Grounds.

VI. The claims to riparian privileges and wharfing rights made by owners of lots in squares beginning with square 233 and extending to the line of the Arsenal Grounds.

VII. The claims made by certain persons occupying wharves below the Long Bridge.

The main determination by the court "of rights drawn in question" in the suit was a decree passed October 17, 1895. The decree adjudicated nearly all the points in controversy in favor of the United States.

Certain lots and parts of lots in squares
[216] 63, 89, 129, and 148, *north of their boundaries on Water street and A street, which were subject to the ebb and flow of the tide, were included in the work of reclamation, and as to them the decree held the owners to be entitled to compensation for the taking and inclusion of the same in the improvements.

By the first paragraph of the decree the claims under class 2, that is, those set forth in the answers of certain defendants founded upon a patent issued to John L. Kidwell in 1869, for a tract of forty-seven and seventy-one one-hundredths (47 71–100) acres in the Potomac river, and alleged accretion thereto, and also to a tract adjoining the Long Bridge, founded upon an application for a patent therefor made by said Kidwell in 1871, are held and declared to be "invalid, void, and of none effect;" and the said patent is "vacated, annulled, and set aside."

By the second paragraph "the claims of each and all of the other parties defendants, set forth in their respective answers, to any rights, titles, and interests, riparian or otherwise, in the said lands or water," are held and declared "to be invalid, void, and of none effect," except as to the parties owning said lots and parts of lots in the squares last mentioned.

By the third paragraph it is held and declared "that there does not exist (except as aforesaid) any right, title, or interest in any person or corporation, being a party to this cause, to or in any part of the said land or water," and "that the right and title of the said United States (except as aforesaid) to all the land and water included within the limits of the said improvements of the Potomac river and its flats, as the said limits are described in the said bill of complaint," is absolute "as against all the defendants to this cause, and as against all persons whomsoever claiming any rights, titles, or interests therein who have failed to appear and set forth and maintain their said rights, titles, or interests as required by said act of Congress."

By the fourth paragraph it is held that the defendants who are owners of the lots or parts of lots in squares 63, 89, 129, and 148, "which are included between the north line or lines of the said improvements of the Potomac river and its flats and the north line or *lines of Water street and A street, are entitled to be indemnified for whatever impairment or injury may have been caused to their respective rights, titles, or interests in said lots or parts of lots by the taking of the same by the United States; the value of such rights, titles, interests, or claims to be ascertained by this court, exclusive of the value of any improvement of the said lots or parts of lots made by or under the authority of the said United States." [217]

By the fifth and last paragraph of the decree the taking of further testimony was authorized, on behalf of the owners and on behalf of the United States, as to the respective areas of the said lots and parts of lots, and of and concerning the true ownership and value of the said lots and parts of lots.

Such testimony as to ownership, areas, and values having been taken and returned, the court upon consideration thereof, and on March 2, 1896, passed a further and supplementary decree, adjudging the values of the said lots and parts of lots so taken to be ten cents per square foot, and payment was directed to be made to sundry persons whom the court found to be the owners of certain of the parcels; the ownership of the remaining parcels not being, in the opinion of the court, sufficiently established, the taking of further testimony with respect thereto was ordered. The total amount of said values found by the court is $26,684.09.

The court having made a report of its action in the premises to Congress, agreeably to the requirements of the act of August 5, 1886, an appropriation was made for the payment of the sums so found to be due to the owners of the said lots and parts of lots in said squares; and with two exceptions, namely, Richard J. Beall and the trustees of the estate of William Easby, deceased, the several owners of the property applied, under said appropriation act, to the court for the payment to them of the respective sums

found to be due to them, and the fund has been very largely disbursed under orders of the court passed on said applications.

From the main decree of October 17, 1895, appeals were taken as follows:

[218] *1. By all the defendants embraced in class one (1), namely, the heirs of James (M.) Marshall and the heirs of his brother, Chief Justice Marshall.

2. By all the defendants embraced in class two (2) claiming under the Kidwell patent, etc., namely, Martin F. Morris, Henry Wells, Edward H. Wilson, Catherine A. Kidwell, Emma McCahill, John W. Kidwell, Francis L. Kidwell, Ida Hyde, and George A. Hyde.

3. By one of the defendants embraced in class three (3), namely, the Chesapeake & Ohio Canal Company and its trustees.

4. By two of the defendants embraced in class four (4), namely, the trustees of the estate of William Easby, deceased, and Richard J. Beall.

5. By all of the defendants embraced in class five (5), namely, certain descendants of Robert Peter.

6. By certain of the defendants embraced in class six (6), namely: (*a*) Charles Chauncy Savage *et al.;* (*b*) The Washington Steamboat Company, limited; (*c*) Avarilla Lambert *et al.;* (*d*) William W. Rapley; (*e*) Mary A. S. Kimmell Gray; (*f*) James F. Barber *et al.;* (*g*) William G. Johnson, assignee of the American Ice Company; (*h*) Thomas W. Riley; (*i*) Edward M. Willis; (*j*) Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, *et al.;* (*k*) Elizabeth K. Riley, in her own right and as trustee and executrix of William R. Riley, deceased; (*l*) The Great Falls Ice Company; (*m*) Daniel S. Evans; (*n*) Margaret J. Stone; and (*o*) Charles B. Church *et al.*

7. By certain of the defendants embraced in class seven (7), namely, Annie E. Johnson, widow, sole executrix and devisee of E. Kurtz Johnson, deceased, *et al.;* Charles B. Church *et al.;* Daniel S. Evans, and William W. Rapley.

The following reduced copies of the plans will assist in applying the reasoning of the opinion. [See opposite].

No. 1 is the city before the conveyances.

No. 2 is the Ellicott plan.

No. 3 is a portion of the Dermott map, sufficient to indicate the river front in part.

Mr. **A. Leo Knott** for the heirs of James Markham Marshall, appellants.

Messrs. **John Howard** and *James V. Brooke* for the heirs of John Marshall, appellants.

Messrs. **George E. Hamilton** and **Nathaniel Wilson** for Martin F. Morris and others, appellants claiming under the Kidwell patent.

Messrs. **John K. Cowen, Hugh L. Bond, Jr.,** and *Charles F. T. Beale* for the Chesapeake & Ohio Canal Company, and Joseph Bryan, John K. Cowen, and Hugh L. Bond Jr., trustees, appellants.

Messrs. **Henry Randall Webb** and *John Sidney Webb* for Rose L. Easby and Fanny B. Easby, trustees of the estate of William Easby, appellants.

Messrs. **J. Holdsworth Gordon,** *Arthur Peter*, and *Enoch Totten* for William L. Dunlop and the heirs of George Peter, deceased, appellants.

Mr. **John Selden** for the heirs of Moncure Robinson, deceased, and others, and for the Washington Steamboat Company, Limited, appellants.

Messrs. **Calderon Carlisle, William G. Johnson,** and **Tallmadge A. Lambert** for Willis, American Ice Company, Thomas W. Riley, Barbour Estate, Great Falls Ice Company, Van Riswick Estate, Johnson Estate, and Kimmell heirs, appellants.

Messrs. Enoch Totten and *Edward A. Newman* submitted a brief for W. W. Rapley, appellant.

Mr. William F. Mattingly submitted a brief for Daniel S. Evans, appellant.

Mr. J. M. Wilson submitted a brief for R. J. Beall, appellant.

Mr. Tallmadge A. Lambert submitted a brief for Wilhelmina M. Easby-Smith, appellant.

Messrs. **Hugh T. Taggart** and **Holmes Conrad** for the United States, appellee.

*Mr. Justice **Shiras** delivered the opinion [222]
of the court:

The first question for our determination arises out of the claims of the heirs of James M. Marshall and the heirs *of John Marshall [223]
to the ownership of the entire bed of the Potomac river, from shore to shore, including therein the reclaimed lands.

Their claims are based upon two distinct lines or sources of title, inconsistent with each other: One originating in the charter granted by Charles I., King of England, on June 20, 1632, to Cecilius Calvert, second Baron of Baltimore and first Lord Proprietary of the province of Maryland; the other, in the charter granted by James II., King of England, on September 27, 1688, to Thomas Lord Culpeper.

We do not think it necessary to enter at length or minutely into the history of the long dispute between Virginia and Maryland in respect to the boundary line. It is sufficient, for our present purpose, to say that the grant to Lord Baltimore, in unmistakable terms, included the Potomac river and the premises in question in this suit, and declared that thereafter the province of Maryland and its freeholders and inhabitants should not be held or reputed a member or part of the land of Virginia, "from which we do separate both the said province and inhabitants thereof."

On September, 1688, King James II., by his royal patent of that date, granted to Thomas, Lord Culpeper, what was called the Northern Neck of Virginia, and described as follows:

"All that entire tract, territory, or parcel of land situate, lying, and being in Virginia in America, and bounded by and within the first heads or springs of the rivers of Tappahannock al^s Rapahannock and Quiriough al^s Patawonuck rivers, the courses of said rivers

from their said first heads or springs as they are commonly called and known by the inhabitants and descriptions of those parts and the Bay of Chesapeake, together with the said rivers themselves and all the islands within the outermost banks thereof, and the soil of all and singular the premises, and all lands, woods, underwoods, timber, and trees, wayes, mountains, swamps, marshes, waters, rivers, ponds, pools, lakes, watercourses, fishings, streams, havens, ports, harbours, bays, creeks, ferries, with all sorts of fish, as well whales, sturgeons, and other
[224]royal fish. . . . To have, *hold, and enjoy all the said entire tract, territory, or portion of land, and every parts and parcels thereof, . . . to the said Thomas, Lord Culpeper, his heirs and assigns forever."

Owing to the conflicting descriptions, as respected the Potomac river, contained in these royal grants, a controversy early arose between Virginia and Maryland. A compact was entered into in 1785 between the two states, whereby, through commissioners, a jurisdictional line, for the purpose of enforcing the criminal laws and regulating the rights of navigation in the Potomac river, was agreed upon.

Finally, the controversy as to the true boundary still continuing, in 1874 the legislatures of the two states agreed in the selection of arbitrators, by whose award, dated January 16, A. D. 1877, the jurisdictional line and boundary were declared to be the low-water mark on the Virginia shore. This award was accepted by the two states, and, by an act approved March 3, 1879 (20 Stat. at L. 481, chap. 196), Congress gave its consent to the agreement and award; but provided that nothing therein contained should be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which formed the subject of the said agreement or award.

It was a mutual feature of the legislation by which this conclusion was reached that the landholders on either side of the line of boundary between the said states, as the same might be ascertained and determined by the said award, should in no manner be disturbed thereby in their title to and possession of their lands, as they should be at the date of said award, but should in any case hold and possess the same as if their said titles and possession had been derived under the laws of the state in which by the fixing of the said line by the terms of said award they should be ascertained to be. Act of Virginia Feb. 19, 1876, chap. 48; Act of Maryland April 3, 1876, chap. 198.

Whether the result of this arbitration and award is to be regarded as establishing what the true boundary always was, and that therefore the grant to Thomas, Lord Culpeper, never of right included the Potomac
[225]river, or as establishing a *compromise line, effective only from the date of the award, we need not determine. For, even if the latter be the correct view, we agree with the conclusion of the court below, that, upon all the evidence, the charter granted to Lord Baltimore by Charles I., in 1632, of the territory known as the province of Maryland, embraced the Potomac river and the soil under it, and the islands therein, to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never devested by any valid proceedings prior to the Revolution, nor was such grant effected by the subsequent grant to Lord Culpeper.

The record discloses no evidence that, at any time, any substantial claim was ever made by Lord Fairfax, heir at law of Lord Culpeper, or by his grantees, to property rights in the Potomac river or in the soil thereunder, nor does it appear that Virginia ever exercised the power to grant ownership in the islands or soil under the river to private persons. Her claim seems to have been that of political jurisdiction.

Without pursuing further this branch of the subject, and assuming that the heirs of John Marshall have become lawfully vested with the Fairfax title, we are of opinion that they have failed to show any right or title to the lands and premises involved in this litigation, and that the decree of the court below, so far as it affects them, is free from error.

There remains to consider the claim of the heirs of James M. Marshall as alleged successors to the title of Lord Baltimore to the river Potomac and the soil thereunder, as part and parcel of the grant to him by the patent of Charles I., in 1632.

We adopt, as sufficient for our purposes, the statement of that claim made in the printed brief filed on behalf of the heirs of James M. Marshall:

1st. That Charles I., in his charter of June, 1632, conveyed to the Lord Proprietary of Maryland, *inter alia*, full title to the lands under the navigable waters and rivers subject to tidal overflow, within the limits of that charter, with the right to grant such lands to others.

2d. That the King in said charter granted to the Proprietary of the province of Maryland the whole bed and soil of the *Potomac [226]
river, from bank to bank, and from its source to its mouth, the *locus in quo* of the lands here in controversy.

3d. That the said Proprietary held such lands, as he held his other lands, in absolute ownership and propriety, but subject to the public servitudes in and of the waters over them, so long as those waters covered the lands.

4th. But that when the waters ceased to be or flow over them, these lands were relieved of those servitudes, and his right of seisin or possession attached and perfected his title, and of this his heirs or assigns could take the benefit and advantage, if holding title at that time.

5th. That by the action of the government of the United States, in reclaiming these lands for public purposes, and converting them into firm and fast lands, and passing the act of August 5, 1886, and bringing suit against these appellants and others, the first opportunity was given to these appellants to make or assert their title.

6th. That title was legally derived to them

by the devises and deeds set out in the record.

Briefly expressed, the appellants' contention is that the propriety in the soil under the river Potomac passed to Lord Baltimore and his grantees, and that it passed, not as one of the regalia of the Crown, or as a concomitant of government, but as an absolute proprietary interest, subject to every lawful public use, but not the less, on that account, a hereditament, and the subject of lawful ownership, and of the right of full and unqualified possession when that public use shall have ceased.

We need not enter into a discussion of this proposition, because the doctrine on which it is based has been heretofore adversely decided by this court in several leading and well-considered cases. *Martin* v. *Waddell*, 16 Pet. 367 [10: 997]; *Den* [*Russell*], v. *Association of Jersey Co.* 15 How. 426 [14: 757]; *Shively* v. *Bowlby*, 152 U. S. 1 [38: 331].

The conclusions reached were that the various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under
[227]*tide waters; that by those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community about to be established, as a public trust, for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property, to be parcelled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States; that when the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

If these principles are applicable to the present case, it follows that, upon the Revolution, the state of Maryland became possessed of the navigable waters of the state, including the Potomac river, and of the soils thereunder, for the common use and benefit of its inhabitants; and that by the act of cession, that portion of the Potomac river, with the subjacent soil which was appurtenant to and part of the territory granted, became vested in the United States.

We do not understand the learned counsel for the appellees to controvert the principles established by the cited cases as applicable to the royal grants and territories considered therein. But their contention is that a different doctrine has prevailed in the courts of the state of Maryland, to the effect that lands beneath the tide waters of the Potomac were grantable in fee to private persons, subject only to the public servitudes, and that when, as in the present case, by the action of the government, these lands have ceased to be submerged, the owner of the title, however long that title has been in abeyance, becomes entitled to possession and to compensation if the land be taken for public purposes.

*The soundness of this contention depends [228]
upon two propositions: First, that the Federal decisions cited do not establish general principles applicable to each and all of the royal charters to the founders of the Atlantic colonies, but are restricted in their scope to the particular grant in question in those cases; and, second, that the law of Maryland, if the sole rule of decision, is to the effect claimed.

In the argument in *Martin* v. *Waddell*, the decision of the supreme court of New Jersey, in the case of *Arnold* v. *Mundy*, 6 N. J. L. 1 [10 Am. Dec. 356], in which that court had laid down the rule as contended for by the appellants, was cited as conclusive, and as establishing a rule of property binding on the Federal courts.

In respect to this contention Mr. Chief Justice Taney said:

"The effect of this decision by the state court has been a good deal discussed at the bar. It is insisted by the plaintiffs in error that, as the matter in dispute is local in its character, and the controversy concerns only fixed property within the limits of New Jersey, the decision of her tribunals ought to settle the construction of the charter; and that the courts of the United States are bound to follow it. It may, however, be doubted whether this case falls within the rule in relation to the judgments of state courts when expounding their own Constitution and laws. The question here depends, not upon the meaning of instruments framed by the people of New Jersey, or by their authority, but upon charters granted by the British Crown, under which certain rights are claimed by the state, on the one hand, and by private individuals on the other. And if this court had been of opinion that upon the face of these letters patent the question was clearly against the state, and that the proprietors had been deprived of their just rights by the erroneous judgment of the state court, it would perhaps be difficult to maintain that this decision of itself bound the conscience of this court. . . . Independently, however, of this decision of the supreme court of New Jersey, we are of opinion that the proprietors are not entitled to the rights in question."

The subject is barely adverted to in *Shively* v. *Bowlby*, where, referring to the case of *Martin* v. *Waddell*, it was *said by [229]
Mr. Justice Gray: "This court, following, though not resting wholly upon, the decision of the supreme court of New Jersey in *Arnold* v. *Mundy*, 6 N. J. L. 1 [10 Am. Dec. 356], gave judgment for the defendants." Whether, in the controversy between the United States, in the capacity of grantees

of the state of Maryland, and the heirs of James M. Marshall, as successors to the property title of Lord Baltimore, involving a construction of the grant of Charles I., the final decision belongs to the Federal or to the state court, we do not find it necessary to decide. For, in our opinion, there is no conflict between the views announced by this court in the cases cited, and those that prevailed in Maryland, as they appear in the public conduct, and in cases decided prior to and about the time of the act of cession.

It does not appear that, in the administration of his affairs as land proprietor, Lord Baltimore, or his successors, ever made a sale, or executed a patent, which, upon its face and in terms, granted the bed or shores of any tide water in the province, or ever claimed the right to do so.

The argument to the contrary, as respects the decisions of the courts of Maryland, depends on the case of *Browne* v. *Kennedy*, 5 Harr. & J. 196 [9 Am. Dec. 503], decided in 1821, and following cases. The legal import of that case, and the effect to which it is entitled in the present case, we shall consider in a subsequent part of this opinion.

The case of *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603 [3: 453], is authority for the propositions that Lord Fairfax's title to the waste and unappropriated lands, which he devised to Denny Fairfax, was that of an absolute property in the soil in controversy in that case, that the acts of ownership shown to have been exercised by him over the whole waste and unappropriated lands vested in him a complete seisin and possession thereof; and that, even if there had been no acts of ownership proved, as there was no adverse possession, and the land was waste and unappropriated, the legal seisin must be considered as passing with the title. But neither Maryland nor any grantee of Maryland was a party to that suit. Nor, even as between the parties, was any actual
[230] question *made or evidence offered as to the boundary between Maryland and Virginia. The questions adjudicated were, what was the *nature*, not the extent of territory involved, of Lord Fairfax's title, and what was the character of the title which Denny Fairfax took by the will of Lord Fairfax, he being at the time of Lord Fairfax's death in 1871, an alien enemy.

Therefore the questions now before us are not affected by that case. Nor do we think it necessary, in view of the conclusion we have reached on other grounds, to consider the legal effect and import of an alleged compromise between the state of Virginia and the devisees of Denny Fairfax and those claiming under them, and which is referred to in the act of December 10, 1796. Revised Code, chap. 92.

However, even if it be conceded—which we do not do—that the river Potomac and the soil under it were, by virtue of the grant of Charles I., the private property of Lord Baltimore, and that the same lawfully descended to and became vested in Henry Harford, the last Proprietary of Maryland, still, by the acts of confiscation passed by the general assembly of Maryland in 1781 (chaps. 45 and 49), all the property and estate of the then Lord Proprietary of Maryland, within that state, were confiscated and seized to the use of the state, and, as public property belonging to the state at the time of the cession of 1791, passed into the ownership of the United States.

As against this proposition, it is argued on behalf of the Marshall heirs that the confiscation acts of Maryland were ineffectual in the present case, because the title to these lands under waters is of such character that they could not be forfeited or confiscated, the owner thereof not having right of possession or right of entry thereon. If, as is elsewhere claimed by the appellants, the soil under the river was the subject of sale and devise, it is not easy to see why it may not be subjected to forfeiture and confiscation. Indeed, it was held in *Martin* v. *Waddell* that lands under navigable waters were subject to an action of ejectment. And in the case of *Lowndes* v. *Huntington*, 153 U. S. 1 [38: 615], an action of ejectment, asserting title to land submerged under the waters of Huntington bay, was sustained.

*It is further claimed that these acts of [231]
Maryland we in derogation of the common law and of the express provisions and inhibitions of the Constitution and bill of rights of that state adopted four years before the passage of these acts of confiscation; and that the effect of the sixth article of the treaty of 1783 and the ninth article of the treaty of 1794 and of the act of Maryland of 1787 making the treaty of 1783 the law of the state, operated to relieve these lands from forfeiture and restored them to Henry Harford, and that the power to pass acts of confiscation did not inhere as a war power in Maryland.

For an answer to the reasoning advanced by the learned counsel for the appellants in support of these contentions, it is sufficient to refer to the case of *Smith* v. *Maryland*, 6 Cranch, 286 [3: 225], where it was held, affirming the court of appeals of the state of Maryland, that by the confiscating acts of Maryland the equitable interests of British subjects were confiscated, without office or entry or other act done, and although such equitable interests were not discovered until long after the peace.

It is finally urged that, even acceding the validity of the confiscation acts, and that they were effectual to devest the title of Henry Harford and put it in the state of Maryland, and even though it was transferred by the act of cession to the United States, yet the latter took the property under a trust or equity created by the treaties with Great Britain, whereby they are in equity bound to restore it to the Harford heirs or to their assigns, or to make just compensation for subjecting it to public purposes. It is said that, when now the United States find themselves in control or possession of a part of the estate of a subject of Great Britain, they should do what they "earnestly recommended" should be done by the states, namely, make a restitution of the confiscated estates.

Whatever force, if any, there may be in

such suggestions, it is quite evident that they are political in their nature, and appeal to Congress, and not to the courts. It cannot be maintained, with any show of plausibility, that Congress intended, by the act under which these proceedings are had, that [232]the *supreme court of the District of Columbia, or that this court on appeal, should have the right to overturn, after the lapse of a century, rights originating in statutes of Maryland and of the United States, sustained as valid by their courts.

We affirm, therefore, the decree of the court below, in respect to the Marshall heirs, that, in the words of the act of 1886, they have no "right, title, or interest in any part of the land or water composing any part of the Potomac river, or its flats, in charge of the Secretary of War."

The next claim for consideration is that founded upon a patent issued, on December 6, 1869, from the General Land Office to John L. Kidwell, for "a tract of vacant land containing fifty-seven acres and seventy-one one-hundredths of an acre, called 'Kidwell's Meadows,' and lying in the Potomac river, above the Long Bridge, according to the official certificate and plat of survey thereof bearing date the tenth and twelfth of October, 1867, made and returned by the surveyor of Washington county, pursuant to a special warrant of survey unto the said surveyor directed on the 26th day of June, 1867, by the Commissioner of the General Land Office aforesaid, in virtue of the authority of Congress, under a resolution 'directing the manner in which certain laws of the District of Columbia shall be executed,' approved on the 16th day of February, 1839."

The resolution of Congress referred to was in the following words: "That the acts of the state of Maryland for securing titles to vacant land which were continued in force by the act of Congress of the twenty-seventh of February, 1821, in that part of the District of Columbia which was ceded to the United States by that state, and which have been heretofore inoperative for want of proper officers or authority in the said District for their due execution, shall hereafter be executed, as regards lands in the county of Washington and without the limits of the city of Washington, by the Secretary of the Treasury, through the General Land Office, where applications shall be made for warrants, which warrants shall be directed to the surveyor for the county of Washington, who shall make return to the Commissioner of the General Land Office; and payment for said land, according to the said laws of [233]Maryland, shall be *made to the Treasurer of the United States, whose certificate of such payment shall be presented to the Commissioner of the General Land Office, who shall thereupon issue, in the usual form of patents for lands by the United States, a patent for such land to the person entitled thereto; and the Secretary of the Treasury shall make such regulations as he may deem necessary, and shall designate the officers who shall carry the said acts into effect: Provided, that any land which may have been ceded to or acquired by the United States for public purposes shall not be affected by such acts." 5 Stat. at L. 365, chap. 229.

The space claimed to be comprehended within the courses and distances of the survey, set forth in the patent, is now included within the lines of the raised land known as the reclaimed flats; and the claimants under the patent contend that this occupation by the United States is an appropriation of their property, for which they are entitled to compensation under the proceedings in this suit.

It is alleged in the bill that the patent to Kidwell was issued without authority of law, and was and is null and void, and several grounds are set forth for each allegation. The main contentions on behalf of the government are that the land covered by the patent was, when it issued, within the limits of the city of Washington, and was therefore excepted from the operations of the resolution of 1839; that the land was, at the time of the cession, a part of the bed of the Potomac river and subject to tidal overflow, and was therefore reserved to the United States for such public uses as ordinarily pertain to the river front of a large city; that said land, as part of the bed of the Potomac river and subject to overflow by the tides, was not the subject of a patent under the resolution of 1839, and the General Land Office and its functionaries were without authority to grant a patent therefor; and that the patent was obtained by fraud, and was ineffectual by reason of certain specified irregularities.

By their answers the claimants under the patent denied these several allegations, and under the issues of law and of fact thus raised a large amount of evidence was taken.

In the opinion of the court below the questions involved *were elaborately considered; [234]
and they have been fully discussed before us in the oral and printed arguments of the respective counsel.

Our examination of the subject has brought us to conclusions which render it unnecessary for us to express an opinion on several of the questions that have been so fully treated.

In our consideration of the questions now before us we shall, of course, assume that the river Potomac with its subjacent soil was included in the grant to Lord Baltimore and became vested, by the methods hereinbefore considered, in the state of Maryland, and that, by the act of cession, that part of the river and its bed which is concerned in this litigation passed into the control and ownership of the United States.

Without questioning the power of Congress to have made a special sale or grant to Kidwell in 1869 of the lands embraced in this patent, in the condition that they then were, or even to have provided by a general law for the sale of such lands by the Land Office, we are of opinion that it was not the intention of Congress, by the general resolution of 1839, to subject lands lying beneath the waters of the Potomac and within the limits of the District of Columbia to sale by the methods therein provided.

The lands which Congress had in view in passing the resolution were stated to be the vacant lands, for securing title to which the

laws of Maryland which were in force in 1801 had made provisions, but which laws had remained inoperative, after the cession, for the want of appropriate officers or authority in the District of Columbia for their execution.

The only acts of Maryland which have been brought to our attention as having been in force in 1801, under which a disposition of the lands of the state could be made, are the acts of November session, 1781, chap. 20, and of November session, 1788, chap. 44. The act of 1781, chap. 20, is entitled "An Act to Appropriate Certain Lands to the Use of the Officers and Soldiers of This State, and for the Sale of Vacant Lands." The preamble recites that there are large tracts of land within the state "reserved by the
[235]late proprietors which may be applied to *the discharge of the engagement of lands made to the officers and soldiers of this state, and that the granting the other vacant lands in this state would promote population and create a fund towards defraying the public burthen." Sections 3 and 4 provide for a land office, and for issuing "common or special warrants of vacant cultivation, and for the surveying of any vacant lands, cultivated or uncultivated."

By the act of November session, 1788, chap. 44, all other vacant lands in the state were made liable to be taken up in the usual manner by warrant.

It would seem evident that the lands whose disposition was contemplated by these acts were vacant lands which had been cultivated, or which were susceptible of cultivation.

By such terms of description it would not appear that the disposition of lands covered by tide water was contemplated, because such lands are incapable of ordinary and private occupation, cultivation, and improvement, and their natural and primary uses are public in their nature, for highways of navigation and commerce.

In the case of *State* v. *Pacific Guano Co.* 22 S. C. 83, the supreme court of South Carolina, in discussing a somewhat similar question, said:

"The absolute rule, limiting landowners bounded by such streams to high-water mark unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the Land Office.

"There seems to be no doubt, however, that the state, as such trustee, has the power to dispose of these beds as she may think best for her citizens, but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow that in order to give effect to an alienation, which the state might undertake to make, it would be necessary to have a special act of the legislature expressing in terms and formally such an intention."

In the case of *Allegheny City* v. *Reed*, 24
[236]Pa. 39, it *was held by the supreme court of Pennsylvania that the provisions of the general acts in respect to patents for lands did not relate to the foundation of an island whose soil had been swept away by floods. "The title of the commonwealth to what remained was not gone, but was no longer grantable under the acts of assembly for selling islands. The foundation of the islands belongs to the commonwealth still, but she holds it, as she does the bed of the river and all sand bars, in trust for all her citizens as a public highway. The act of 1806 was not a grant of the state's title, but only a mode prescribed in which titles might thereafter be granted. . . . The jurisdiction is a special one, and if the subject-matter, to which the act of 1806 relates, were gone,—had ceased to be,—the board of property had no jurisdiction; no more than they would have over any other subject not intrusted to their discretion."

In *Illinois Central Railroad Co.* v. *Illinois*, 146 U. S. 387 [36: 1018], it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several states belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce.

In *Shively* v. *Bowlby*, 125 U. S. 1 [38: 331], the discussion was so thorough as to leave no room for further debate. The conclusions there reached, so far as they are applicable to the present case, were as follows:

"It is well settled that a grant from the sovereign of land bounded by the sea or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention." 152 U. S. 13 [38: 336].

"We cannot doubt that Congress has the power to make grants of land below high-water mark of navigable *waters in any ter- [237]
ritory of the United States, whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory. But Congress has never undertaken by general laws to dispose of such lands." 152 U. S. 48 [38: 349].

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public high-

ways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government." 152 U. S. 49 [38: 349].

"Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the title and dominion passed to the United States, for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory." 152 U. S. 57 [38: 352].

In *Mann* v. *Tacoma Land Company*, 153 U. S. 273 [38: 714], it was again held that the general legislation of Congress in respect to public lands does not extend to tide lands; that the scrip issued by the United States authorities to be located on the unoccupied and unappropriated public lands could not be located on tide lands; and that the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

As against these principles and these decisions, the claimants under the patent cite and rely on the case of *Browne* v. *Kennedy* (5 Harr. & J. 195 [9 Am. Dec. 503]), to the
[238] alleged effect "that the bed *of any of the navigable waters of the state may be granted, and will pass if distinctly comprehended by the terms of any ordinary patent, issuing from the land office, subject only to the existing public uses of navigation, fishery, etc., which cannot be hindered or impaired by the patentee."

Our examination of this case has not satisfied us that the decision therein went as far as is now claimed. As we read it, the gist of the decision was that, by the common law and the law of Maryland, proprietors of land bounded by unnavigable rivers have a property in the soil covered by such rivers *ad filum medium aquæ*, and that where one holding land on both sides of such a stream had made separate conveyances, bounding on the stream, and the stream had afterwards been diverted or ceased to exist, the two original grantees took each to the middle of the land where the stream had formerly existed, and that a subsequent grantee of the territory formerly occupied by the stream took no title. Such a decision would have no necessary application here.

But we are bound to concede that the court of appeals, in the subsequent case of *Wilson* v. *Inlocs*, 11 Gill & J. 352, has interpreted *Browne* v. *Kennedy* as establishing the principle that the state has the right to grant the soil covered by navigable water, subject to the public or common right of navigation and fishery, and inferentially that a title, originating in a patent issued under general law from the land office, attached to the land, and gave a right of possession when the waters ceased to exist.

The decision in *Browne* v. *Kennedy* was not made till a quarter of a century after the cession by Maryland to the United States, and seems to have been a departure from the law as previously understood and applied, both during the colonial times and under the state prior to the cession.

Thus, in *Lord Proprietary* v. *Jennings*, 1 Harr. & McH. 94, an information was filed by the attorney general of the Lord Proprietor, in 1733, to vacate a patent on the ground that it had been illegally obtained, and the case clearly indicates that land under tide water was not patentable. *Smith and Purviance* v. *State* [*ex rel. Yates*], 2 Harr. & McH. 247, was the case of an *appeal from a de- [239]
cree of the chancellor, dated April 27, 1786, vacating and annulling, on the ground of fraud and misrepresentation, a patent granted to Nathaniel Smith, June 2, 1783, for a tract of land called Bond's Marsh. It was disclosed in the case that Smith was the owner of a tract of land called Bond's Marsh, which had been granted to one John Bond, September 16, 1766, for four acres; and that, on April 20, 1782, Smith, who had become the owner of the tract, petitioned for a warrant of resurvey, stating that he had discovered some vacant land contiguous thereto, and that he was desirous of adding the same to the tract already held by him. Thereupon the surveyor of the county was directed "to lay out and carefully resurvey, in the name of him, the said Smith, the said tract of land called Bond's Marsh, according to its ancient metes and bounds, adding any vacant lands contiguous thereto," etc. On May 8, 1782, the surveyor certified to the land office that he had resurveyed the said original tract called Bond's Marsh, and that it contained exactly four acres, and that there were seventeen and one-half acres of vacant land added. Upon this Smith obtained from the state a grant on the said certificate for twenty-one and a half acres under the name of Bond's Marsh resurveyed, and, July 8, 1784, Smith conveyed for a consideration two undivided third parts of said tract to Samuel Purviance. The bill averred that "although the said Smith by his aforesaid petition did allege and set forth that he had discovered vacant land adjoining the said tract called Bond's Marsh, there was not any vacant land adjoining or contiguous to the same, but that the whole which by the said grant is granted to the said Smith as vacant land added to the original tract aforesaid now is and at the time of obtaining the said warrant and grant was part of the waters of the northwest branch of Patapsco river." The bill also averred that Purviance was not an innocent purchaser, but knew that the pretended vacancy included in the patent "was not land, but part of the waters of the northwest branch of Patapsco river." The decree vacating the patent was affirmed.

In the footnotes to *Baltimore* v. *McKin*, 3 Bland, Ch. 468, the *cases of *Fowler* v. *Goodwin* [240]
and *Ritchie* v. *Sample* are referred to. In *Fowler* v. *Goodwin* the chancellor, on May 19, 1809, refused to direct a patent to issue because a large part of the land lay in the waters of Bell's cove. In *Ritchie* v. *Sample* the certificate of survey showed that the tract applied for was a parcel of the Susquehanna river, comprehending a number of

small islands, and the chancellor held, July 10, 1816, "that the land covered by the water cannot be called grantable land, although possibly islands may have been taken up together, between which the water sometimes flows."

Of course, the recent decisions of the courts of Maryland, giving to the statutes of that state a construction at variance with that which prevailed at the time of the cession, cannot control our decision as to the effect of those statutes on the territory within the limits of the District of Columbia since the legislative power has become vested in the United States. *Ould* v. *Washington Hospital*, 95 U. S. 303 [24: 450]; *Russell* v. *Allen*, 107 U. S. 163, 171 [27: 397, 400]; *De Vaughan* v. *Hutchinson*, 165 U. S. 570 [41:829].

At the utmost, such decisions can only be considered as affecting private rights and controversies between individuals. They cannot be given effect to control the policy of the United States in dealing with property held by it under public trusts.

This aspect of the question was considered by Mr. Justice Cox of the supreme court of the District of Columbia, in a case arising out of the legislation of Congress establishing the Rock Creek park; and wherein the effect of a patent granted by the state of Maryland, in 1803, for a piece of land afterwards included in the park, was in question. It was said in the opinion:

"There is a still more important question, and that is whether the state of Maryland at that period could convey any interest, legal or equitable, in the property. In the act of 1791, ceding this property to the United States, there is this proviso: 'That the jurisdiction of the laws of this state over the persons and property of individuals residing within the limits of the cession aforesaid shall not cease or determine until Congress shall by law provide for the government thereof, under their jurisdiction in manner
[241] provided by the article of *the Constitution before recited.' Now this continues in force the jurisdiction of the laws of the state of Maryland over the persons and property of individuals residing therein. To make that applicable to the present case it would be necessary to have extended it to the property held by the state; but it seems to me that it extended no further than to say that the laws which affected private rights should continue in force until proper provision was made by Congress. See what the consequences would be if another construction had been given to it. The state of Maryland extended to the Virginia shore, and suppose that after this cession and before 1801 the state of Maryland had undertaken to cede to the state of Virginia the whole bed or bottom of the Potomac river, from its source to its mouth, including that part in the District of Columbia, doubtless Congress could have had something to say about it after the cession had been made. We are satisfied, therefore, that the proviso does not continue in operation the land laws of the state of Maryland, and consequently no title could be derived at the dates of this survey and patent or at the date when the warrant on which it was based was taken out. We are satisfied that the proviso does not continue in operation the land laws of the state of Maryland, as to the public lands owned by the state within the said district, and that consequently no title to such lands could be obtained by patent from the state after the act of 1791."

This decision was adopted and the opinion approved by this court in the case of *Shoemaker* v. *United States*, 147 U. S. 307 [37: 187].

If any doubt is left as to whether Congress intended by the resolution of 1839 to subject the river and its subjacent soil to the ordinary land laws as administered by the Land Office, that doubt must, as we think, be removed by a consideration of the express language of the proviso therein contained, withholding lands held by the United States for public purposes from the operation of the acts of Maryland. The language of the proviso is as follows: "*Provided, that any lands which may have been ceded to, or acquired by, the United States, for public purposes, shall not be affected by such acts.*"

*Placed as this proviso is, at the end of the enactment, the natural implication is that Congress did not intend to include the lands which the United States held for public purposes within the scope of the resolution, but added the proviso out of abundant caution. However this may be, the intention expressed is clear that, in the administration of the land laws by the Secretary of the Treasury through the General Land Office, the lands that had been ceded to or acquired by the United States for public purposes should not be affected. [242]

What were the lands so held by the United States? Undoubtedly, the squares and lots selected by the President as sites for the President's house, the capitol, and other public buildings, and which had been, in legal effect, dedicated to public use by the grantors, were not meant, because the resolution in terms provides that the lands to be affected were such as were within the county of Washington and *without the limits of the city of Washington.*

There may have been other land held by the United States for public purposes outside of the limits of the city of Washington, but surely the Potomac river and its bed, so far as they were embraced in the county of Washington, were included in the terms of the proviso. Indeed, it is not too much to say that they constituted the very land which Congress was solicitous to withhold from sale under proceedings in the Land Office.

It cannot, we think, be successfully claimed that even if, in 1839, the lands embraced within the Kidwell patent were exempted from the jurisdiction of the Land Office, yet they were brought within that jurisdiction by the fact that the waters had so far receded in 1869 as to permit some sort of possession and occupancy. Not having been within the meaning of the resolution of 1839, they would not be brought within it by a subsequent change of physical condi-

tion, but a further declaration by Congress of a desire to open them to private ownership would be necessary.

Besides, the facts of the case show that Congress is asserting title and dominion over these lands for public purposes. Whether Congress should exercise its power over these [243] reserved *lands by dredging, and thus restoring navigation and fishery, or by reclaiming them from the waters for wharfing purposes, or to convert them into public parks, or by subjecting them to sale, could only be determined by Congress, and not by the functionaries of the Land Office.

If, then, there was an entire want of authority in the Land Office to grant these lands held for public purposes, a patent so inadvertently issued, under a mistaken notion of the law, would plainly be void, and afford no defense to those claiming under it as against the demands of the government.

As was said by this court in *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 641 [26: 876]:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

Similar views were expressed in *Doolan* v. *Carr*, 125 U. S. 618 [31: 844], where it was said:

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law as distinguished from suits in equity, subject, [244] *however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent—not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and therefore should be avoided. . . . It is nevertheless a clear distinction, established by law, and it has often been asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue."

The further contention on the part of the United States, that the lands embraced within the Kidwell patent lie within the limits of the city of Washington, and that therefore they were, for that reason, not grantable by the Land Office, we have not found it necessary to determine, and we refrain from expressing any opinion upon it.

Nor do we need to enter at any length into the question of fraud attending the issue of the patent. We deem it not improper to say, however, that the allegations imputing fraud to the government officials concerned in the issuance of the patent, or to those who were active in procuring it, or in asserting rights under it, do not appear to us to have been sustained by the evidence.

We therefore conclude this branch of the case by affirming the decision of the court below, "that the proceedings of Kidwell, under the resolution of 1839, to obtain a patent for the 'Kidwell Meadows,' and the issue of that patent, are inoperative to confer upon the patentee or his assigns any title or interest in the property within its limits, adverse to the complete and paramount right therein of the United States."

It is urged on behalf of those claiming under the Kidwell *patent that a court of equity [245] will not set aside the patent at the suit of the United States, unless on an offer by the latter to return the purchase money; that, in granting the relief, the court will impose such terms and qualifications as shall meet the just equities of the opposing party.

As the invalidity of the patent in the present case was not apparent on its face, but was proved by extrinsic evidence, and as the controversy respecting the title was not abandoned by the defendants, they were not, we think, entitled to a decree for a return of the purchase money, or for costs. *Peirsoll* v. *Elliott*, 6 Pet. 95 [8: 332].

Before considering the remaining claims it will be necessary to dispose of the question of the river boundary of the city of Washington.

What place should be selected for the permanent seat of government was, as shown by the histories of the times, a matter of long and bitter debate, occupying a large part of the second session of the second Congress. After the claims of Philadelphia and Baltimore had been adversely disposed of, the question was reduced to a choice between a site on the Susquehanna river in Pennsylvania and one on the Potomac river. And we learn from the recently published journal of William Maclay, Senator from Pennsylvania, 1780–91, and who was an earnest advocate for the former, that the allegation

that a large expenditure would be required to render the Susquehanna navigable was used as a decisive argument in favor of the site on the Potomac. Maclay's Journal, p. —.

The result was the act of July 16, 1790 (1 Stat. at L. 130, chap. 28), whereby the President was authorized to appoint three commissioners to survey and, by proper metes and bounds, to define and limit, under his direction, a district of territory, to be located on the river Potomac. By the same act, the commissioners were empowered "to purchase or accept such quantity of land on the eastern side of the said river, within the said district," as the President might deem proper for the use of the United States, and *according to such plans as he might approve*, and were required, prior to the first Monday of December, 1800, to provide suitable [246] buildings for the accommodation *of Congress and of the President and for the public offices of the government.

It has been the practice in this country, in laying out towns, to have the plat surveyed, and a plan made in accordance with the survey, designating the streets, public squares, and open spaces left for commons, wharves, or any other public purpose. Those streets, squares, and open spaces are thus dedicated to the public by the proprietors of the soil, whether they be the state or private individuals. When a town is situated on a navigable river it is generally the custom to leave an open space between the line of the lots next the river and the river itself. This was done by William Penn in 1682 in the original plan of the city of Philadelphia on the Delaware river front, and he called it a top common; and in 1784 his descendants, the former proprietors, in their plan of Pittsburgh, adopted a similar measure of leaving such an open space, and they called it Water street. *Birmingham* v. *Anderson*, 48 Pa. 258.

In 1789 the proprietors of the land on which the city of Cincinnati is built pursued the same policy, and in their plan the ground lying between Front street and the Ohio river was set apart as a common for the use and benefit of the town forever. *City of Cincinnati* v. *White*, 6 Pet. 432 [8: 453]; *Barclay* v. *Howell's Lessee*, 6 Pet. 498 [8: 477]; *New Orleans* v. *United States*, 10 Pet. 662 [9: 573]; *Barney* v. *Keokuk*, 94 U. S. 339 [24: 228]; *Rowan's Executors* v. *Portland*, 8 B. Mon. 232.

Our examination of the evidence has led us to the conclusion that it was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac river, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in commerce free access to the navigable water, and that such intention has never been departed from.

While, as we have already seen, the United States became vested with the control and ownership of the Potomac river, and its subjacent soil, within the limits of the District, by virtue of the act of cession by the state of Maryland, it must yet be conceded that, as to [247] the land above high-water *mark, the title of the United States must be found in the transactions between the private proprietors and the United States, consisting of the mutual agreements entered into by the proprietors, their deeds of conveyance to the trustees, their concurrence in the action of the commissioners in laying out plats and giving certificates, and their recognition of the several plans of the city made under the direction of the President.

As we have already said, our inquiry is as to the intention of the parties to be affected, but that intention need not be expressed by any particular form or ceremony, but may be a matter of necessary implication and inference from the nature and circumstances of the case.

We cannot undertake to comment upon each and every step of the transactions, but shall briefly refer to those of the most significance.

And, first, in the agreement of March 13, 1791, signed by the principal proprietors, including Robert Peter, David Burns, Notley Young, and Daniel Carroll, are the following recitals:

"We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal city laid off upon our lands, do hereby agree and bind ourselves, heirs, executors, and administrators, to convey in trust to the President of the United States, or commissioners, or such person or persons as he shall appoint, by good and sufficient deeds in fee simple, the whole of our respective lands which he may think proper to include within the lines of the Federal city, for the purposes and on the conditions following:

"The President shall have the sole power of directing the Federal city to be laid off in what manner he pleases. He may retain any number of squares he may think proper for public improvements, or other public uses, and the lots only which shall be laid off shall be a joint property between the trustees on behalf of the public and each present proprietor, and the same shall be fairly and equally divided between the public and the individuals as soon as may be after the city shall be laid out.

"For the streets the proprietors shall receive no compensation, *but for the squares or [248] lands in any form which shall be taken for public buildings or any kind of public improvements or uses, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public," etc.

And by an agreement of March 30, 1791, the proprietors of lots in Carrollsburgh, including Daniel Carroll and Notley Young, it was provided as follows:

"We, the subscribers holding or entitled to lots in Carrollsburgh, agree with each other and with the President of the United States that the lots and land we hold or are entitled to in Carrollsburgh shall be subject to be laid out at the pleasure of the President as part of the Federal city, and that we will receive one half the quantity of our respective lots as near their present situation as may agree with the new plan, and where we may be en-

titled now to only one lot or otherwise not entitled on the new plan to one entire lot, or do not agree with the President, commissioners, or other person or persons acting on behalf of the public on an adjustment of our interest, we agree that there shall be a sale of the lots in which we may be interested respectively, and the produce thereof in money or securities shall be equally divided, one half as a donation for the use of the United States under the act of Congress, the other half to ourselves respectively. And we engage to make conveyances of our respective lots and lands aforesaid to trustees or otherwise whereby to relinquish our rights to the said lots and lands, as the President or such commissioners or persons acting as aforesaid shall direct, to secure to the United States the donation intended by this agreement."

A similar agreement was entered into by the owners of lots in the town of Hamburgh.

Following these agreements came the conveyances by the several proprietors to Beall and Gantt, trustees. Without quoting from them at length, and referring to those of David Burns and Notley Young, copied in full in the statement of the case, it is sufficient here to say that the proprietors, by said conveyances, completely devested themselves of all title to the tracts conveyed, and
[249] that the lands were granted to the *said trustees, "to have and to hold the hereby bargained and sold lands with their appurtenances to the said Thomas Beall and John Mackall Gantt, and the survivor of them, and the heirs of such survivor, forever, to and for the special trust following, and no other, that is to say, that all the said lands hereby bargained and sold, or such part thereof as may be thought necessary or proper, be laid out together with the lands for a Federal city, with such streets, squares, parcels, and lots as the President of the United States for the time being shall approve; and that the said Thomas Beall and John Mackall Gantt, or the survivor of them, or the heirs of such survivor, shall convey to the commissioners for the time being appointed by virtue of an act of Congress entitled 'An Act for Establishing the Temporary and Permanent Seat of the Government of the United States,' and their successors, for the use of the United States forever, all the said streets, and such of the said squares, parcels, and lots as the President shall deem proper for the use of the United States. And that as to the residue of the lots into which the said lands hereby bargained and sold shall have been laid out and divided, that a fair and equal division of them shall be made," etc.

In a suit between the heirs of David Burns and the city of Washington and the United States this court had occasion to pass upon the nature of these grants, and used the following language:

"It is not very material, in our opinion, to decide what was the technical character of the grants made to the government; whether they are to be deemed mere donations or purchases. The grants were made for the foundation of a Federal city, and the public faith was necessarily pledged, when the grants were accepted, to found such a city. The very agreement to found a city was itself a most valuable consideration for these grants. It changed the nature and value of the property of the proprietors to an almost incalculable extent. The land was no longer to be devoted to agricultural purposes, but acquired the extraordinary value of city lots. In proportion to the success of the city would be the enhancement of this value; and it required scarcely any *aid [250]
from the imagination to foresee that this act of the government would soon convert the narrow income of farmers into solid opulence. The proprietors so considered it. In this very agreement they state the motive of their proceedings in a plain and intelligible manner. It is not a mere gratuitous donation from motives of generosity or public spirit; but in consideration of the great benefits they expect to derive from having the Federal city laid off upon their lands. Neither considered it a case where all was benefit on one side and all sacrifice on the other. It was in no just sense a case of charity, and never was so treated in the negotiations of the parties. But, as has been already said, it is not in our view material whether it be considered as a donation or a purchase, for in each case it was for the foundation of a city." *Van Ness* v. *City of Washington and United States*, 4 Pet. 284 [7: 860].

In *Potomac Steamboat Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 686 [27: 1075], after an elaborate consideration of the agreements and conveyances, it was said:

"Undoubtedly Notley Young, prior to the founding of the city and the conveyance of his land for that purpose, was entitled to enjoy his riparian rights for his private uses and to the exclusion of all the world besides. It can hardly be possible that the establishment of the city upon the plan adopted, including the highway on the river bank, could have left the right of establishing public wharves, so essential to a great center of population and wealth, a matter of altogether private ownership."

Thomas Johnson, Daniel Carroll, and David Steuart were, on January 22, 1791, appointed by President Washington such commissioners; and on March 30, 1791, by his proclamation of that date, the President finally established the boundary lines of the District; directed the commissioners to proceed to have the said lines run, and, by proper metes and bounds, defined and limited; and declared the territory, so to be located, defined and limited, to be the district for the permanent seat of the government of the United States.

With the lines of the District thus established, the next important question that presented itself was the location of the *Federal [251]
city, in which were to be erected the buildings for the accommodation of Congress, the President's house, and the public offices.

We are here met with a serious controversy as to the place and nature of the river boundary of the city. The record contains a large amount of evidence, consisting chief-

ly of maps and plans, of correspondence between the President and the commissioners, the deeds of conveyance by the original proprietors, and the testimony of old residents, some of whom had acted as surveyors and engineers during the early history of the city.

We cannot complain of having been left unassisted to examine and analyze this mass of evidence, for we have had the aid of the painstaking opinion of the court below and of a number of able briefs on all sides of the controversy.

As a national city was to be founded, which was to be the permanent seat of the government of the United States, where foreign nations would be expected to be represented, and as the site selected was on a navigable, tide-water river, inviting foreign and domestic commerce, we should naturally expect to find the city located in immediate proximity to the river, with public wharves and landings, and with a municipal ownership and control of the streets and avenues leading to and bounding on the stream.

As we have seen, the agreement of the proprietors provided that "the President shall have the sole power of directing the Federal city to be laid off in what manner he pleases."

In the exercise of that power the President, at different times, caused several maps or plans of the city to be prepared, the authenticity and effect of which constitute a large part of the controversy in the present case.

The earliest of these plans was that prepared in 1791, by Major L'Enfant, and was by him submitted to the President on August 19 of that year. On October 17, 1791, after advertisement, and under direction by the President, the commissioners sold a few lots. On December 13, 1791, by a communication of that date, the President placed before Congress this L'Enfant plan. On this plan the squares were unnumbered and the streets unnamed.

[252] *Afterwards differences arose between L'Enfant and the commissioners, which resulted in the removal of L'Enfant by the President early in March, 1792. Thereupon Andrew Ellicott was directed by the President to prepare this plan so that it might be engraved, but Major L'Enfant refused to permit Ellicott to use his original plan, and Ellicott proceeded to prepare a plan from materials in his possession and from such information as he had acquired while acting as surveyor under L'Enfant.

It may be well to mention, though out of chronological order, that in a letter of February, 1797, President Washington, in a letter to the commissioners, referring to L'Enfant's plan and to certain alterations that had been made, stated that Mr. Davidson, a purchaser of lots, "is mistaken if he supposed that the transmission of Major L'Enfant's plan of the city to Congress was the completion thereof; so far from it, it would appear from the message which accompanied the same that it was given as a matter of information only to show what state the business was in; that the return of it was requested; that neither house of Congress passed any act consequent thereupon; that it remained as before under the control of the Executive."

Ellicott completed his plan and laid it before the President on February 20, 1792. This plan was engraved at Boston and at Philadelphia—the engraved plans differing in the circumstance that the latter did and the former did not exhibit the soundings on the river front and on the Eastern Branch.

On October 8, 1792, the commissioners, who had been notified that "about 100 squares were prepared and ready for division," had a second public sale of lots—a copy of Ellicott's engraved plan being exhibited at the sale. Under the general authority conferred upon them by the President, on September 29, 1792, to make private sales at such prices and on such terms as they might think proper, the commissioners, before November 6, 1792, had effected private sales of fifteen lots.

Between 1792 and 1797, this plan of Ellicott's known as the "engraved plan," was circulated by the commissioners in *the United States, [253] and forwarded to European countries from the Office of State, as the plan of the city, and was referred to as such by the commissioners in their negotiations for loans for the purpose of carrying on the public buildings.

On February 27, 1797, the commissioners addressed a letter to the President, in which, among other things, they said:

"What Mr. Davidson alludes to in his memorial, when he says deviations have been made since the publication of the engraved plan, we know not; that plan required the doing of many acts to carry it into effect—such as the laying out and bounding a water street on the waters which surround the city, and laying out squares where vacant spaces unappropriated were left in several parts of the city. Acts of this kind have no doubt from time to time been done, and with the full consent of all interested."

It appears that the Ellicott plan was, in some respects, incomplete, as it did not show all the squares or correctly delineate the public reservations, and was made before the completion of the surveys.

The first appearance of the Dermott map, that we find in this record, was on June 15, 1795, when, as appears in the proceedings of the commissioners of that date, "Dermott is directed to prepare a plat of the city with every public appropriation plainly and distinctly delineated, together with the appropriation now made by the board for the National University and Mint."

On March 2, 1797, by an instrument under his hand and seal, President Washington requested Thomas Beall and John M. Gantt, the trustees, to convey to the commissioners all the streets in the city of Washington, as they are laid out and delineated in the plan of the city thereto annexed; and also the several squares, parcels, and lots of ground therein described. Though in this communication President Washington mentioned a plan of the city as annexed thereto, yet it seems that a plan was not so actually annexed. And on June 21, 1798, the commis-

sioners wrote a letter to President Adams in the following terms:

"At the close of the late President's admin-
[254]istration he executed *an act directing the trustees of the city of Washington to convey to the commissioners the streets of said city and the grounds which were appropriated to public use. In the press of business the plan referred to was not annexed. We now send it by Mr. Nourse, with the original act and the draft of another act, which appears to us proper to be executed by the present President, in order to remove any objection to a compliance with the late President's request arising from the omission above mentioned. As these acts are the authentic documents of the title of the public to the lands appropriated, we shall write to Mr. Craik, or some other gentleman, to take charge of their return rather than trust them to the mail."

Accordingly, on July 23, 1798, President Adams, by an instrument reciting the act executed by his predecessor on March 2, 1797, and the non-annexation to that act of the plan of the city therein mentioned, makes known to Beall and Gantt, trustees, that he has caused the said plan to be annexed to the said act, and requests them to convey to the commissioners for the use of the United States forever, according to the tenor of the act of Congress of July 16, 1790, "all the streets in the said city of Washington, as they are laid out and delineated in the plan of the said city hereto annexed, and all the squares, parcels, and lots of ground described in the said act as public appropriations."

The following entry, as of the date of August 31, 1798, appears in the proceedings of the commissioners: "Mr. William Craik delivered into the office the plan of the city of Washington, with the acts of the late and present Presidents."

Some dispute subsequently arose as to whether the plan which President Washington intended to have annexed to his act was the plan of Ellicott or that of Dermott. Thus, in an opinion delivered on December 16, 1820, by Attorney General Wirt to President Monroe, it was said that "if President Washington has, as Mr. Breckinridge states, previously ratified Ellicott's engraved plan, this must be considered as the plan he intended to annex, and it was not competent
[255]for President *Adams to give the instrument of writing a different direction by annexing to it a different plan."

But this opinion was evidently given in ignorance of the proceedings of the commissioners on June 21, 1798, already referred to, and in which it appears that, in their letter to President Adams, they mention that the plan sent was "the last plan of the city, made by Mr. Dermott, and referred to in said instrument of writing"—the said instrument of writing being President Washington's act of March 2, 1797.

We also find in the record that, on January 7, 1799, Attorney General Lee, in an opinion given to President Adams, said:

"Already a plan of the city has been approved and ratified by the President of the United States, who has signed the plan itself, or an instrument referring to the plan, which I presume is a sufficient authentication. If this plan, under the President's signature, varies from the L'Enfant's or Ellicott's essays, they must yield to it, as they are to be considered only as preparatory to that plan which received ultimately the formal and solemn approbation of the President. It is not supposed that this is incomplete in any respect, except in relation to the rights appurtenant to the water lots, and to the street which is to be next to the watercourses."

The record also contains a copy of a report of a committee of the House of Representatives, of April 8, 1802, in which it is said, referring to the Dermott plan:

"This plan has been signed by Mr. Adams, in conformity with which the trustees were directed by him to convey the public grounds to the United States, and is considered by the commissioners the true plan of the city. The plan has never been engraved or published. . . . Your committee are of the opinion that suffering the engraved plan, which is no longer the true plan of the city, to continue to pass as such, may be productive of great deception to purchasers; and that measures ought to be taken for its suppression."

On July 14, 1804, President Jefferson, in a communication to Mr. Thomas Monroe, Superintendent of Public Buildings, said:

"The plan and declaration of 1797 were final so far as they *went, but even they left[256]
many things unfinished, some of which still remain to be declared."

What would seem to be decisive of the dispute is the fact that in the act or instrument signed by President Washington on March 2, 1797, is contained, by metes and bounds, a specification of the reservations, seventeen in number, and those metes and bounds do not coincide with the reservations indicated upon the Ellicott plan, but do accurately coincide with the reservations as indicated in the Dermott plan.

We, therefore, cannot doubt that the Dermott map was the one intended by President Washington to be annexed to his act of March 2, 1797.

But while we regard the Dermott map as sufficiently authenticated, we do not accept the contention that it is to be considered as the completed and final map of the city, and that it alone determines the questions before us.

On the contrary, we think it plain, upon the facts shown by this record, that the President, the commissioners, and the surveyors proceeded, step by step, in evolving a plan of the city. Under each of the plans mentioned lots were sold and private rights acquired. Changes were, from time to time, made to suit the demands of interested parties, and additions were made as the surveys were perfected. Even the last map approved by President Washington, as was said by President Jefferson in 1804, left many things unfinished, some of which still remained to be declared.

In short, we think that these several maps are to be taken together as representing the

intentions of the founders of the city, and, so far as possible, are to be reconciled as parts of one scheme or plan.

Pursuing such a method of investigation, we perceive that, in the first map submitted to Congress by President Washington on December 13, 1791, as "the plan of the city," there is between the lots fronting on the Potomac and the river itself an open space, undoubtedly intended as a thoroughfare and for public purposes. It is true that this open space is not named as a street. But none of the other streets and avenues on this map are named. And we read in a letter
[257] of *the commissioners to Major L'Enfant, dated September 9, 1791, as follows:

"We have agreed that the Federal district shall be called 'The Territory of Columbia,' and the Federal city 'The City of Washington;' the title of the map will therefore be 'A map of the City of Washington in the Territory of Columbia.' We have also agreed the streets be named alphabetically one way, and numerically the other; the former divided into north and south letters, the latter into east and west numbers from the capitol. Major Ellicott, with proper assistants, will immediately take and soon furnish you with soundings of the Eastern Branch to be inserted in the map."

This L'Enfant plan contains all the essential features of the city of Washington as they exist to-day.

Owing to the disputes between L'Enfant and the commissioners, as already stated, the former withdrew, and Andrew Ellicott, who had been acting as an assistant to L'Enfant, proceeded with the work, with the result that about October, 1792, the engraved or Ellicott map was completed and in the hands of the commissioners. This map shows the squares numbered, the avenues named, and the lettered and numbered streets all designated. It also shows on the front on the Potomac river and on the Eastern Branch, between the ends of the lots and the squares and the water, an open, continuous space or street, extending through the entire front of the city.

But it must be said of this map that it did not show all the squares or correctly place the public reservations, and, indeed, it was made before the completion of the surveys. As was said by the commissioners in their letter of February, 1797, "that plan required the doing of many acts to carry it into effect, such as the laying out and bounding a water street on the waters which surround the city."

Then came, in March, 1797, the Dermott map, which indicated the location and extent of the public reservations or appropriations, and also certain new squares, not shown on the engraved plan, and which were laid out on the open spaces at the intersection of streets appearing on the engraved plan; and also exhibited the progress that had been
[258] made since 1792, in *laying down the city upon the ground in accordance with the scheme of the previous plans. But, as was said by President Jefferson on July 14, 1804, in a passage previously quoted, "The plan and declaration of 1797 were final so far as they went; but even they left many things unfinished, some of which still remain to be declared."

President Jefferson was probably led to form this opinion by his personal knowledge of the situation, which was intimate. And here may well be quoted a portion of a long communication addressed to him by Nicholas King, surveyor of the city of Washington, dated September 25, 1806, in which the writer, adverting to the several plans and to certain regulations published by the commissioners on July 20, 1795, said:

"Perfecting this part of the plan, so as to leave nothing for conjecture, litigation, or doubt, in the manner which shall most accord with the published plans, secure the health of the city, and afford the most convenience to the merchants, requires immediate attention. . . . The principle adopted in the engraved plan, if carried into effect and *finally established in the plan now laid out upon the ground*, when aided by proper regulations as to the materials and mode of constructing wharves for vessels to lay at and discharge their cargoes on, seems well calculated to preserve the purity of the air. The other streets will here terminate in a street or key, open to the water, and admitting a free current of air. It will form a general communication between the wharves and warehouses of different merchants, and, by facilitating intercourse, render a greater service to them than they would derive from a permission to wharve as they pleased. The position of this Water street being determined, it will ascertain the extent and situation of the building squares and streets on the made ground, from the bank of the river, and bring the present as near to the published plan as now can be done. It will define the extent and privileges of water lots, and enable the owners to improve without fear of infringing on the rights of others. . . . Along the water side of the street, the free current or stream of the river should be permitted to flow and carry with it whatever may have been brought from the city
along *the streets or sewers. The wharves [259]
permitted beyond this street to the channel may be stages or bridges with piers and sufficient waterways under them. And on the wharves so erected, it would seem proper to prohibit the erection of houses or anything obstructing a free circulation of air. . . . The surveying is now so far completed that it can be done with the utmost precision, and every foot of ground within the limits of the Federal city, with its appurtenant privileges, may be so defined as to prevent litigation or doubt on the subject. If it is not done at this time the evils will increase and every year add to our difficulties. Even now, from the various decisions or neglects, alterations, or amendments which have heretofore taken place, some time an investigation may be necessary in the arrangement of a system which shall combine justice with convenience. If this decision is left to a future period and our courts of law, they can only have a partial view of the subject, and any

general rule they may adopt may be attended with serious disadvantages."

Nicholas King himself prepared a plan or serial map of sixteen sheets in 1803. There is evidence tending to show that this was done in pursuance of an order of the commissioners; and in reference to it the record contains the testimony, in the present case, of William Forsythe, who had been connected for many years with the office of surveyor of the city, in subordinate capacities and as the head of it, and who was in 1876 the surveyor of the District of Columbia. He says:

"I can only say that it is the best in point of execution of the early maps of the city; and that it has been acted upon ever since it has been prepared in connection with the affairs of the surveyor's office, and that the lines of wharfing indicated upon the map from Rock Creek to Easby's Point have been followed; in other words, that all the improvements, such as reclamation of land, and the wharves that have been built in that section of the city, were made and built in accordance with the plan of wharfing, etc., indicated on this map. . . . The map of 1803 has always, in my recollection going back forty years in connection with the sur-[260]veying *department of the city, been considered and acted upon as an official map, and from conversation with those who have preceded me in the surveyor's office, I know that it was always considered by them as an authentic official map of the city. It has in fact been the standard map."

While it is true that this map of 1803 was never officially approved or authenticated by any President of the United States, as were the earlier maps, and is not therefore of conclusive effect, it is, in our opinion, a legitimate and important piece of evidence.

In connection with the later map of 1803, prepared by King, ought also to be considered a series of plans drawn by him and laid before the commissioners on March 8, 1797, in a communication, as follows:

"I send you herewith a series of plans exhibiting that part of the city which lies in the vicinity of the water, and includes what is called the water property, from the confluence of Rock creek with the Potomac to the public appropriation for the Marine Hospital on the Eastern Branch. What appears to me the most eligible course for Water street, with the necessary alterations in the squares already laid out, or the new ones which will be introduced therehy, are distinguishable by the red lines which circumscribe them, while those already established are designated by two black lines."

Without pausing to examine the King map and plans in their particulars, to some of which we may have occasion to recur at a subsequent stage of our investigation, it is enough to here state that the existence of a water street in front of the city, and comporting, in the main, with its course as laid down on the engraved plan of the Ellicott plan, is distinctly recognized.

The record also contains a map proposed by William Elliott, surveyor of the city of Washington, in 1835, and adopted in 1839 by the city councils and approved by President Van Buren, entitled "Plan of part of the City of Washington, exhibiting the water lots and Water street, and the wharves and docks thereon, along the Potomac, from E to T streets south." This map exhibits Water street as extending in front *of that part of [261]
the city embraced in the map, and it also shows that what are styled "water lots" front on the north side of Water street.

We have not overlooked the fact disclosed by the evidence in the record that, even during the presidency of General Washington, there were complaints made, from time to time, of alleged changes or departures from the L'Enfant and Ellicott plans, and that also efforts were made, sometimes successfully, to get changes allowed. And on November 10, 1798, a memorial was addressed to President Adams by some of the proprietors of lands within the city, complaining of changes made by the Dermott plan in some of the features of the previous plans, and calling attention to the incompleteness of that plan in omitting a delineation of Water street.

But these complaints appear to have been ineffectual. Nor are we disposed to understand them as meaning more than a call for a perfect delineation of Water street—not as asserting that the Dermott plan was an abandonment of such a street.

In connection with the various maps and plans must be read the regulations issued by the commissioners while they were acting, and their contract and agreements with the proprietors and purchasers.

In July, 1795, certain wharfing regulations were published, containing, among other things, the following: "That all the proprietors of water lots are permitted to wharf and build as far out into the river of Potomac and the Eastern Branch as they may think convenient and proper, not injuring or interrupting the channels or navigation of the said waters; leaving a space, wherever the general plan of the streets of the city requires it, of equal breadth with those streets; which, if made by an individual holding the adjacent property, shall be subject to his separate ocupation and use, until the public shall reimburse the expense of making such street; and where no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground." This was certainly an assertion of the control by the public, then represented by the commissioners, over the *fast land adjoining the [262]
shores and extending to the navigable channels.

Another fact of much weight is that, in the division of squares between the commissioners and Notley Young, the plats of which were signed by the commissioners and by Notley Young in March, 1797, the southern boundary is given as Water street.

It is doubtless true, as argued in the brief filed for those who succeeded to Young's title, that such a division would not, of itself, have the effect of vesting title in fee to the land in the United States. Nor, perhaps, would such a transaction operate as a donation by Young to the city of the territory covered by

the street, although it might be deemed a dedication thereof to public use as a street.

But the importance of the fact consists in the recognition by Young of the existence of Water street, as an existing or projected southern boundary of the squares.

Stress is laid, in the arguments for the appellants, on the use of the term "water lots," in the agreement of December 24, 1793, between the commissioners for the Federal buildings, of the one part, and Robert Morris and James Greenleaf, of the other part, and also on the statement made, in that agreement, that Morris and Greenleaf were entitled to the lots in Notley Young's land, and, of course, to the privileges of wharfing annexed thereto.

It should, however, be observed that the term "water lots," as used in that agreement, and elsewhere in the proceedings of the commissioners, does not necessarily mean that such lots were bounded by the Potomac river. The lots fronting on Water street were spoken of as "water lots" because next to that street and nearer to the river than the lots lying behind—a fact which gave them additional value. That this was the usage in speaking of "water lots" appears in Ellicott's map made in 1835, and approved by President Van Buren in 1839, where the lots abutting on Water street on the south are termed "water lots."

As to the statement in the agreement that Morris and Greenleaf, as purchasers from the
[263] commissioners of lots in *Notley Young's land, would be entitled to the privilege of wharfing annexed thereto, it must be remembered that that language was used in 1793, before the division of squares between Notley Young and the commissioners was made.

It is true that in the return made by the surveyors, on June 15, 1793, of squares 472, 473, 505, 506, south of 506, and south of south 506, they bounded said lots by the Potomac river. But in a further and subsequent return, made on December 14, 1793, these squares are given, in each instance, a boundary by Water street. And on June 22, 1794, the commissioners adopted the later survey, as shown by an entry on their minutes, as follows:

"The commissioners direct that the surveys and returns made of the part of the city in Mr. Young's land, adjoining the Potomak, leaving Water street according to the design of the plan of the city, be acted on instead of the returns made by Major Ellicott in some instances bounded with and in others near the water."

And we learn, from the evidence in the record, that on July 12, 1794, by a letter of that date, Thomas Freeman, a surveyor in the employ of the commissioners, informed them that "Water street on Potomak river is adjusted and bounded."

So that Morris and Nicholson, who succeeded to the interest of Greenleaf, took under their contract squares laid off in Notley Young's land with a boundary in every instance on Water street.

By various ordinances, from time to time passed, the city, from its organization in 1802, exercised jurisdiction over the portions of the Potomac river and the Eastern Branch adjoining the city and within its limits. So, too, Congress, by the act of May 15, 1820 (3 Stat. at L. 587, chap. 104), enacted that "the city should have power to preserve the navigation of the Potomac and Anacostia rivers, adjoining the city, to erect, repair, and regulate public wharves, and to deepen creeks, docks, and basins; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the anchorage, stationing, and mooring of vessels."

Controversies arose, involving the meaning of the agreements *between the original [264] proprietors and the United States and the city of Washington, and as to the effect of subsequent acts of Congress and ordinances of the city authorities, and these questions found their way into the courts.

Van Ness and Wife v. *The City of Washington and the United States*, 4 Pet. 232 [7: 842], grew out of an act of Congress of May 7, 1822, authorizing the corporation of Washington, in order to improve certain parts of the public reservations and to drain the low grounds adjoining the river, to lay off in building lots certain parts of the public reservations and squares, and also a part of B street, as laid out and designated in the original plan of the city, which lots they might sell at auction, and apply the proceeds to those objects, and afterwards to enclosing, planting, and improving other reservations, the surplus, if any, to be paid into the Treasury of the United States. The act also authorized the heirs or vendees of the former proprietors of the land on which the city was laid out, who might consider themselves injured by the purposes of the act, to institute in the circuit court of the District of Columbia a bill in equity against the United States, setting forth the grounds of any claim they might consider themselves entitled to make; the court to hear and determine upon the claim of the plaintiffs, and what portion, if any, of the money arising from the sale of the lots they might be entitled to, with a right of appeal to this court. The plaintiffs, Van Ness and wife, filed their bill against the United States and the city of Washington, claiming title to the lots which had been thus sold, under David Burns, the original proprietor of that part of the city, on the ground that by the agreement between the United States and the original proprietors, upon the laying out of the city, those reservations and streets were forever to remain for public use, and without the consent of the proprietors could not be otherwise appropriated or sold for private use; that by such sale and appropriation for private use the right of the United States thereto was determined, or that the original proprietors reacquired a right to have the reservations laid out in building lots for their joint and equal benefit with the United States, or that they were in equity entitled to the whole or a moiety of the *proceeds of the sales of the [265] lots. This court held that the United States possessed an unqualified fee in the streets and squares, and that no right or claims existed in the former proprietors or their heirs.

This decision is criticised by the learned counsel of the appellants as founded on an erroneous assumption by the court, that Beall and Gantt, the trustees, had made a conveyance, on November 30, 1791, of all the premises contained in the previous agreements, including the squares or lots for public buildings and the land for the streets. And, indeed, it does appear, by the evidence in the present case, that although both President Washington and President Adams did formally request the trustees to convey to the commissioners all the streets in the city of Washington, and also the several squares, parcels, and lots of ground appropriated for public purposes, yet that the trustees, owing to disputes and objections on the part of several of the original proprietors, failed to ever actually execute such a deed of conveyance. Yet even if such an alleged state of facts had been made to appear to the court, namely, that no conveyance of the land in the streets had been actually made by the trustees, we think the conclusion reached by the court in that case could not have been different.

In the act of Maryland, ratifying the cession, and entitled "An Act Concerning the Territory of Columbia, and the City of Washington," passed December 19, 1791, was contained the following:

"*And be it enacted*, That all the squares, lots, pieces, and parcels of land within the said city, which have been or shall be appropriated for the use of the United States, *and also the streets*, shall remain and be for the use of the United States; and all the lots and parcels, which have been or shall be sold to raise money as a donation as aforesaid, shall remain and be to the purchasers, according to the terms and conditions of their respective purchase . . ."

In August, 1855, Attorney General Cushing rendered to the Secretary of the Interior an opinion upon the question of the authority of the Commissioner of Public Buildings,
[266] as *successor of the early commissioners, to sell and convey lots in the city of Washington. Adverting to the act of the legislature of Maryland of December 19, 1791, and citing the section above quoted, he said:

"This provision seems to have been designed to have the legal effect to vest in the United States the fee of all the lots, conveyed for their use, and also to perfect the title of purchasers to whom sales had been or should be made according to the terms of the act of Congress." Ops. Atty. Gen. p. 355.

And even if the act of Maryland did not avail, of itself, to convey unto the United States a legal statutory title, the facts show that the United States were entitled to a conveyance from the trustees, and a court of equity will consider that as having been done which ought to have been done.

In point of fact the trustees did, by their deed of November 30, 1796, on the request of President Washington, convey to the commissioners in fee simple all that part of the land which had been laid off into squares, parcels, or lots for buildings and remaining so laid off in the city of Washington, subject to the trusts remaining unexecuted.

In the case of *Potomac Steamboat Co.* v. *Upper Potomac S. B. Company*, 109 U. S. 672 [27: 1070], it was held, following *Van Ness* v. *City of Washington*, that the fee of the streets was in the city, and further that the strip between the squares and lots and the Potomac river was such a street, and that there were no private riparian rights in Notley Young and those who succeeded to his title.

In the discussion of the evidence that led to such a conclusion Mr. Justice Matthews said:

"It has been observed that both squares No. 472 and No. 504 are bounded on the southwest by Water street. This street was designated on the adopted plan of the city as occupying the whole line of the river front, and separating the line of the squares from the river for the entire distance from Fourteenth street to the Arsenal grounds. It is alleged in the bill in respect to this street that there was traced on the map of the city 'but a single line denoting its general course
*and direction; that the dimensions of said [267]
Water street, until the adoption, on the 22d of February, 1839, of the certain plan of one William Elliott, as hereinafter more particularly mentioned, were never defined by law; and that the said Water street was never, in fact, laid out and made in the city until some time after the close of the recent civil war; that before the commencement of said civil war one high bluff or cliff extended along the bank of said river in the city of Washington, from Sixth street west to Fourteenth street west; that to the edge thereof the said bluff or cliff, between the points aforesaid, was in the actual use and enjoyment of the owners of the land which it bounded towards the river; that public travel between the two streets last above mentioned, along the said river, could only be accomplished by passing over a sandy beach, and then only when the tide was low; and that what is now the path of Water street, between the two streets aforesaid, was and has been made and fashioned by cutting down the said cliff or bluff and filling in the said stream adjacent thereto.'

"These allegations in substance, are admitted in the answer to be true, with the qualification that the width of the street was left undefined because it constituted the whole space between the line of the squares and the river, whatever that might be determined to be from time to time; but that the commissioners, on March 22, 1796, made an order directing it to be laid out eighty feet in width from square 1079 to square east of square 1025, and to 'run out the squares next to the water and prepare them for division,' and that it was so designated on the maps of the city in 1803. If not, the inference is all the stronger that the whole space south of the line of the lots was intended to be the property and for the use of the public. *Barclay* v. *Howell's Lessees*, 6 Pet. 498 [8: 477]. In *Rowan's Exers.* v. *Portland*, 8 B. Mon. 239, that inference was declared to be the legal result of such a state of facts.

"It is quite certain that such a space was designated on the official map of the city as

originally adopted, the division and sale of the squares and lots being made in reference to it. *What the legal effect of that fact is we shall hereafter inquire, and while we do not consider it to be qualified by the circum- [268] stance, set forth as to the actual history of the street as made and used, they perhaps sufficiently account for the doubt and confusion in which the question of right brought to issue in this litigation seem for so long a period to have been involved.

"The transaction between Notley Young and the public authorities, as evidenced by the documents and circumstances thus far set forth, was equivalent in its result to a conveyance by him to the United States in fee simple of all his land described, with its appurtenances, and a conveyance back to him by the United States of square No. 472, and to Greenleaf of square No. 504, bounded and described as above set forth, leaving in the United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water street, intervening between the line of the squares as laid out and the Potomac river."

It is earnestly urged in the present case that the court in that case did not have before it the Dermott map, and was not aware that said map was the one approved by President Washington on March 2, 1797. From this it is reasoned that, if the court had been informed that the Dermott map was the real and only official plan, and had seen that Water street was not laid out or designated upon it, a different conclusion as to the ownership of Water street would have resulted.

It is by no means clear that the Dermott plan was not before the court. If it was, as is now contended, the only plan which was approved by President Washington as the official map, it would seem very singular that the able and well-informed counsel who represented the respective parties in that case did not think fit to put it in evidence, and make it the subject of comment.

We are inclined to infer that the Dermott plan was the very one referred to in the bill and answer in that case. Thus, in the bill, in the portion above quoted, it was alleged, in respect to Water street, that there was traced on the map of the city "but a single line, denoting its general course and direction;" and in the answer it is stated that the [269] width of *the street was left undefined, because it constituted the whole space between the line of the squares and the river.

An inspection of the Dermott plan discloses such a single line, extending along the entire river front on both the Potomac and the Eastern Branch, and outside of the line of the squares and lots.

But the Ellicott plan, as engraved in Philadelphia, discloses a well-defined space, of varying width, between the river and the line of the lots and squares, extending along the entire front of the city.

There are expressions used in the opinion of the court, in that case, that show that the attention and consideration of the court were not restricted to a single map. Thus, on page 679 [27: 1072], after adverting to the order of the commissioners on March 22, 1796, directing that Water street should be laid out eighty feet in width, the court adds "that it was so designated on the maps of the city in 1803"—evidently referring to the King plan.

Even if so unlikely a fact did exist, namely, that in the case in 109 U. S. the Dermott map was not considered, we think that the conclusion of the court would not have been changed by its inspection. It was not understood to set aside or dispense with the important features of the previous maps. It, no doubt, having been made after most of the surveys had been returned, more accurately comported with the lots, squares, and streets as laid out, than the previous plans. But, as we have seen, it was not itself complete. The contention that it omitted Water street, with the intention of thereby renouncing the city's claim to a street on the river, does not impress us as sustained by the evidence. The preceding plans exhibited a space for such a street, and the succeeding plans, both that of King in 1803, and that of Elliott, adopted by the city councils and approved by President Van Buren in 1839, recognize and, in part, define Water street. The Dermott plan itself exhibits the line of a space outside of the line of the squares and lots, and that portion of such space that lies on the Eastern Branch is marked on the Dermott plan as Water street.

The latest reference to the maps that we are pointed to in the reports of this court is in *Patch* v. *White*, 117 U. S. 221 [29: 864], *where Mr. Justice Woods said: "The devise [270] clearly and without uncertainty designates a lot on Ninth street, between I. and K. streets, well known on the map of the city of Washington, whose metes, bounds, and area are definitely fixed, platted, and recorded. The map referred to was approved by President Washington in 1792 and recorded in 1794. Thousands of copies of it have been engraved and printed. All conveyances of real estate in the city made since it was put on the record refer to it; it is one of the muniments of title to all the public and private real estate in the city of Washington, and it is probably better known than any document on record in the District of Columbia. The accuracy of the description of the lot devised is, therefore, matter of common knowledge, of which the court might even take judicial notice."

It is true that in that case there was no controversy respecting the authenticity of the city maps, and that the expressions quoted are found in a dissenting opinion. Still, such statements made in a closely contested case, where the parties were represented by leading counsel, residents of the city of Washington, may fairly be referred to as a contribution to the history of the city maps.

Without protracting the discussion, we think, considering the reasonable probability that a public street or thoroughfare would be interposed between the lots and squares and the navigable river; the language and history of the acts of Maryland referred to; the agreements between the original proprietors; the deeds to the trustees; the subsequent transactions between the property

holders and the commissioners; the regulations affecting the use of wharves and docks, published by the commissioners; the several acts of Congress conferring jurisdiction upon the city over the adjacent waters; the several city maps and plans, beginning with that of L'Enfant, sent by President Washington to Congress in 1791, and ending with that of Elliott, approved by President Van Buren in 1839; and the views expressed on the subject in previous decisions of this court, that the conclusion is warranted, that, from the first conception of the Federal city, the establishment of a public street, bounding the
[271] city on the south, and to be *known as Water street, was intended, and that such intention has never been departed from.

With this conclusion reached, it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights; nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river, unless they can show valid grants to the same from Congress, or from the city under authority from Congress, or such a long protracted and notorious possession and enjoyment of defined parcels of land as to justify a court, under the doctrine of prescription, in inferring grants.

With these results in view, we shall now proceed to examine the remaining claims.

The Chesapeake & Ohio Canal Company was incorporated in 1824 by concurrent acts of the leigslatures of Virginia and Maryland. The object of the company was the construction of a navigable canal from the tide water of the Potomac to the Ohio river.

By an act approved March 3, 1825 (4 Stat. at L. 101, chap. 52), Congress enacted "that the act of the legislature of the state of Virginia, entitled 'An Act Incorporating the Chesapeake & Ohio Canal Company,' be, and the same is hereby, ratified and confirmed, so far as may be necessary for the purpose of enabling any company that may hereafter be formed, by the authority of said act of incorporation, to carry into effect the provisions thereof in the District of Columbia, within the exclusive jurisdiction of the United States, and no further."

That portion of the canal which lies within the boundaries of the city of Washington extends from Twenty-Seventh street in a southeasterly direction to Seventeenth street, and appears to have been opened for navigation in the latter part of 1835. This part of the canal was wholly constructed north of the street designed to run between the squares nearest to the river front and the river itself. The land occupied by the canal company within the city belonged in part to individual owners and in part to the United States.

Entering the city so long after the adop-
[272] tion of the several *maps and plans, the canal company must be deemed to have been aware of their contents, and to have been subjected thereto, except in particulars in which the company may have been released or exempted therefrom by the acts of Congress, or by the authorities of the city. Consequently the company cannot validly claim riparian rights as appurtenant to those lots or parts of lots which the company purchased from individual owners who held lots north of Water street. Having themselves, as we have seen, no riparian rights, such owners could not convey or impart them to the canal company.

But it is contended, on behalf of the canal company, that riparian rights attached at least to those portions of their land which they acquired by virtue of the legislation of Congress, and which were located on the margin of the Potomac river.

If it was, indeed, the persistent purpose of the founders of the city to erect and maintain a public street or thoroughfare along the river front, it would be surprising to find so reasonable a policy subverted by legislation on the part of Congress in favor of this canal company. To justify such a contention we should expect to be pointed to clear and unmistakable enactments to that effect. But the acts of Congress relied on are of a quite different character. Let us briefly examine them.

There was, in the first place, the act of March 3, 1825, heretofore quoted, wherein the act of Virginia incorporating the Chesapeake & Ohio Canal Company is ratified and confirmed so far as may be necessary for the purpose of enabling any company that might thereafter be formed under the authority of that act to carry into effect the provisions thereof in the District of Columbia within the exclusive jurisdiction of the United States, and no further. Then followed the act of May 23, 1828 (4 Stat. at L. 292, chap. 85), authorizing the connection of lateral canals, constructed under authority of Maryland and Virginia, with the main stem of the canal within the District. By the act of May 24, 1828 (4 Stat. at L. 293, chap. 86), Congress authorized a subscription by the United States for ten thousand shares of the capital stock of the *company, and made pro- [273]
vision for the elevation and width of the section below the Little Falls, so as to provide a supply of water for lateral canals or the extension of the Chesapeake & Ohio Canal by the United States.

It may be conceded that it is clear from these enactments that Congress contemplated the location of the Chesapeake & Ohio Canal along the bank of the Potomac river within the District of Columbia; and it may be further conceded that Congress acquiesced in the route and terminus of the canal selected by the company. But it does not follow from such concessions, or from anything contained in the legislation referred to, that Congress was withdrawing from the city of Washington its rights in Water street, or was granting to the canal company a fee simple in the river margin with appurtenant riparian rights.

It is further urged, that by the act of March 3, 1837 (5 Stat. 303), Congress adopted and enacted as a law of the United States the provision of the Virginia act of February 27, 1829, in the following terms: "That whenever it might be necessary to form heavy embankments, piers, or moles, at the mouths of creeks or along the river

shore, for basins or other purposes, and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purpose may by them, when so improved, be sold out or let for a term of years, as they may deem most expedient for the company, on such conditions as may direct the application of the proceeds thereof to useful purposes, and at the same time repay the necessary expense of the formation of such banks, piers, or moles; provided, that this power shall in no case be exercised so as to injure the navigation of the canal;" that by the second section of the act of 1837, penalties were declared against any person who should maliciously injure the canal or its necessary embankments, tow paths, bridges, or drains; and, by the third section, enacted that "all condemnations of lands for the use and purposes of said canal company, which have heretofore been made by the marshal of the District or any lawful deputy
[274]*marshal, shall be as valid as though the same had been situated in the state of Maryland, and had been condemned in pursuance of the laws of said state through the action and agency of a sheriff of any of the counties of said state."

As the canal had been constructed and opened for navigation within the limits of the city before the passage of this act of 1837, and as it is not claimed or shown that any embankment, piers, or moles were constructed on the route of the canal, within the city, since the passage of the act, it thus appears that no rights were acquired by the company on the strength of the act, which are interfered with by the improvements projected by Congress.

It was, indeed, alleged in paragraph 16 of the company's answer that "the company did construct a gate house at the foot of Seventeenth street, and a pier, embankment, or mole at the foot of Seventeenth street, and extending into the Potomac river; and that said gate house and the made land appurtenant thereto, and part or all of said pier, embankment, or mole at the foot of Seventeenth street, as the same now exists, are the property of this defendant."

Without stating the particulars of the evidence on this part of the subject, it is sufficient to say that it clearly appears that the basin at the mouth of Tiber creek, at the foot of Seventeenth street, was constructed by the corporation of the city of Washington, and that the pier or embankment, mentioned in the company's answer, did not extend into the Potomac river, but into this basin, and that the gate house referred to was erected under a permission granted by the city council by an act approved May 20, 1837, in the following terms:

"That permission be and is hereby granted to the Chesapeake & Ohio Canal Company to use and occupy so much of the northwest corner of the wharf erected at the southern termination of Seventeenth street west as they may deem necessary, for the purpose of erecting thereon a house for the keeper of the river lock at that place: *Provided*, The extent thereof shall not exceed sixty feet measured south and thirty feet measured east from the northwest corner of the said wharf."

*There is nothing in this or in any other [275]
legislation on the part of the city council which can be construed as conferring on the company any rights of property in the land intervening, according to the plans of the city, between the canal and the river.

The fair meaning and effect of the legislation of Congress and of the city respecting the Chesapeake & Ohio Canal Company were to permit that company to construct and maintain its canal within the limits of the city, and to approve its selection of the route and terminus. The purpose of the construction of the basin at the foot of Seventeenth street was to provide a commodious harbor, in which were to meet and be exchanged the commerce of the Potomac river and of the Chesapeake & Ohio Canal. But we find, in such legislation, no intimation, much less any clear and distinct declaration, of an intention to set aside the existing plans of the city in respect to its river front.

We do not deem it necessary to enter upon a consideration of the exact nature of the company's title to the lands occupied by its canal within the limits of the city, nor to discuss the legal consequences of a failure by the company to occupy and use such lands for canal purposes. Different conclusions might be reached in respect to lands derived by purchase or condemnation and public lands granted for the public purpose of a navigable highway. But such questions are not before us.

It is sufficient now to hold that the Chesapeake & Ohio Canal Company does not, either as to lots procured from private owners, or as to lands occupied under the permission of Congress and of the city authorities, own or possess riparian rights along the line of its canal within the limits of the city.

Accordingly, the decree of the court below in respect to the claim of the Chesapeake & Ohio Canal Company is affirmed. It was, however, found by the court below that there is a small strip of land north of Water street and owned by the Chesapeake & Ohio Canal Company, which lies within the limits of the government improvement, the value of which was determined by the court below at the sum og $353.33. *As the United States have [276]
not appealed from this part of the decree, and as the Chesapeake & Ohio Canal Company has not excepted to the finding of the value, it follows that the canal company is entitled to that sum out of the appropriation by Congress as compensation for the occupation by the government of such strip of land.

The next class of claimants consists of lot owners between Seventeenth street west and Twenty-Seventh street west.

All these lots, with respect to which riparian rights are claimed, lie to the north of Water street, which intervenes between them and the channels of the river. Under the principles already established, no riparian rights belonged to these lots. But some portions of the lots are embraced within the

limits of the government plan of reclamation, and for such portions the court below awarded compensation. All of these claimants, save two, have accepted and received the compensation.

Richard J. Beall and the heirs and trustees of William Easby have refused to accept the compensation so awarded them, and have appealed. Their asserted grounds of appeal are, first, their alleged rights to riparian and wharfage privileges on the Potomac river as appurtenant to their lots, and, second, the insufficiency of the compensation allowed by the court below.

An effort is made to distinguish the case of these lots from that of the lots east of Seventeenth street by referring to a book marked "Register of Squares," produced from among the records of the city, and wherein squares 63 and 89 are bounded on the north by Water street and on the south by the Potomac river, and square 129 is bounded on the north by B street and on the south by the Potomac river.

It was the opinion of the court below that there was a lack of evidence to prove that the registers of squares were contemporaneous and original books which it was the duty of the commissioners to keep, that the entries were not in their handwriting, nor in that of any person whose handwriting is proved, and that they have not the quality of a public record.

We agree with that court in thinking that,
[277] in no point of *view, on the evidence adduced in this case, can effect be given to these registers of squares as contradicting or overriding the plans of the city adopted by the President, wherein, as we have seen, the squares in question were bounded by streets interposed between them and the channels of the river.

The second complaint on behalf of these appellants is of the insufficiency of the amount allowed them by way of compensation.

We have read the evidence on this subject contained in the record and have been surprised by the discrepancy in the values put on these parcels of land by the respective witnesses—a discrepancy so wide that we find it impossible to reconcile the testimony, or to reasonably compromise between the extremes. In such circumstances we think our proper course is to adopt the conclusions of the learned judge who disposed of this matter in the court below. Acquainted, as he presumably was, with the locality of the lands and with the character and experience of the numerous witnesses, his judgment would be much safer than any we could independently form. The fact that the larger number of those concerned have acquiesced in the valuation and accepted the award is not without significance. The claim of Mr. Beall that he should be allowed interest or rental value for his property which was taken possession of by the United States in 1882 seems entitled to further consideration by the court below.

The amount awarded to the estate of William Easby was made payable in the decree of the court below to William Easby's heirs. The estate was represented in the appeal to this court by Rose L. Easby and Fanny B. Easby, styling themselves trustees of the estate of said William Easby, and by Wilhelmina M. Easby-Smith, who is described as one of the heirs at law and administratrix *de bonis non cum testamento annexo* of William Easby, deceased. These parties appear by the record to have taken a joint appeal, but they are represented by different counsel. It is now claimed by the counsel representing Rose L. Easby and Fanny B. Easby, alleged trustees of the estate, that the decree awarding payment to William Easby's heirs should be amended so as to make the *award payable to [278]
said alleged trustees. It is said that they were the only parties to the record, representing said estate, at the time the said award was made, and apprehensions are expressed that if the award is distributed to the different heirs of William Easby injustice will be done the alleged trustees, because it will enable said heirs to receive their proportionate shares directly from the government without being compelled to share in the expenses of the suit. This controversy does not seem to have been dealt with in the court below, where it properly belongs, and to which, affirming the award in other respects, we shall remit the question.

The next claim is one made by the descendants of Robert Peter to parcels of land included in the government plan of reclamation, and situated near the Observatory grounds.

In June, 1791, Robert Peter executed and delivered a conveyance of his lands to Beall and Gantt in trust that the Federal city should be laid out upon them and other lands similarly conveyed by other proprietors.

Robert Peter was one of the signers of the agreement of March 13, 1791, hereinbefore mentioned, and the terms of his conveyance to Beall and Gantt were substantially similar to those used in the conveyances of David Burns and Notley Young. There therefore passed by this deed to the trustees his entire title to the main land and all his riparian rights appurtenant thereto.

It is now claimed that, under the terms of the agreement and of the conveyance, such streets, squares, and lots should be laid out as the President might direct, and conveyances be made of them to the United States, and the residue of said lots should be divided between the United States and Robert Peter, and the lots so divided to him, together with any part of said land which should not have been laid out in the city, should be conveyed to Robert Peter in fee by the said trustees; and it is further claimed that certain parts of said land were never laid out as part of the city, nor conveyed either to the United States or Robert Peter, and that the equitable title to such parts, with the riparian rights appurtenant thereto, is in his heirs, for which they are now entitled to compensation. It is *not denied that, in pursuance of [279]
the agreement and conveyance, the city was laid out, and its streets, squares, lots, and boundaries defined, in the several maps or

plans approved by the President and adopted by the city authorities. Nor has any evidence been adduced that by any act or declaration of the President, or of anyone in authority under him, was any portion of the lands conveyed by Peter and the other proprietors to Beall and Gantt, trustees, ever excluded from the city. Nor is it denied that there was a division of lots between Peter and the commissioners in pursuance of the agreement and conveyance.

But reliance is placed upon the correspondence between Peter and the commissioners tending to show that lands with riparian privileges remained undivided.

In June, 1798, Nicholas King, in behalf of Mr. Peter, addressed a letter to the commissioners, representing that it was "an object highly interesting to Mr. Peter to know the bounds, dimensions, and privileges of those parts of the city generally called water property, and assigned to him on the division. . . . The square south of No. 12 has not yet been divided between said Peter and the commissioners. . . . The square No. 22 as at present laid off and divided with the commissioners does not extend to the channel by several hundred feet. If another square be introduced to the south of it, that square will be covered to a small depth with water, and the proprietors thereof will want earth to wharf and fill it up with. It will perhaps be best therefore to redivide square No. 22 and attach the low ground to it."

Replying on June 28, 1798, the commissioners said:

"When the commissioners have proceeded to divide a square with a city proprietor, whether water or other property, they have executed all the powers vested in them to act on the subject. It appertains to the several courts of the states and of the United States to determine upon the rights which such division may give; any decision by us on the subject would be extrajudicial and nugatory; of this, no doubt, Mr. Peter, if applied to, would have informed you. *With respect to square No. 22, we do not conceive that it*
[280] *is entitled to *any water privilege, as a street intervenes between it and the water;* but as there is some high ground between Water street and the water, we have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

This suggestion of the commissioners, to lay out and divide a square south of Water street was never acted on. It is plain that the commissioners would have had no right to disregard the action of the President in establishing Water street as the southern boundary of the city. It also appears from the letter of Mr. King that such a proposed square would have been under the waters of the Potomac, and therefore consisted of territory belonging to the United States as successor to the sovereignty of Maryland, and not to them as grantees of Mr. Peter.

In November, 1798, Mr. Peter, with other persons, as appears in the record, appealed to the President to have corrections made in the plan of the city, and used the following language:

"We know your excellency will attend to the necessity of defining what water privilege or right of wharfage is attached to the lots on the Eastern Branch, the Potomac river, and Rock creek, also all such streets as are to be left in wharfing from the shore to the channel of said waters, and the extent to which those wharves are to be carried; and what ground, so made and filled up, shall be considered as subject to occupancy by buildings."

This memorial was referred by the President to the Attorney General, Charles Lee, who, in an opinion dated January 7, 1799, advised against the application to make any departure from the plans of the city already approved by the President.

In May, 1800, Mr. Peter and the commissioners agreed upon a division of square south of square No. 12, by which four of the lots were given to Peter, one of which faced on Water street, and two others facing on Water street were assigned to the United States; and in a note attached to the map of square No. 22, signed in 1800 by Nicholas King, as *attorney for R. Peter, it is stated [281]
that the commissioners conveyed to Robert Peter the lot No. 6 in square No. 22, in consideration of the balance due him by the public of square feet in the division of lots.

Since the year 1800 to the time of the institution of this suit no attempt to impeach this settlement, and no assertion of title to the land south of Water street, by the descendants of Robert Peter, appear to have been made.

The decree of the court below in respect to this claim is affirmed.

The next class of appellants consists of those who claim rights of property on the river front between the Long Bridge and the Arsenal. They all derive title under Notley Young, and the parcels of land they claim are all situated south of Water street, and fall within the limits of the government improvement.

In so far as the arguments advanced in support of these claims are based on the alleged abandonment of Water street in the Dermott plan, and on the legal consequences supposed to follow from the fact that the trustees never formally conveyed the streets or public reservations, they are disposed of by the conclusions already reached.

But it is further contended that, even if we conclude that Water street was designed to be the southern boundary of the city, and that the title to said street passed to the United States, yet the facts disclose such equities between the United States, on the one hand, and the private claimants, on the other, as to justify a decree in favor of these appellants. Those equities are said to arise out of grants made by the United States and the city authorities, from time to time, in respect to wharves and water fronts, under which the appellants and their predecessors acted, and out of the long lapse of time during which they have been in undisturbed possession.

In considering the facts relied on by the

appellants we must not lose sight of the conclusions already reached, namely, that Notley Young, by his agreement with the other proprietors and by his conveyance to the
[282] trustees, had parted with his *entire title to the lands described and to the riparian rights appurtenant thereto; that all the lots subsequently conveyed to Notley Young were subject to the plans of the city establishing Water street, and did not reinvest him with his original riparian rights.

Hence these appellants, claiming under Notley Young, can only rely, in their contention now under consideration, on transactions that have taken place since the division between the commissioners and Notley Young; and these we shall now briefly examine.

Our attention is first directed to the twelfth section of the Maryland act of December 19, 1791 (Kilty's Laws Md. chap. 45), in the following terms:

"That the commissioners aforesaid, for the time being, or any two of them, shall, from time to time, until Congress shall exercise the jurisdiction and government within said territory, have power to license the building of wharves in the waters of the Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner and extent, they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before the land of another, nor shall any wharf be built in said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance."

Here we may pause to observe that the only power given to the commissioners was to grant *licenses*, from time to time, and *until* Congress should assume and exercise its jurisdiction within the territory, and it was declared that any wharf built in the waters of the Potomac without such license. or in disregard of its provisions was declared to be a common nuisance.

The licenses contemplated therefore were temporary, and liable to be withdrawn by Congress on assuming jurisdiction. Such legislation certainly cannot be relied on as either conferring or recognizing rights to erect and maintain permanent wharves within the waters of the Potomac and the Eastern Branch.

[283] *On July 20, 1795, the commissioners published the following regulations respecting wharves:

"The board of commissioners, in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, and to regulate the materials, the manner and extent thereof, hereby make known the following regulations:

"That the proprietors of water lots are permitted to wharf and build as far out into the river Potomac and the Eastern Branch as they think convenient and proper, not injuring or interrupting the channels or navigation of the said waters, leaving a space, wherever the general plan of streets in the city requires it, of equal breadth with those streets, which if made by an individual holding the adjacent property shall be subject to his separate occupation and use, until the public shall reimburse the expense of making such street; and when no street or streets intersect said wharf, to leave a space of sixty feet for a street at the termination of every three hundred feet of ground. The buildings on said wharves to be subject to the general regulations for buildings in the city of Washington as declared by the President. Wharves to be built of such materials as the proprietors may elect."

It will be seen that, in publishing these regulations, the commissioners claimed no authority in themselves, but professed only to act in virtue of the act of Maryland, and must therefore be understood as having intended to grant temporary licenses, subject to the will of Congress when it should take jurisdiction.

It appears in the record that Notley Young himself procured from the commissioners a license to build a wharf on the Potomac river, and that the wharf appears as an existing structure upon the map of 1797. The board of commissioners was abolished by an act of Congress approved May 1, 1802 (2 Stat. at L. 175, chap. 41) by the second section whereof it was enacted:

"That the affairs of the city of Washington, which have heretofore been under the care and superintendence of the said commissioners, shall hereafter be under the direction of *a superintendent to be appointed [284]
by and under the control of the President of the United States; and the said superintendent is hereby invested with all the powers, and shall hereafter perform all the duties, which the said commissioners are now vested with, or are required to perform by or in virtue of any act of Congress, or any act of the general assembly of Maryland, or any deed or deeds of trust from the original proprietors of the lots of said city, or in other manner whatsoever."

This was followed by the act of May 3, 1802, entitled "An Act to Incorporate the Inhabitants of the City of Washington, in the District of Columbia." (2 Stat. at L. 195, chap. 53). In it was given to the corporation "full power and authority to regulate the stationing, anchorage, and mooring of vessels," but no authority to license or regulate the building of wharves is given. Then came the act of February 24, 1804 (2 Stat. at L. 254, chap. 14), wherein was given to the city councils power "to preserve the navigation of the Potomac and Anacostia rivers, adjoining the city; to erect, repair, and regulate public wharves, and to deepen docks and basins."

By the act of May 15, 1820 (3 Stat. at L. 583, chap. 104), entitled "An Act to Incorporate the Inhabitants of the City of Washington, and to Repeal All Acts Heretofore Passed for That Purpose," the corporation was empowered "to preserve the navigation of the Potomac and Anacostia rivers adjoining the city; to erect, repair, and regulate public wharves; to regulate the manner

of erecting and the rates of wharfage at private wharves; to regulate the stationing, anchorage, and mooring of vessels."

On July 29, 1819 (Burch's Dig. 126), the city council enacted:

"Sec. 1. That the owners of private wharves or canals and canal wharves be obliged to keep them so in repair as to prevent injury to the navigation.

"Sec. 2. That no wharf shall hereafter be built, within this corporation, without the plan being first submitted to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same, and
[285]if it shall appear *to their satisfaction that no injury could result to the navigation from the erection of such wharf, then, and in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf shall approach the channel."

By acts of councils approved January 8, 1831, it was enacted:

"Sec. 1. That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same; and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then, in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall approach the channel and at what angle they shall extend from the street on which they are erected."

The record discloses a continuous series of acts and joint resolutions of the city councils, on the subject of improving the navigation of the Potomac river, the erection and repair of sea walls on the river, granting special permission to named persons to build wharves in front of such walls. The last we shall notice is the act of March 23, 1863, entitled "An Act Authorizing the Mayor to Lease Wharf Sites on the Potomac River," etc. By this act the mayor was authorized to lease for any term of years, not exceeding ten, wharf sites in front of any sea wall theretofore built by the corporation, or in front of any sea wall that might thereafter be built in pursuance of any enactment for that purpose; and it was provided that at the expiration of ten years, or sooner, the said sites and all wharf improvements thereon should revert to the corporation, and that if the occupants should fail to keep said wharves in good repair and to comply with all the provisions of the act, the contract should cease, and the mayor should notify them to vacate the premises within ten days. And this was followed by similar acts in
[286]1865, 1867, 1870, and 1871, all *asserting power by the corporation over the wharves on Water street.

We think it impossible to reconcile the succession of acts of Congress and of the city councils with the theory that the wharves south of Water street were erected by individuals in the exercise of private rights of property in defined parcels of land to them belonging. The legislation clearly signifies that during the entire history of the city Congress and the city authorities have claimed and exercised jurisdiction for public purposes over the territory occupied by these wharves; and that jurisdiction seems to have been recognized and submitted to by the appellants and their predecessors in many instances in which the evidence discloses the nature of the transactions.

It is earnestly urged by the learned counsel of the appellants that possession and enjoyment by successive occupants for so long a period warrant the presumption of a grant, and authorities are cited to show that such presumptive grant may arise as well from the Crown or the state as from an individual. As between individuals, this doctrine is well-settled and valuable; and it may be that, in respect to the ordinary public lands held by the government for the purposes of sale, occupation, and settlement, there might exist a possession so long, adverse, and exclusive as to justify a court of equity or a jury in presuming a grant. But where, as in the present case, the lands and waters concerned are owned by the government in trust for public purposes, and are withheld from sale by the Land Department, it seems more than doubtful whether an adverse possession, however long continued, would create a title. However, under the facts disclosed in this record, it is unnecessary to determine such questions; for, as we have seen, at no time have Congress and the city authorities renounced or failed to exercise jurisdiction and control over the territory occupied by these wharves and docks.

An effort is made to distinguish the claim of Edward M. Willis, as alienee of A. I. Harvey, defendant, to land lying between Thirteen-and-a-half street and Maryland avenue, and fronting on the Potomac, by the circumstance that Water *street has never [287]
been actually constructed and opened as a thoroughfare in front of this land. But it is not perceived that the failure of the city heretofore to open Water street could create any title in Willis to the land and water lying south of the territory appropriated for that street. His occupancy, or that of his predecessors, of such land for wharfing or other purposes may be presumed to have been with the consent of the city authorities, but could not, under the facts shown in this record, avail to raise the presumption of a grant.

Referring to a similar claim this court said, in *Potomac Steamboat Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 692 [27: 1077]:

"Disputes undoubtedly arose, some quite early, not so much as to what rights belonged to 'water lots,' nor as to what property constituted a 'water lot,' but, in regard to particular localities, whether that character attached to individual squares and lots. In part, at least, the uncertainty arose from the fact that the plan of the city, as exhibited on paper, did not accurately correspond at all points with the lines as surveyed and

marked on the land. Complaints of that description, and of designed departures from the plan, seem to have been made. It is also true, we think, that mistakes arose, as perhaps in the very case of the lots on the north side of Water street, owing to the fact that the street existed only on paper, and for a long time remained an unexecuted project; property appearing to be riparian, because lying on the water's edge, which, when the street was actually made, had lost its river front, they were thought to be 'water lots,' because appearing to be so in fact but were not so in law, because they were bounded by the street, and not by the river." *Barclay* v. *Howell's Lessee*, 6 Pet. 505 [8: 480]; *City of Boston* v. *Lecraw*, 17 How. 426 [15: 118].

There are also defendants who claim the right to hold certain wharf properties on the Potomac between the Long Bridge and the Arsenal, under licenses in writing issued by the Chief of Engineers for the time being, authorizing the erection of wharves. The power to grant such licenses is attributed to the Chief of Engineers as the successor of the office of Commissioner of Public Buildings
[288] under the act of *March, 1867. It was the opinion of the court below that, under the legislation that preceded the act of 1867, jurisdiction with respect to private wharves had been conferred upon the authorities of the city, and that hence the Chief Engineer was without any lawful authority to issue such licenses. In so holding the court below followed the decision of the supreme court of the district in the case of *The District of Columbia* v. *Johnson*, 3 Mackey, 120.

We see no reason to doubt the soundness of this conclusion, though, for the reasons already given, even if the power to grant such licenses had belonged to the Chief of Engineers, they would not have vested any rights in fee in the land and water south of Water street in these appellants.

The contention, on behalf of the Washington Steaboat Company, as successor to the title of the Potomac Ferry Company by a purchase on June 1, 1881, that the act of Congress of July 1, 1864, creating the latter company, operated as a release of the title of the government to such land as that company might acquire for its proper purposes, we cannot accept. The legal purport of that enactment was, as we interpret it, to authorize the ferry company to purchase and hold such real estate as should be necessary to carry its chartered powers into effect, but was not intended as a grant of land on the part of Congress, or as a legislative admission of the title of private parties. The power to purchase land thereby conferred had room to operate on land north of Water street and on land situated in the state of Virginia.

While, however, our conclusion is that no riparian rights in the waters of the Potomac river belong to the owners of lots lying north of Water street, and that no presumption of grants in fee can arise, in these cases, from actual occupation of lands and water south of that street, we do not understand that it is the intention of Congress, in exercising its jurisdiction over the territory in question, and in directing the institution of these proceedings, to take for public use, without compensation, the private property of individuals situated within the lines of the government *improvement, even where such [289]
property may lie south of Water street. Those who, relying, some of them, on express and others on implied licenses from the city authorities, have erected and maintained expensive wharves and warehouses for the accommodation of the public, are not to be treated, as we read the will of Congress, as mere trespassers.

That such is not the intention of Congress we infer, not merely from the fact that, by the act of 1886, the inquiry was submitted to a court of equity and not to a court of law, but from the express language of the act. Thus, by the first section, it is made "the duty of the Attorney General of the United States to institute, as soon as may be, in the supreme court of the District of Columbia, a suit against all persons and corporations who may have or pretend to have any right, title, claim, or interest in any part of the land or water in the District of Columbia within the limits of the city of Washington, or exterior to said limits and in front thereof toward the channel of the Potomac river, and composing any part of the land or water affected by the improvements of the Potomac river or its flats in charge of the Secretary of War, for the purpose of establishing and making clear the right of the United States thereto." The second section provides "that the suit mentioned in the preceding section shall be in the nature of a bill in equity, and there shall be made parties defendant thereto all persons and corporations who may claim to have any such right, title, or interest."

The third section provides that the cause "shall proceed with all practicable expedition to a final determination by the said court of all rights drawn in question therein; and that the said court shall have full power and jurisdiction by its decree to determine every question of right, title, interest, or claim arising in the premises, and to vacate, annul, set aside, or confirm any claim of any character arising or set forth in the premises."

The fourth section provides that if, on the final hearing of said cause, the said court "shall be of opinion that there exists any right, title, or interest in the land or water in this act mentioned in any person or corporation adverse to the complete *and para- [290]
mount right of the United States, the said court shall forthwith and in a summary way proceed to ascertain the value of any such right, title, interest, or claim, exclusive of the value of any improvement to the property covered by such right, title. or interest made by or under the authority of the United States, and report thereof shall be made to Congress."

It may be well here to mention that it is disclosed in the record that the wharves owned by the Potomac Steamboat Company opposite square 472, and other wharves on the Potomac, were rented by the government

during the Civil War, and that rent was paid for them monthly by the government during a period of several years. It is not to be supposed that the United States are now estopped by such conduct, but the fact is worthy of mention as going to show that the government did not regard those who owned the wharves, and to whom the rent was paid, as trespassers, or that the structures were an obstruction to navigation and unlawfully there.

Such recognition by the government of a right on the part of the wharf owners to receive rent, and the long period in which Congress has permitted private parties to expend money in the erection and repair of wharves and warehouses for the accommodation of the public, may be well supposed to have influenced Congress in providing for an equitable appraisement of the value of interests or claims thus arising.

In the twelfth section of the bill of complaint the United States "disclaim in this suit seeking to establish its title to any of the wharves included in the area described in paragraph 3 of this bill, and claim title only to the land and water upon and in which said wharves are built, leaving the question of the ownership of the wharves proper, where that is a matter of dispute, to be decided in any other appropriate proceeding."

Apparently acquiescing in this allegation or disclaimer, the appellants put in no evidence as to the value of their improvements, and sought no finding on that subject in the court below, but stood, both there and in this court, on their claims of absolute title.

An examination, however, of the language of the act of 1886, hereinbefore quoted, discloses that it was the plain purpose of *Con- [291]
gress that the court should make "a final determination of all rights drawn in question," and should "in a summary way proceed to ascertain the value of any such right, title, interest, or claim."

We think it was not competent for the counsel of the respective parties to disregard this purpose of Congress and to withhold a part of the controversy from the action of the court.

It is not disclosed in this record whether it is the design of the government, on taking possession of the wharves and buildings belonging to the appellants, to continue them in the use of the public or to supersede them by other improvements. Whatever may be the course pursued in that respect, it should not deprive the appellants of the right conferred upon them by the act of Congress to have the value of their respective rights, titles, interests, or claims ascertained and awarded them.

As to the method to be pursued in valuing property of so peculiar a character, the cases of *The Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 [37: 463], and *Hetzel* v. *Baltimore & O. R. R. Co.* 169 U. S. 26 [42: 648], may be usefully referred to.

While, therefore, we affirm the decree of the court below as to the claims of the Marshall heirs, and as to the Kidwell patent, and as to the several claims to riparian rights as appurtenant to lots bounded on the south by Water street, we remand the case to the court below for further proceedings in accordance with this opinion; and it is so ordered.

Mr. Justice **Gray** and Mr. Justice **McKenna** were not present at the argument, and took no part in the decision.

Mr. Justice **White** and Mr. Justice **Peckham** dissented.

Mr. Justice **White**, with whom concurs Mr. Justice **Peckham**, dissenting:

The court holds that the owners of lots fronting on the Potomac river, who are impleaded in this record, have no riparian rights appurtenant or attached to such lots, and that they never possessed rights of that description.

This conclusion rests primarily upon a finding of fact, that is, that it was the intention of the founders of the city that a street should bind the city on the entire water front, which street should be the exclusive property of the public, thus *cutting off all [292]
the lotowners facing the river from connection therewith. Applying to this premise of fact the legal principle that where property is separated from the water by land belonging to someone else, no riparian rights attach to the land of the former, it is held that the lotowners before the court have no riparian privileges which the government of the United States is in any way bound to respect.

Lest the precise theory may not be accurately conveyed the clear statement thereof contained in the opinion is quoted, *viz.:*

"Our examination of the evidence has led us to the conclusion that it was the intention of the founders of the city of Washington to locate it upon the bank or shore of the Potomac river, and to bound it by a street or levee, so as to secure to the inhabitants and those engaged in commerce free access to the navigable water, and that such intention has never been departed from."

Again, at the end of the review of the evidence following the above extract, the court states as follows:

"The conclusion is warranted that, from the first conception of the Federal city, the establishment of a public street, bounding the city on south, and to be known as Water street, was intended, and that such intention has never been departed from.

"With this conclusion reached, it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights; nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river."

From the legal proposition that where property is separated from a stream by land belonging to another person, such property is not abutting property, and hence not entitled to riparian rights, I do not dissent. I cannot, however, bring my mind to the conclusion that it was ever contemplated in the foundation of the city of Washington

that there should be established a street on the water front so as to cut off the riparian rights of the lot holders. On the contrary, [293] my examination *of the record has forced me to the conclusion that from the legislation by which the city of Washington was founded, from the nature of the contracts made by the owners of the land upon which the city is situated, and from the subsequent statutory provisions relating to the foundation of the city, and their practical execution, it was understood and agreed that riparian rights should attach to the lots fronting on the river, and that any proposed street actually projected or which it was contemplated might ultimately be established was designed to be subordinate to the riparian rights of the lot holders, and was in nowise intended injuriously to impair or affect the same. It also, in my opinion, clearly appears that this result was understood by the lotowners, was contemplated by the founders, was approved by legislation, and was sanctioned by a long course of administrative dealing ripening into possession in favor of the lot holders to such a degree that to now hold that they are not entitled to riparian rights would, as I understand the record, amount to a denial of obvious rights of property. Indeed, to disregard the riparian rights of the lotowners as shown by the record it seems to me will be equivalent to confiscation, and that in reason it cannot be done without imputing bad faith to the illustrious men who so nobly conceived and so admirably executed the foundation of the Federal city. Of course, I say this with the diffidence begotten from the fact that the court takes a different view of the record, which therefore admonishes me that, however firm may be my convictions on the subject, there is some reason which has escaped my apprehension.

Even if it be conceded that the record established that the intention of the founders was to bind the city towards the water by a street which would separate the land of the lot holders from the river, and that the fee of such street was to be in the public, such concession would not be conclusive in this case. For the record, as I read it, establishes such conclusive equities arising from the conduct of the government in all its departments, in its dealings with the lot holders and the grantees of the government [294] and those holding under them, *as to conclusively estop the government from now asserting any real or supposed technical rule of law so as to cut off rights of private property which the government itself has solemnly avouched, upon the faith of which persons have dealt with it, and from which dealings the nation has reaped an abundant reward.

Before approaching the facts I eliminate propositions which seem irrelevant, and the consideration of which may serve to confuse the issue. Let it be at once conceded, *arguendo*, as found by the court, that whether riparian rights exist does not depend upon deciding whether one or the other of the particular maps or plans of the city is to be controlling. For in my view of the record the riparian rights of the lot holders will be clearly shown to exist, whatever plan of the city may be considered. For the purposes then of this dissent, it is not at all questioned that the several plans of the city, referred to in the opinion of the court, are to be treated each as progressive steps in the evolution of the original conception of the city, and therefore are each entitled to be considered without causing one to abrogate the efficacy of the other, except where there is an essential conflict. It is also deemed unnecessary to refer to the events which led up to the selection of the sites of other cities, for instance Philadelphia, New Orleans, Pittsburgh, and Cincinnati, decisions respecting which have been referred to, because in my judgment the existence of the riparian rights in the city of Washington depends upon the proceedings and legislation with reference to the city of Washington and not to wholly dissimilar proceedings in relation to the foundation of other cities.

I come, then, to an examination of the record as to the foundation of the city of Washington. In doing so—in order to avoid repetition and subserve, as far as I can, clearness of statement—the subject is divided into three distinct epochs: First, that involving the conception of the city and the steps preparatory to its foundation, with the cessions by Maryland and Virginia of sovereignty over the land which was to form the Federal district, down to and including the 19th of December, 1791, when the general assembly of Maryland passed *an act ratifying the pre- [295]
vious cession and conferring certain powers upon the commissioners, etc.; second, the formative period of the city, in which the initial steps taken in the period just stated were in a large measure carried into execution, and this embraces the period from the Maryland act of 1791 down to and including the actual transfer and establishment of the seat of government in the city of Washington; and, third, the events subsequent to the last stated period.

1. *Events connected with the conception of the city and the steps preparatory to its foundation down to and including the statute of Maryland of December 19, 1791.*

The cessions by Maryland and Virginia, in 1788 and 1789, of the territory intended for the seat of government of the United States need not be recapitulated, as they are fully stated in the opinion of the court. The acceptance by Congress, in 1790, of the cessions just mentioned is also stated fully in the opinion of the court. It is important, however, in considering this, to bear in mind a few salient facts: First, that whilst accepting the cessions, it was provided that the seat of the Federal government should not be removed to the proposed capital until more than ten years thereafter, that is, the first Monday of December in the year 1800; second, that "until the time fixed for the removal thereto," and until Congress should by law otherwise provide, the operation of the laws of the state within the district should not be affected by the acceptance by Congress; third, whilst the act empowered the President to appoint three commissioners, who should, under his direction, define and

limit the district, and conferred upon the commissioners authority to purchase or accept such quantity of land as the President might deem proper and to provide suitable buildings for the occupation of Congress and of the President and for the public offices of the government, no appropriation was contained in the act for these essential purposes. On the contrary, the only means provided by the act was the authority conferred to accept grants of money or land for the purposes designated in the act.

The controversy which preceded the selection by Congress of the district ceded by Vir-
[296]ginia and Maryland, in order to *establish therein the capital of the nation, is portrayed in the opinion of the court, and, indeed, if it were not, it is mirrored in the provisions of the act of acceptance already referred to. For, weighing those provisions, the conclusion cannot be escaped that an acceptance by Congress which left the territory ceded under the control of the ceding states for a period of ten years, and made no provision whatever, by appropriation of money, for the establishment of the city, affixed to the act of acceptance a provisional character depending upon the successful accomplishment by Washington of the plan for the foundation of the capital which he had so fervently advocated. In other words, that the accepting act devolved upon President Washington the arduous duty of bringing into being, within ten years, the establishment of the capital and of securing the means for constructing therein all the necessary buildings for the use of the government, without the appropriation of one dollar of the public money. To the great responsibility thus imposed upon him, Washington at once addressed himself with that intelligence and foresight which characterized his every act. On January 17, 1791, he appointed as the commissioners to execute the provisions of the act of Congress, Thomas Johnson, Daniel Carroll, and David Stuart. The first two were owners of land within the limits of the proposed city. Mr. Johnson, after his designation as a commissioner, was, in 1791, appointed an Associate Justice of this court, and although he qualified as such, he still continued to serve as commissioner during and until after he had resigned his judicial office.

By the spring of 1791 the President had finally determined upon the precise situation of the proposed capital, locating it on the banks of the Potomac, within the ceded district, at the point where the city of Washington is now situated. The exact position of the land where the city was to be established is shown by the map annexed to the opinion of the court.

A casual examination of this map discloses that the proposed city began on the banks of the Potomac at Rock creek, separating it at that point from Georgetown, following along
[297]*the course of the river to where the Eastern Branch emptied into the Potomac, and extending some distance along the banks of the Eastern Branch. It also shows that all the land fronting on the water within the designated limits was farming land, except at two points—the one where the town of Hamburgh (sometimes called Funkstown) was located, not far from Georgetown, and the other where the town of Carrollsburgh was situated, on the Eastern Branch. All the farming land fronting on the river and Eastern Branch was owned by Robert Peter, David Burns, Notley Young, Daniel Carroll, William Prout, Abraham Young, George Walker, and William Young.

It is conceded that at the time the city was located on the territory thus selected that the owners of all the farming land fronting on the water were entitled under the law of Maryland to riparian privileges as appurtenant to their ownership and that the same right belonged to the owners of lots fronting on the water in the two towns of Hamburgh and Carrollsburgh. It is, moreover, indisputably established that at the time the selection was made some of the lotowners, by wharves or otherwise, were actually enjoying the riparian rights appurtenant to their property. Indeed, an inspection of the map already annexed makes it clear that the lots in Hamburgh and Carrollsburgh ran down to the water's edge, and in some instances extended into the water.

A few months after the appointment of the commissioners, in March, 1791, in order to aid in the establishment of the city and to procure the funds wherewith to execute the duties imposed by the act of Congress, through the influence of President Washington most of the larger proprietors of the land embraced within the limits of the city executed an agreement, binding themselves to convey their lands, for the purposes of the Federal city, to such persons as the President might appoint, expressly, however, excepting from the operation of the agreement any lots which the subscribers might own in the towns of Hamburgh and Carrollsburgh. The main purposes of this contract were concisely expressed *by President Washington in a let- [298]
ter to Mr. Jefferson, then Secretary of State, of date March 31, 1791, enclosing the proclamation fixing the boundary lines of the Federal district. He said:

"The land is ceded to the public on condition that when the whole shall be surveyed and laid off as a city (which Major L'Enfant is now directed to do) the present proprietors shall retain every other lot—and for such part of the land as may be taken for public use, for squares, walks, etc., they shall be allowed at the rate of twenty-five pounds per acre—the public having the right to reserve such parts of the wood on the land as may be thought necessary to be preserved for ornament. The landholders to have the use and profits of all the grounds until the city is laid off into lots, and sale is made of those lots which, by this agreement, become public property—nothing is to be allowed for the ground which may be occupied as streets or alleys."

Subsequently, in order to carry out the agreement, the lotowners conveyed their lands to trustees. The draft of the conveyances, which were executed on June 28, 1791, there is every reason to believe was prepared by Commissioner Johnson.

Several of the conveyances are set out in

full in the opinion of the court. Suffice it to say, that the land was conveyed to the trustees by described boundaries, with the appurtenances. Besides embodying the provisions contained in the previous agreement, the deeds also contained other provisions material to be noticed. Thus, in effect, the portion of the land conveyed which was to inure to the benefit of the public was divided into two classes: First, the public reservations, streets, and alleys, not intended to be disposed of for purposes of profit but retained for the public use; second, the share of the public in the building lots (one half) intended as a donation. The land embraced in the first class was to be conveyed by the President to the commissioners for the time being appointed under the act of Congress, 1790, "for the use of the United States forever." The lands included in the second class were stipulated to be sold and the proceeds ap-
[299] plied as a *grant of money, etc., but the trustees were to retain the title and themselves execute deeds to purchasers of the public lots.

As already stated in the preliminary agreements and the conveyances to trustees executed by the larger proprietors, their lots situated in Carrollsburgh and Hamburgh were excepted. On February 21, 1791, a portion of the proprietors of lots in Hamburgh executed an agreement binding themselves to sell their lots in that town to the President of the United States or to such commissioners as he might appoint. None of these lots would seem to have been situated on or near the river, and the agreement may be dismissed from view. On March 30, 1791, an agreement was executed by certain lotowners in Carrollsburgh, Commissioners Johnson and Carroll being among the number. It was stipulated that the lots of the subscribers should be subject to be laid out as part of the Federal city; each subscriber donated one half of his lots, and stipulated that his half should be assigned to him *in like situation as before;* it being, moreover, provided that in the event of a disagreement between the owners and the President as to the allotments made to them, a sale should be made of the lots and the proceeds be equally divided. A copy of the agreement is set out in the margin.†

[300] *The contracts just referred to embraced all the territory included within the proposed city, except certain lots in Carrollsburgh and Hamburgh, the owners of which had entered into no contract, and also certain lots in these towns owned by nonresidents and others who were incapable from infancy, coverture, or imbecility to consent to a sale or division of their lots.

I submit that the contracts in question clearly point out the difference between a city laid out as was the city of Washington and a city laid out as the result of a plat made by a proprietor in which lots are located on a street fronting on the river and intervening between the lots and the water. The President and the commissioners, in dealing with the land embraced within the proposed Federal city, were not acting as owners in their own right, but were acting under the terms and according to the covenants contained in the contracts between the parties. What was to be given by the proprietors was plainly specified, and what was to be retained by them was also clearly stated. Riparian rights having been vested in the owners at the time the contract was made, it cannot, it seems to me, with fairness be said that the former proprietors were to receive as an equal division, one half of their lots, if in making that division the government was to strip all the lots, as well those assigned to the public as those retained by the proprietors, of the riparian privileges originally appurtenant to the land. The intention of the contracting parties is plainly shown by the provisions for the transfer of the property in Carrollsburgh, where the owners stipulated that they should retain one half of the lots, *in like situation;* and where the plan to which reference has been made shows that many of the lots abutted on the bank of the water in the Eastern Branch.

But if there be doubt as to the agreements from which it could be implied that the lotowners intended to give, not only one half of their lots, but all the riparian rights appurtenant to the lots which they were to retain, the official conduct of the commissioners, the action of President Washington and of all concerned, including the former proprietors, demonstrates *that the understanding of [301]
everybody concerned in the transaction was that the half of the lots which were to remain to the lotowners should preserve their riparian privileges, and that they should be continued to be exercised, even although it was proposed, on a plan of the city, that there should be a street on the entire river front. And it seems to me it equally conclusively appears that it was plainly understood that the lots which were donated to the nation, and which were to be sold, for the purpose of raising money to erect the necessary buildings for the establishment of the

†We the Subscribers holding or entitled to Lots in Carrollsburgh agree with each other and with the president of the United States that the lots and land we hold or are entitled to in Carrollsburgh shall be subject to be laid out at the pleasure of the president as part of the Federal City and that we will receive one half the Quantity of our respective Lots as near their present Situation as may agree with the new plan and where we may be entitled now to only one Lot or otherwise not entitled on the new plan to one entire lot or do not agree with the president, Commissioners or other person or persons acting on the part of the public on an adjustment of our Interest we agree that there shall be a sale of the Lots in which we may be Interested respectively and the produce thereof in money or Securities shall be equally divided one half as a Donation for the Use of the United States under the Act of Congress, the other half to ourselves respectively. And we engage to make Conveyances of our respective Lots and lands af'd to Trustees or otherwise whereby to relinquish our rights to the said Lots & Lands as the president or such Commrs. or persons acting as af'd shall direct to secure to the United States the Donation intended by this Agreement.

government, should, so far as those lots fronted on the water, have attached to them the riparian rights which were originally appurtenant, and the fact that they had such original rights formed the basis upon which it was hoped that as to these lots a higher price would be obtained, because of the existence of the riparian rights which were intended to be conveyed, and as will be shown were actually conveyed along with the water lots which the government sold.

It cannot be in reason successfully denied that the construction of the agreements between two parties contemporaneously made by all concerned, and followed by long years of official action and practical execution, furnishes the safest guide to interpret the contracts, if there be doubt or ambiguity in them.

In March, 1791, President Washington intrusted the preparation of a plan of the proposed city to Major L'Enfant. On April 4, 1791, that officer requested Secretary of State Jefferson to furnish him with plans of leading cities and maps of the principal "seaports or dock yards and arsenals," and in a letter to President Washington, dated April 10, 1791, Mr. Jefferson alluded to the fact that he had sent by post to L'Enfant the plans of a number of Continental European cities. Mr. Jefferson mentioned that he had himself procured these plans when he was visiting the named cities. The serious import of the plans thus sent and the significance resulting from them I shall hereafter comment upon.

Among the proprietors who joined in the agreement and had actually conveyed his
[302] land to the trustees was Robert *Peter. His property was situated abutting on Rock creek, and on the river from the mouth of Rock creek to the Hamburgh line. The record shows the following letter to the commissioners from President Washington:

Philadelphia, July 24, 1791.

I have received from Mr. Peter the inclosed letter proposing the erection of wharves at the new city between Rock creek and Hamburgh. My answer to him is that the proposition is worthy of consideration, and that the transaction of whatever may concern the public at that place in future being now turned over to you, I have inclosed the letter to you to do therein whatever you think best, referring him at the same time to you for an answer.

The consequences of such wharves as are suggested by Mr. Peter will, no doubt, claim your first attention; next, if they are deemed a desirable undertaking, the means by which the work can be effected with certainty and dispatch; and lastly the true and equitable proportion which ought to be paid by Mr. Peter towards the erection of them.

The pertinent portions of the letter of Mr. Peter, which President Washington transmitted, are as follows:

Georgetown, July 20, 1791.

Sir:—Colonel L'Enfant, I understand, has expressed a wish that I should make propositions to join the public in the expense of erecting wharves to extend from the mouth of Rock creek to the point above Hamburgh called Cedar Point, being about three thousand feet. . . . That the wood should be furnished by me on the same terms that it could be had from others, and that the whole expense should be divided between the public and me in proportion to the property held by each on the water. The streets I consider as belonging to the public and one half the lots, so that I suppose somewhere about one third of the expense would be mine, and about two thirds the public's.

On August 28, 1791, Mr. Jefferson wrote from Philadelphia to the commissioners, acknowledging the receipt of a letter *from [303]
them to the President, and adding: "Major L'Enfant having also arrived here and laid the plan of the Federal city before the President, he (the President) was pleased to desire a conference of certain persons in his presence on these several subjects."

Further along in his letter Mr. Jefferson stated that Mr. Madison and himself "will be in George Town on the evening of the 7th or morning of the 8th of next month, in time to attend any meeting of the commissioners on that day."

In accordance with this suggestion, on September 8, 1791, the records show a meeting of the commissioners, and it is recited that "the Hon. Thomas Jefferson, Secretary of State, and the Hon. James Madison attended the commissioners in conference."

It is further recited: "The following queries were presented by the Secretary of State to the commissioners, and the answers thereto, with the resolutions following, were given and adopted: . . . Whether ought the building of a bridge over the Eastern Branch to be attempted, canal set about, and Mr. Peter's proposition with respect to wharves gone into now or postponed until our funds are better ascertained and become productive?"

In the margin is this notation: "Must wait for money."

The foregoing letter of Mr. Peter to President Washington clearly conveyed that his (Peter's) construction of the deed of conveyance which he made to the trustees was that the lots to be assigned to him along the river should preserve their riparian rights, since he proposed as such owner to exercise his riparian rights by building wharves under a joint agreement with the commissioners, by which the work should be done between the commissioners and himself as joint proprietors, he of his lots and they of their share of the building lots, and as owners of the intersecting streets and reservations. That such also was the view of President Washington necessarily follows from the fact that he transmitted Peter's letter to the commissioners with what amounted to an express approval of Peter's construction of the contract, cautioning the commissioners only to be circumspect as to the consequences* of con- [304]
structing the wharves and the proper equitable proportion of the cost of construction between the respective parties; that is, Peter on the one hand in the exercise of his ri-

parian rights in front of his lots, and the public on the other in the exercise of its riparian rights in front of its own lots and the public land. It is worthy of note that the letter of Peter states that he wrote the President under the inspiration and at the suggestion of Major L'Enfant. If it be true that L'Enfant, who was then engaged in making the plan under Washington's orders, had conceived the project of cutting off all the riparian rights of the lots fronting on the river by a proposed street, how can it be conceived, in consonance with honesty or fair dealing, that he would suggest to Peter the making of a proposition absolutely inconsistent with the very plan which he was then supposed to be carrying out? How can it be thought that if President Washington entertained the idea, that the engineer employed by him had such an intention, could he consistently have favorably indorsed the proposition which would destroy the very plan which it now is decided was then adopted and in process of actual execution? The scrupulous honor, the marvelous accuracy of detail and precision of execution as to everything which he supervised or undertook, which were the most remarkable characteristics of President Washington, exclude the possibility of any other construction being placed upon his acts with reference to Peter's letter than that which I have thus given. But the reasoning is yet more conclusive. Mr. Jefferson's letter shows that before the meeting of the commissioners was held where Peter's letter was acted upon, the plan of Major L'Enfant had been laid before the President and by him transmitted to Mr. Jefferson. With this plan in his possession, do the proceedings at the meeting of the commissioners at which Mr. Jefferson and Mr. Madison were present in conference with the commissioners disclose the slightest repudiation by them or the commissioners of the construction put by Peter upon the contract? Emphatically no, for the sole reason ascribed for not entering into an arrangement with Peter is the minute entry, "Must wait for money."

[305] *At the time this meeting of the commissioners with Mr. Jefferson and Mr. Madison was held advertisement had been made of an intended sale of some lots at public auction in the following October. In a letter of Andrew Ellicott, a surveyor who had been assisting L'Enfant, which letter was addressed to the commissioners under date of September 9, 1791, he offered suggestions with reference to the contemplated sale of lots, remarking that three things appeared necessary to be attended to:

"*First*, those situations which will be considerably increased in value when the public improvements are made; *secondly*, those situations which have an immediate value from other considerations; and, *thirdly*, those situations whose real value must depend upon the increase and population of the city."

With respect to the second of these considerations he further stated as follows:

"*Secondly*, it is not probable that the Public Improvements will considerably affect either the value of the Lots from Geo. Town to Funks Town; or generally on the Eastern Branch; the proximity of the *first* to a trading town and good navigation, and the *second* lying on one of the best Harbours in the Country, must have an immediate value, and are therefore the most proper plans to confine the first sales to."

On the same day, also, L'Enfant was instructed by the commissioners that the Federal district should be called "the Territory of Columbia," and that the Federal city should be named the City of Washington; and that the title of the map should be "A Map of the City of Washington in the Territory of Columbia."

How can it be that Ellicott, the surveyor engaged with Major L'Enfant in laying off the plan of the city, would have suggested that the lots fronting on the water would obtain the best price because of an advantageous situation, if it had been supposed that those lots should be, by the effect of the plan of the city, stripped of their riparian rights, especially when the Peter letter is borne in mind and the construction of the contracts which arise therefrom is taken into consideration.

*On October 17, 1791, a first partial division of squares or parts of squares was made with one or more of the former proprietors; and on the same day and on the two days following a small number of lots were sold. At this sale plats of that portion of the city in which the lots offered for sale were situated were shown to those in attendance. As none of these appear to have been near the water, no further attention need be given to them. [306]

On October 25, 1791, in his third annual address, President Washington informed Congress that "a city has been laid out agreeably to a plan which will be laid before Congress," and the plan prepared by L'Enfant was transmitted to Congress on December 13, 1791.

It is obvious from a glance at this plan, as contained in the record, that it projected an open space along the water front, and showed at various localities separate wharves extending beyond the open way. That L'Enfant never contemplated, however, that the effect of this was to cut off the riparian rights of the lot holders, and cause the water privileges to be merely appurtenant to the street, is shown by his suggestion to Peter and the contemporaneous circumstances which have been already adverted to, and will be moreover shown hereafter. A vivid light on this subject is derived from an additional occurrence which took place at the meeting of the commissioners with Mr. Jefferson and Mr. Madison.

At that meeting it is recited that a letter was written by the commissioners to the general assembly of Maryland, in which occurs this passage:

"That it will conduce much to convenience and use, as well as beauty and order, that wharfing should be under proper regulations from the beginning. . . . Your memorialists therefore presume to submit to your honors whether it will not be proper to . . . enable the commissioners or some

other corporation, till Congress assumes the government, to license the building of wharves of the materials, in the manner, and of the extent they may judge desirable and convenient, and agreeing with general order."

The request embodied in the memorial [307] thus submitted *implied that in the judgment of those by whom it was drawn riparian rights, embracing the privilege of wharfage, were attached to the lots fronting on the river, and authority was deemed necessary to regulate the exercise and enjoyment of such existing rights. There is not a word in the memorial which can lead to the supposition that the commissioners desired power to *originate* rights of wharfage, for the memorial asks for authority to license the building of wharves "of the materials, in the manner, and of the extent they may judge desirable and convenient, *and agreeing with general order.*" Indeed, if all the riparian rights as to the lots facing on the river had been destroyed by the effect of the drawing of the L'Enfant plan, then the requested authority was wholly unnecessary, for in that case all the riparian rights would have been appurtenant to a street which belonged to the public, and no one would have had the right to enjoy them without consent of the commissioners, and consequently they would have had the power, in giving their assent to such enjoyment, to affix any condition they deemed proper, without legislative authority for that purpose. The mere fact that the right of a riparian owner to erect wharves is subject to license and regulation in nowise implies the nonexistence of riparian rights and rights of wharfage, for all ownership of that character is held subject to control, as to the mode of its enjoyment, by the legislative authority. I do not stop to make any copious citation to authority on this subject, but content myself with referring to the opinion of Chief Justice Shaw, where the whole matter is admirably considered, in *Commonwealth* v. *Alger*, 7 Cush. 53.

The argument, then, that, because the riparian right was subject to license and regulation, it could not have pre-existed amounts to saying that no riparian right can ever exist. This follows from an analysis of the contention, which may be thus stated: Riparian rights exist as rights of property and are ever subject to lawful legislative regulation. If, however, they are regulated, the necessary result of the regulation is to take away the right. I do not here further consider this question, because, [308] as will hereafter be shown by a statement *of the commissioners, which was in effect approved by President Washington, it was expressly declared that the sole object and purpose of the desired regulations was to compel the owners, in the enjoyment of their existing riparian rights as to wharfage, to conform to some general plan of public convenience.

On December 19, 1791, the general assembly of Maryland passed an act complying with the above request and conferring authority to license the building of wharves, as well as excavations and the erection of buildings within the limits of the city. The fact that in the same act in which was given the power to license and regulate wharves there was also conveyed the authority to license excavations and the erection of buildings, shows that it was considered that the act did not originate a right, but merely controlled its exercise. For, can it be said that because a lot holder was obliged to obtain a license before erecting a building on his lot, that therefore his ownership of his building was destroyed, and that he held it at the will of the commissioners? If it cannot be so said in reason as to buildings, how can it be thus declared as to the wharves, which were placed by the act in exactly the same category? The act of the Maryland legislature in which the foregoing provisions were contained embraced, besides, other subjects. It subjected to division lands in Hamburgh and Carrollsburgh, not yet conveyed, for the purposes of the Federal city, and provided legal means to accomplish the division of such lands belonging to persons who, on account of mental or other incapacity, had not hitherto conveyed their rights. The act contained a provision as to building liens, provided for the existence of party or common walls between contiguous owners, for a record book, etc. Annexed in the margin† *are [309]

†Extracts from act of general assembly of Maryland, dated December 19, 1791:

After reciting the proclamation of President Washington, of date March 20, 1791, declaring the bounds of the territory, since called the Territory of Columbia, it was further recited in the first section as follows:

"And whereas, Notley Young, Daniel Carroll of Duddington, and many others, proprietors of the greater part of the land hereinafter mentioned to have been laid out in a city, came into an agreement, and have conveyed their lands in trust to Thomas Beall, son of George, and John Mackall Gantt, whereby they have subjected their lands to be laid out as a city, given up part to the United States, and subjected other parts to be sold to raise money as a donation to be employed according to the act of Congress for establishing the temporary and permanent seat of the government of the United States, under and upon the terms and conditions contained in each of the said deeds; and many of the proprietors of lots in Carrollsburgh and Hamburgh have also come into an agreement, subjecting their lots to be laid out anew, giving up one half of the quantity thereof to be sold, and the money thence arising to be applied as a donation as aforesaid, and they to be reinstated in one half of the quantity of their lots in the new location or otherwise compensated in land in a different situation within the city, by agreement between the commissioners and them, and, in case of disagreement, that then a just and full compensation shall be made in money; yet some of the proprietors of lots in Carrollsburgh and Hamburgh, as well as some of the proprietors of other lands, have not, from imbecility and other causes, come into any agreement concerning their lands within the limits hereinafter mentioned, but a very great proportion of the landholders having agreed on the same terms, the President of the United States directed a city to be laid out. . . .

"Sec. 3. *And be it enacted*, That all the lands belonging to minors, persons absent out of the state, married women, or persons *non compos mentis*, or lands the property of this state, within the limits of Carrollsburgh and Hamburgh,

extracts from the act, and, without stopping to analyze its text, it seems to me that it evinces the clear intention of the legislature that the lotowners should receive in all and
[310] every *respect an equal division of their property upon the allotments authorized to be made by the commissioners, and that thereby it rebuts the assumption that, by the effect of allotments or the plan of the city, the lots fronting on the river were stripped of their riparian rights, and that all such riparian rights were vested in the public as the owners of a projected street binding on the river. In passing, attention is directed to the fact that some of the very lots in controversy in this cause, and as to which riparian rights are now denied, were allotted by the commissioners upon a division of water lots owned by persons incapable of acting for themselves, under the proceedings provided for in the Maryland statute, which clearly, as to such persons, negates the conception that
[311] their *riparian rights had been or could be destroyed by the involuntary surrender of their property under the operation of the statute.

I am thus brought to a consideration of the second epoch.

2. *The formative period of the ctiy, in which the initial steps in the previous period were in a large measure carried into execution, which extends to the actual establishment of the seat of government in Washington.*

The L'Enfant plan was not engraved and put into general circulation, owing to the withdrawal of that gentleman from the employment of the city, in consequence of differences with the commissioners, and his retention of the plan which he had prepared. In consequence, Andrew Ellicott was employed, about the middle of February, 1792, to prepare another plan of the city for engraving. A proof sheet of a plan by him made, which had been engraved at Boston, but which omitted to indicate the soundings of the Eastern Branch and the Potomac river, was received by the Secretary of State early in the following July. Proof from a plate of the same plan engraved in Philadelphia, which indicated the soundings, was, however, received by the commissioners about the middle of November, 1792. Copies of both of the above plans were largely distributed throughout this country and abroad. The Ellicott plan, in its general features, was similar to that of L'Enfant, being practically based thereon. It indicated an open space along the water front, and wharves projecting from the further side thereof. A reduced copy of this plan is a part of the opinion of the court.

Incidentally it may be stated that a project of the Secretary of State for obtaining a loan upon the public property to meet the expenditures connected with the establishment of the new city was transmitted to the commissioners on March 13, 1792, but action thereon was suspended owing to a financial crisis which occurred soon afterwards.

On September 29, 1792, President Washington transmitted to the commissioners an order authorizing a public sale of lots on the 8th day of October, 1792, and conferring authority upon the commissioners to dispose
thereafter of lots by private *sale. The sec- [312]
ond public sale of lots was held on October

shall be and are hereby subjected to the terms and conditions hereinbefore recited, as to the lots where the proprietors thereof have agreed concerning the same; and all the other lands, belonging as aforesaid, witbin the limits of the said city of Washington, shall be, and are hereby subjected to the same terms and conditions as the said Notley Young, Daniel Carroll of Duddington, and others, have, by their said agreements and deeds, subjected their lands to, and where no conveyances have been made, the legal estate and trust are hereby invested in the said Thomas Beall, son of George, and John Mackall Gantt, in the same manner as if each proprietor had been competent to make, and had made, a legal conveyance of his or her land, according to the form of those already mentioned, with proper acknowledgments of the execution thereof, and, where necessary, of release of dower."

The section then authorized the commissioners, after due notice by advertisement, to allot to the owners one half of the lots owned by infants, married women, insane persons or owners absent out of the city. It was then further provided:

"And, as to the other lands within the said city the commissioners aforesaid, or any two of them, shall make such allotment and assignment, within the lands belonging to the same persons, in alternate lots, determining by lot or ballot whether the party shall begin with the lowest number: *Provided*, That in the cases of coverture and infancy, if the husband, guardian, or next friend will agree with the commissioners, or any two of them, then an effectual division may be made by consent; and, in case of contrary claims, if the claimants will not jointly agree, the commissioners may proceed as if the proprietor was absent; and all persons to whom allotments and assignments of lands shall be made by the commissioners, or any two of them, on consent and agreement, or pursuant to this act without consent, shall hold the same in their former estate and interest, and in lieu of their former quantity, and subject in every respect to all such limitations, conditions, and encumbrances as their former estates and interests were subject to, as if the same had been actually reconveyed pursuant to the said deed in trust."

"Sec. 12. *And be it enacted*, That the commissioners aforesaid for the time being, or any two of them, shall from time to time, until Congress sball exercise the jurisdiction and government within the said territory, have power to license the building of wbarves in the waters of Potomac and the Eastern Branch, adjoining the said city, of the materials, in the manner and of the extent they may judge durable, convenient, and agreeing with general order; but no license shall be granted to one to build a wharf before tbe land of another, nor shall any wharf be built in the said waters without license as aforesaid; and if any wharf shall be built without such license or different therefrom, the same is hereby declared a common nuisance: . . . they may also, from time to time, make regulations for landing and laying materials for building the said city, for disposing and laying earth which may be dug out of the wells, cellars, and foundations, and for ascertaining the thickness of the walls of houses."

8, 1792, and the plan of the city engraved at Boston was exhibited. During 1792 some squares were divided with the proprietors, among others Nos. 4, 8, 160, 728, and 729.

Nothing else of material importance, requisite to be noticed, transpired in 1792.

On March 12, 1793, Major Ellicott, who had been in charge of the surveying department, left the service of the commissioners. Two days afterwards Dermott, who had prepared a plan of that part of the city which is covered by Hamburgh, and who had laid down the lines of Hamburgh in different ink, was requested to do the like with respect to Carrollsburgh, so that each might be ready for division with the proprietors in April.

On April 9, 1793, a number of lotowners in Hamburgh and Carrollsburgh joined in a formal conveyance of lots owned by them, to the trustees named in the deeds of the proprietors of the farming tracts, for the purposes of the Federal city. This was after, it will be remembered, both the L'Enfant and Ellicott plans had been prepared, and the latter extensively circulated. It was stipulated in this deed that on the allotment and division to be made by the commissioners, "one half the quantity of the said lots, pieces, and parcels hereby bargained and sold shall be assigned and conveyed as near the old situation as may be to them, the said Thomas Johns, James M. Lingan, William Deakins, Jun., Uriah Forrest, and Benjamin Stoddard, respectively, in fee simple, so that each respective former proprietor shall have made up to him one half of his former quantity and in as good a situation."

If the L'Enfant and Ellicott plans had destroyed all riparian rights, as it is now held, it is obvious that the provisions of this conveyance could not be carried out if the water lotowners were to receive half of their lands in the same or as good a situation.

On April 9, 1793, regulations were promulgated by the commissioners relative to the subject of surveys by the surveying department, prescribing forms of returns to be made, etc., adding: "The work is from
[313] time to time to be added *on the large plat, which, on being finished, is to be considered as a record."

On April 10, 1793, James R. Dermott was appointed to lay off squares into lots, and regulations were prescribed with respect to the performance of his duties. He was to take minutes of the squares from the certificates of surveys returned to the office of the clerk of the commissioners, and, from this, plat the squares by a scale of forty feet in an inch and divide the squares into lots, and in one corner of the paper containing the plat of the squares he was to write down the substance of the certificate from which it was made, giving the boundaries. Mr. Dermott, in answers to questions propounded by the commissioners on February 28, 1799, enumerates thirty squares that were surveyed in the summer of 1792, having been in a manner bounded and a small ditch cut around them, but the dimensions were not noted on any document. He said that Mr. Ellicott's return of their survey and measurement was after the 10th of April, 1793, on which date Ellicott returned to the service of the city.

On June 17, 1793, Andrew Ellicott forwarded to the clerk of the commissioners three sheets of different parts of Washington, with the returns of the bounds and dimensions of the several squares represented on the sheets. Sheet 2 contained the part which was formerly Hamburgh—the interferences between the new and old locations being delineated in different colors—Hamburgh, as formerly, being represented in red. Sheet No. 3 contained the town called Carrollsburgh drawn in yellow, so that the interferences, as in the case of Hamburgh, might be rendered conspicuous.

The map of Hamburgh showing interferences is contained in the record. No city squares are shown nearer to the water than Nos. 62 and 88. They abut on the south line of what was named Water street in Hamburgh, which street was the northerly boundary of the lower range of water lots. Squares 63 and 89 were subsequently made to embrace the water lots, those squares being bounded on the north by the south line of the old Water street, while in the return and plat of survey they are bounded on the south by the Potomac river.

*A partial division was made with some of [314]
the lot owners of Hamburgh and Carrollsburgh in 1793. Concerning this, Dermott, in a report to the commissioners made on February 28, 1799, answering the question as to whether he knew of any instance when the right of wharfage in the city had been so claimed or exercised *as to raise a dispute*, or was likely to do so, said:

"The commissioners in 1793, when dividing Carrollsburgh and Hamburgh, *had the subject of wharfage under consideration.* There were only two places where any difficulty could arise, against which every precaution was taken. The one place was square south of 744. In compensating for what was termed *water property* of Carrollsburgh, which lay on that ground, there were some lots laid out in that square to satisfy claimants. Upon an investigation of the business it was found that that square must bind on Canal street to the east, and not the channel, and that it could have *no privilege* south, therefore the new locations of water property made in it were withdrawn (except one) and placed in square 705, in a much more advantageous situation than could be expected from the original location; to this the original proprietors acquiesced."

Three things are evident to me from this statement: First, that the commissioners had considered wharfing and found no difficulty in recognizing it in every case but the instances mentioned, a condition of things impossible to conceive of if no wharfing rights existed and they had all been vested in the public; second, that the privilege in the water or water lots was treated by Dermott and the commissioners as synonymous with the right of wharfing, in other words, with riparian rights; and, third, that as by the peculiar location of one of the squares which was entitled originally to the water privilege, such privilege was by the new plan

impaired, a new water lot was given to the owner to enable him to have the full enjoyment of his water and wharfage privilege. But that to give the owner another allotment to secure him an existing right is utterly incompatible with the conception that the right did not exist, seems to me too clear for anything but statement.

[315] *Dermott also communicated the following as alterations made after the Ellicott plan had been published, having respect to the exercise of wharfing privileges:

"In running a water street on the southeast of Carrollsburgh *on the bank and establishing the right of wharfing to be governed by the parallel (or east and west streets to the channel).* This latter part is not considered as a difference, but an establishment of right, to regulate *the privilege by at all times.* This was done in order to accommodate the original proprietors of lots in that town already established by law. Without this there was no mode known at the time to do it. Similar regulations had taken place through the rest of the city, of which the returns of the surveyors in the office can testify. The whole of this met the approbation of the commissioners under the regulations of the 10th of April, 1793."

This explains the presence on the Dermott map at this locality of a number of new squares, *in the water*, with the river side of the squares open towards the channel. As Dermott declares, they were designed to mark the direction for wharfing, and the evidence establishes that lots thus situated *in the water* were regarded as appurtenant to the water squares, or squares bounded towards the water by an apparent street, and of which squares an equal division was to be made.

May I again pause to accentuate the fact that every statement thus made by Dermott to the commissioners of the changes in the Ellicott plan are absolutely inconsistent with the assumed nonexistence of wharfing rights and, indeed, as I understand them, are irreconcilable with honesty on the part of Dermott or the commissioners if the riparian rights had been obliterated. Remember that the lotowners had a right to have the share of the lots coming to them in "a like or as good situation" as before, and if not satisfied with the share given to them, had the power to cause the sale of the whole. To satisfy them and induce them to accept the allotment, here is the final declaration that in considering the question of wharfage the lot holders were assured that their rights would extend across the proposed street by *parallel east and west lines* to the channel. Can it be believed that Mr. Justice Johnson, then a member of this court, and all the

[316] other honorable *men concerned in the division of the lands, would have given such assurances to the proprietors to cause them to accept the allotment, if they knew or believed that the rights of the lot owners were cut off by the proposed street, and that there could be no extension of the east and west lines across the street to the channel? Mark, moreover, the express declaration of Mr. Dermott, upon whom the duty had been cast of platting the surveys of the division, that "similar regulations had taken place through the rest of the city. . . . The whole of this met the approbation of the commissioners under the regulations of the 10th of April, 1793." This, then, is the situation. An official concerned with duties respecting divisions with lotowners solemnly declares that throughout the whole city the lotowners had been assured that the riparian privileges attached to their water lots, which right of wharfage would extend by east and west lines across the proposed street to the channel, and that this declaration was approved by the commissioners; but yet it is now decided that at the time all this was done there were no riparian rights to extend across the proposed street by east and west lines to the channel, because they had all been cut off by the street in question.

Dermott replied to the question: "Were any difficulties ever suggested as to the direction of the wharves or rights of purchasers until the time of Nicholas King?" as follows:

"None that I know of after the first arrangements had taken place, in 1793, respecting Carrollsburgh, Hamburgh, and other parts of the city. Sometimes purchasers of water property could not at the first view understand their *privileges*, but when explained to them were generally satisfied; and I know of no one closing a bargain until fully convinced *of their rights of wharfage.*"

Evidently the "first arrangements" referred to were those made on the initial division or sale of water property. "Privileges" and "rights of wharfage" are here also used as synonymous in meaning.

The government having succeeded in selling, at an enhanced price, lots fronting on the river only after convincing the purchasers *of their rights to wharfage, it seems to [317]
me that, after all these years, it cannot in equity be allowed to hold on to the result of the sales and deny the right of wharfage, by giving positive assurance as to the existence of which the sales were alone made possible.

Mr. Dermott also alluded to the fact that variations had been made in the published plan of Ellicott "in order to compensate original proprietors of lots in Carrollsburgh with lots on the plan of the city upon the principles established by law, *and as near the original situation* as could be."

In December, 1793, Ellicott addressed another letter to the commissioners, from which it is clearly inferable that the advantages attached to the lots having riparian rights were deemed to give to those lots a higher value than those not possessing such rights.

Dermott, in enumerating the sales of "public water squares, in lots on navigable waters," which were sold before a date stated, mentioned among other property: "The public water property from squares No. 2 to 10, inclusive." The above squares were on land which formerly belonged to Mr. Peter, and was part of the land in front of which the negotiations were had in 1791, already

referred to, for the erection of wharves in conjunction with the city. They were all bounded on the Ellicott map on the water side by a *street*. Square No. 3, appearing as a small triangular piece of ground and as abutting directly on the river street, was separated by a street on the west from square No. 8. Though appearing on the plan, square No. 3 had not been platted or officially admitted as a square. On December 22, 1793, John Templeman offered to buy one half—presumably the public half—of square 8 (which square had been divided October 8, 1792), and one half of the square back of it, "provided that the slip of ground which lays between the water and streets is given in, . . . and oblige myself to *build a good wharf* and brick store immediately." The proceedings of the commissioners in January, 1794, recite the sale to Templeman of nine lots in square No. 8, and the delivery to him of a certificate with the following indorsement thereon: "It is the in-
[318] tention of *this sale that the grounds across the street next the water, with the privilege of wharfing beyond the street in front, and of the breadth of the lots, pass with them *agreeably to the general idea in similar instances.*"

It will be observed that the conveyance, in the body of the certificate, was of lots in square 8, the indorsement evidently being designed to indicate what was to be regarded as appurtenant to *those* lots.

It seems hardly necessary to suggest that riparian rights, that is, rights of wharfage, could not possibly have been certified as existing in the land sold to Templeman, "*agreeably to the general idea in similar instances,*" if all such rights had been already cut off by the effect of the L'Enfant and the Ellicott maps, for it must be borne in mind that the property certified, in effect, as *appurtenant* to the lots in square 8 and sold to Templeman was delineated on the map as being bounded on the water side by a proposed street.

Let me for a moment consider the consequences of the above transaction. When it took place it is not denied by anyone that the commissioners were sedulously engaged in an effort to dispose of the public lots for the purpose of obtaining the money to carry out the great object of establishing the city. The property sold to Templeman was unquestionably separated from the water by a street on the proposed plans, which had been distributed and were known; but more than this, partially in front of it, on the further side of the street, lay a small strip of land, also bounded on the plan on the river side by an apparent street, and that such square was marked on the plan as a numbered square, though not actually platted. Templeman desired to buy the platted square, but he was unwilling to do so lest it might be claimed that the small piece of unplatted land on the opposite side of the street might cut him off from the river, and thereby deprive him of his riparian rights. That he needed the riparian rights and intended to use them results from the fact that his proposition contained a guaranty to erect a wharf. It is patent from such proposition that it entered into the mind of no one to conceive of the fact that a street laid down on the plan as in *front of the square would [319]
cut off riparian rights. Now, what did the commissioners do? They accepted the proposition and sold square 8, expressly declaring that riparian rights should exist in front of the square, across the street, "agreeably to the general idea in similar instances." Put side by side the decision now made and the declaration of the commissioners. There were no riparian rights across the street, because they had all been destroyed and taken away from the owners and given to the public by the L'Enfant and Ellicott plans. So, now, it is held. Riparian rights exist across the street, including wharfage, in all similar cases; that is, in all cases where the property substantially abuts upon the river, but is bounded by a proposed and projected street, is the declaration which the commissioners made in the execution of the great trust reposed in them.

When the effect of this declaration is considered in connection with the previous acts of the commissioners and the contracts and negotiations of the proprietors, and when the flood of light which it throws upon subsequent dealings is given due weight, my mind refuses to reach the conclusion that riparian rights did not attach to the water lots. Can it be doubted that this formal and official declaration of the commissioners became the guide and the understanding for the sales thereafter made by the commissioners, and which they were then contemplating and endeavoring to consummate? Will it be said that the members of the commission and all those associated in the work would have allowed a declaration so delusive and deceptive to have been made and entered on the minutes of the commission, if it had in the remotest degree been conceived that riparian rights did not exist?

The sale to Templeman, as stated, was not consummated until January, 1794. No sales in the city took place deserving attention until the 23d of December, 1793, when a contract was made with Robert Morris and James Greenleaf for the sale of 6,000 lots (to be selected), averaging 5,265 square feet, at the rate of thirty pounds per lot, payable in seven annual instalments, without interest, commencing the 1st of *May, 1794, and with [320]
condition of building twenty brick houses annually, two stories high; covering 1,200 square feet each; and with further condition that they should not sell any lots previous to the 1st of January, 1796, but on condition of erecting on every third lot one such house within four years from the time of sale. It was expressly stipulated that 4,500 of the lots should be to the southwest of Massachusetts avenue, and that of those lots "the said Robert Morris and James Greenleaf shall have the *part of the city in Notley Young's land.*" Certain squares were next specifically excepted from the operation of the agreement, as also "the lots lying in Carrollsburgh, and . . . the water lots, including the water lots on the Eastern Branch, and also one half of the lots lying

in Hamburgh, the lots in that part of the city and belonging to it, *other than water lots*, being to be divided by alternate choice between the said commissioners and the said Robert Morris and James Greenleaf." Immediately thereafter was contained this proviso: "Provided, however, and it is hereby agreed by and between the parties to these presents, that the said Robert Morris and James Greenleaf are entitled to the lots in Notley Young's land, *and of course to the privilege of wharfing annexed thereto*."

The word "lots" in the proviso manifestly meant "water" lots, as there had been previously an express agreement that Morris and Greenleaf should "have the part of the city in Notley Young's land." As stated, the proviso followed a stipulation excepting "water lots" generally from the operation of the agreement. Evidently, therefore, the proviso was inserted out of abundant caution, to leave no room for controversy as to the right of Morris and Greenleaf to the "*water*" lots in Notley Young's land; and therefore clearly imported that the lots in Notley Young's land fronting on the river, and which had been bounded at that time by both the L'Enfant and the Ellicott plan and by the return of surveys by Water street, were notwithstanding water lots, and entitled to wharfage as a matter of course.

My mind fails to see that there were no riparian rights or rights of wharfage attached to the lots bounded by the proposed
[321] *Water street, in view of the express terms of the above contract. How could it have been declared that "of course" the water privilege and consequent right of wharfage went with the water lots, when it had been long determined, as the court now holds, that there were no water lots and no wharfing privileges to be sold? True, it has heretofore been suggested that this provision in the Morris and Greenleaf contract may have referred to lots in Notley Young's land which might be water lots other than those on the Potomac river, as, for instance, lots in Carrollsburgh or on the Eastern Branch. But *all* lots in Carrollsburgh and the water lots on the Eastern Branch were excluded from being selected by Morris and Greenleaf by the express terms of the contract, and besides there were no lots in the land conveyed by Notley Young which could be considered as water lots, other than those fronting on the Potomac river and on that portion of the Eastern Branch which the government had already taken as a public reservation for an arsenal. The fact is, then, that at the very time when it is now decided that all riparian rights had been wiped out and that no wharfing privilege existed as appurtenant to water lots, in order to accomplish the successful foundation of the city an enormous number of lots were sold under the express guarantee of the existence of water lots and under the unambiguous stipulation that such lots should, *of course*, enjoy the wharfing privilege. That this sale to Morris and Greenleaf was submitted to President Washington before its consummation no one can doubt, in view of the deep interest he took in the foundation of the city and of the manifest influence which the making of the sale was to have on the accomplishment of his wishes. Can it be said of Washington that he would have allowed a stipulation of that character to go into the contract if he believed that there were no water lots and no wharfing privileges because under his direction they had all ceased to exist? If this were a controversy between individuals, and it were shown that a conveyance had been made with statements in it as to the existence of water lots and rights of wharfage, would a court of equity be found to allow the person who had reaped the benefit of *his assurance by [322]
selling the property, to alter his position and assert as against the purchaser the nonexistence of the very rights which he had declared "of course" existed, in order to consummate the conveyance? If a court of equity would not allow an individual to take such a position, my conception is that a nation should not be allowed here to avail itself of an attitude so contrary to good faith and so violative of the elementary principles of justice and equity, and, especially, where the statute on which this controversy is based imposes upon the court the duty of administering the rights of the parties according to the principles of equity.

It is true that some time after the Morris and Greenleaf contract was made a certificate was issued by the commissioners, giving more formal evidence of the title to the land, and describing the lots by reference merely to the numbers in the squares, without repeating the assurance that the lots were water lots, and that, "of course," the rights of wharfage attached as stated in the previous contract. But neither did the certificate reiterate or re-express the obligations assumed by the purchasers to erect buildings, and so on. Can the certificate be treated as changing the covenants of the contract as against Morris and Greenleaf so far as the water lots and wharfing privilege are concerned, because it was silent on this subject, and yet be not held to have discharged them from the burdens of the contract, as to which also the certificate was silent? Can it be imputed to the commissioners that after the contract was made, and they had duly reaped the benefits arising from it, that, of their own accord, by the mere fact of the issue of the certificate, they could discharge themselves from the burdens of the contract and hold on to the benefits? Can a court of equity recognize such a principle or enforce it? If not, how in consonance with equity can such a principle be applied here? But the record in my judgment entirely relieves the mind of the possibility of imputing any such inequitable conduct to the commissioners, for it shows beyond dispute that after the consummation of the allotments to Morris and Greenleaf, and to Notley Young, both these parties or their grantees applied to the commissioners *for [323]
license to erect wharves in front of their "water lots," and that licenses were issued as a matter of course. It should also be remembered that the expression "water lots"

and "the wharfing privileges," which were, of course, attached "thereto," used in the contract with Morris and Greenleaf, affirmatively shows what was the signification of the words "water lots" as previously made use of by the commissioners in dealing with other persons. As there were no lots in Notley Young's land embraced within the terms of the contract which were not separated from the river by the proposed street on the L'Enfant or Ellicott plan, it follows conclusively that the words "water lots" could only have referred to the lots fronting on the river and facing on the projected street, which were deemed water lots because of their situation, and which were of course entitled in consequence to the privilege of wharfage. It cannot be gainsaid that at the time the contract with Morris and Greenleaf was made the L'Enfant plan was known and the Ellicott reproduction of it had been engraved and was extensively circulated. Dealing with this ascertained and defined situation the covenants in the contract with Morris and Greenleaf were, in reason, it seems, susceptible alone of the construction which I have placed upon them. The importance with which the Morris and Greenleaf contract was regarded at that time and the influence which it was believed it would exert upon the successful accomplishment of the foundation of the city is amply shown by a report of the commissioners made to President Washington, inclosing, on December 23, 1793, a copy of the Morris and Greenleaf contract. The commissioners said:

"A consideration of the uncertainty of settled times and an unembarrassed commerce weighed much with us as well as Mr. Morris' capital, influence, and activity. The statement of funds inclosed may enable the prosecution of the work even in a war, in which event we should (be?) *without this contract* have been almost still."

This summary of the events of the year 1793 is concluded with a reference to the Maryland act of December 28, 1793, passed as supplementary to the statute of December
[324] 19, 1791.* By the first section it would seem to have been designed to vest in the commissioners the legal title to the lands which had been conveyed to the trustees, while the third section provided for division and allotment by the commissioners of the lots within the limits of Carrollsburgh not yet divided. In the margin† the sections referred to are inserted.

As further evidence that the commissioners regarded the special value of "water lots" to consist in the wharfing privilege, and that a water lot was not devested of riparian rights because the lots were bounded towards the water (either on the plat of survey or on the plan of the city), by a street, attention is called to the minutes of the commissioners in March, 1794, with respect to squares 771 and 802, which, on both the Ellicott and Dermott maps, were separated from the water by Georgia avenue. Return of survey of square 802 was dated September 3, 1793, and bounded the square on all sides by streets.

*The minutes read as follows (6: 162): [325]

"A copy of the following proposition was delivered Mr. Robert Walsh, of Baltimore: Mr. Carroll will sell only half of his half of the water lots, in square 771 & 802; he will divide so that the purchaser may have his part adjoining.

"The commissioners have for the public a right in one half of these water lots. They are willing to dispose of that part.

"Mr. Greenleaf by his contract has a right to choose the public part in squares 770, 771, & 801, 802, except the water lots.

"The commissioners have advised Mr. Greenleaf that they were in treaty for the public water lots in squares 771 and 802, and some adjoining lots, and expected that Mr. Greenleaf would have waived his right of choice in the back lots; he has not done so, but desired in case the contract for the water lots was not finished that they might be reserved as a part of twelve. The commissioners had promised to reserve for him to accom'odate his friends, under terms of speedy improvement. So circumstanced, the commissioners can positively agree for the public interest in the water lots only, which they offer at the rate of 200 pounds each, and the public interest in the rest of the lots in the four squares, at 100 pounds each, to take place in case Mr. Greenleaf does not fix his choice on them.

"But the commissioners, conceiving there is room *on three fourths of the water line* FOR WHARFAGE SUFFICIENT TO GRATIFY BOTH, and that the views of all would be promoted by the neighborhood and efforts of both interests, would wish rather that on Mr. Greenleaf coming here, from 10 to 15th of next month, the two interests might be adjusted. The commissioners would have a pleasure in contributing all in their power, and assure themselves there would be no difficulty if all were met together."

These squares, because they were "water lots in the Eastern Branch," could not have been selected by Greenleaf under the large contract already referred to, and therefore the purchase of these lots was a separate transaction. The fact that the *respective [326] parties referred to in the communication were contending for the acquisition of the water lots separated from the river by Georgia avenue, because they wanted the water privileges, clearly shows that it was

†Sec. 1. *Be it enacted by the General Assembly of Maryland,* That the certificates granted, or which may be granted, by the said commissioners, or any two of them, to purchasers of lots in the said city, with acknowledgment of the payment of the whole purchase money, and interest, if any shall have arisen thereon, and recorded agreeably to the directions of the act concerning the territory of Columbia and the city of Washington, shall be sufficient and effectual to vest the legal estate in the purchasers, their heirs and assigns, according to the import of such certificates, without any deed or formal conveyance.

. . . .

Sec. 3. *And be it enacted,* That the commissioners aforesaid, or any two of them, may appoint a certain day for the allotment and assignment of one half of the quantity of each lot of ground in Carrollsburgh and Hamburgh,

deemed that such privilege was appurtenant; and that the commissioners thought that on three fourths of the water line there was wharfage room sufficient to gratify both makes it plain that it did not occur to the mind of anybody that the contemplated street would cut off the water lots from the possession of riparian rights or destroy the wharfing privilege.

As already stated, a division of the water lots in Hamburgh was not made until June, 1794. Without stopping to analyze these divisions, suffice it to say that in my opinion they affirm the fact that it was not intended to cut off the water privileges of the owners whose water lots were divided. It is clear from the proceedings as to the allotments in squares 63 and 89 (which embraced most of the former water lots) that some of these divisions in Hamburgh, as already mentioned, were made as against owners incapable of representing themselves, and that allotments were made by the commissioners by virtue of the authority conferred by the Maryland act, which commanded, as I have already shown, that the allotments should be in *a like situation* and that the division should be *equal*. The acts of the commissioners in the division of the squares referred to manifest, as understood by me, an effort and purpose to comply, not only with the terms of the contracts for the division of Hamburgh, but with the commands of the statute, and show the preservation of whatever rights were appurtenant to the water lots before the division took place. It may be worthy of note that one of the lots in square 63 which was so divided and fell to the public was sold contemporaneously with the transaction as a water lot by the front foot.

I have already referred to the fact that Dermott in 1799 enumerated the public water property previously sold, as part of "the public water property from squares Nos. 2 to 10, inclusive," formerly land of Robert Peter, and part of the water lots in front of which L'Enfant in 1791 had proposed that
[327] *Peter and the city should jointly erect wharves. On November 7, 1794, the commissioners wrote to General W. Stewart in part as follows:

". . . With respect to the water lots, the squares are also not yet divided, and the commissioners can only sell you the part of the said two squares" (referring to squares 2 and 10) " which shall belong to the public on making divisions. Such we have no objections to sell you at 16 dollars the foot in front."

And on November 11 following the commisioners again wrote General Stewart:

". . . No. 2 contains at the termination of the wharf 317 feet. This is to be paid for by the number of feet in front, but it includes square No. 7" (a small square on the east), "15,444 square feet, not taken into any other calculation. No. 10 contains in front, at high-water mark, 176 feet. At the termination of the wharf 246. Medium, on account of the vicinity of the channel.

"N. B.—It must be remembered that only one half of these squares belong to the public."

This shows that at the time of these negotiations wharves existed in front of the squares, and that though the squares were bounded *on the plan*, towards the water, *by a street*, yet that the squares lay partly in the water, and that the negotiations were conducted on that basis and with reference to the wharfing privileges. No other inference is possible in view of the fact that an actual charge was made for land beyond the street and out to the end of the wharf.

A sale was made to General Stewart on December 18, 1794.

At what was formerly Carrollsburgh, as already stated, a variation was made from the Ellicott map by running a water street on the southeast *on the bank*, and establishing the right of wharfage to be governed by the parallel (or east and west streets) to the channel. Dermott, in his report to the commissioners, represented that "the public water squares, or lots on navigable water what fell to the public *after satisfying original proprietors of lots in Carrollsburgh* from square 611 round to square 705, both inclusive," except four lots in squares 610 and 613, *were sold by a date named. The main [328]
portion of the water lots in front of Carrollsburgh would seem to have been allotted to former water lotowners. The evidence in this record, however, as to sales of public water lots in this locality, clearly exhibits the fact that *apparent* squares shown on the Dermott map as lying wholly or almost entirely *in the water*, outside of the line of the assumed street, were sold, simply as a part of the water lots on the other side of the projected street; that is to say, the conveyances were of those lots by the front foot, in some instances adding "with the water privileges east of the same," showing clearly that what lay east of the street was considered as simply a part of the property fronting on the street, and as necessarily following it in order not to impair its value. Instances of this kind are shown by the record in connection with squares 667 and east of 667, squares 665 and 666, and squares 662 and 709. And in the case of square s. s. 667, lying to the south of the street, which consisted of considerable fast land, a sale was made of a lot in that square with the

not before that time divided or assigned, pursuant to the said act concerning the territory of Columbia and the city of Washington, and on notice thereof in the Annapolis, some one of the Baltimore, the Eastern, and Georgetown newspapers, for at least three weeks, the same commissioners may proceed to the allotment and assignment of ground within the said city, on the day appointed for that purpose, and therein proceed, at convenient times, till the whole be finished, as if the proprietors of such lots actually resided out of the state; provided, that if the proprietor of any such lot shall object, in person, or by writing delivered to the commissioners, against their so proceeding as to his lot, before they shall have made an assignment of ground for the same, then they shall forbear as to such lot, and may proceed according to the before-mentioned act.

privilege east of the same, being an unnumbered square lying in the water.

It is worthy to be mentioned, although out of the order of its date, that lots in one of the very squares above referred to (No. 667) were conveyed to General Washington himself, together with the appurtenant lots *lying in the water* beyond the street, and that General Washington, in his will (1 Spark's Writings, 582, 585,) referred to the lots fronting towards the river on the street as water lots, and made no mention of the lots *in the water*.

Illustrations like unto those above made abound in the record, showing that lots which were separated from the river by a street delineated upon the plan of the city, and also by the return of actual survey, were yet sold by the commissioners for an increased price as water lots, which imported, as has been shown and will hereafter further appear, that riparian privileges were attached to the lots. The record also cites instances where application was made to the commissioners by the owner of a water lot for a license to wharf in front of his lot, and such license issued. I do not stop to
[329]*refer in detail to all such cases, because those already enumerated adequately show the conception of the situation entertained by all the parties at the time and on the faith of which they dealt. No single instance to the contrary has been found, nor has a case been pointed to where the commissioners sold or offered to sell a water privilege or riparian right of any kind, including the right of wharfage, as appurtenant *to a public street*. The importance of this fact cannot be overestimated. The history of the times leaves no doubt of the solicitude of President Washington and of the commissioners, whose hopes were enlisted in the permanent establishment of the capital, to avail of every resource to obtain the means wherewith to erect the public buildings, so that the capital might be ready for occupancy at the time designated in the act of Congress. If it be true that the riparian rights were cut off by the intention to make a street along the river, then all such rights along the whole river front belonged to the United States and were at the disposal of the commissioners for sale. Seeking, as they were doing, to make use of every resource by which funds could be procured, can it be doubted that if they had deemed this to be the case, there would not have been mention of the fact on the plans which were put in circulation, and that there would have been effort made to sell these available rights in order to obtain the much desired pecuniary aid? It is certain that the minds of the commissioners were addressed to the importance and value of the water lots and of wharfage, because of the many contracts referring to this subject from the very beginning. The only inference to my mind permissible from this is, that as the commissioners were seeking to obtain the highest possible price for the water lots, because they enjoyed riparian and wharfing privileges, the thought never entered their mind of destroying the sale of the water lots by stripping them of that attribute which gave peculiar value to them.

Let me come now to a circumstance which seems to throw such copious light on the situation that it is even more conclusive than the facts to which reference has heretofore been made.

*In September, 1794, Messrs. Johnson and [330]
Stuart were succeeded as commissioners by Messrs. Scott and Thornton. In May, 1795, Commissioner Stuart was succeeded by Commissioner White. The views of the new commissioners on the subject of wharfage were expressed by them in a communication to the President dated July 24, 1795, the communication being one transmitting for the President's approval regulations formulated by the commissioners as the result of their consideration of "the subject of regulating the building of wharves." In the communication it was expressly declared that the regulations had been prepared "with respect to the *private property on the water.*" Referring to the Maryland act of December 17, 1791, which conferred the power to regulate wharfing, the commissioners said:

"Had the legislature of Maryland been silent on the subject, the holders of water property in the city would have had a right to carry their wharves to any extent they pleased under the single restriction of not injuring navigation. The law of the state is therefore restrictive of that general right naturally flowing from the free use of property, and ought not to be construed beyond what sound policy and the necessity of the case may require."

Adverting to the importance of so drafting the regulations as not to impose restrictions calculated to discourage those intending to purchase water lots with their appurtenant privileges, the commissioners said:

"Our funds depend in some measure on sales, and the sales on public confidence and opinion. Any measure greatly counteracting the hopes and wishes of those interested would certainly be injurious, and ought not to be adopted without an evident necessity."

Does not the declaration that the rules were adopted with respect to private property on the water rebut the contention now advanced that there was no such property on the water, because all riparian rights and rights of wharfage were exclusively the property of the public?

Are these statements of the commissioners not a complete answer to the contention that the Maryland act was intended *to *originate* [331]
rights of wharfing, and not merely to regulate the exercise of existing rights? At the outset attention was called to the fact that the Maryland law was passed at the request of the commissioners, preferred at a meeting where Mr. Jefferson and Mr. Madison were present, and that the very terms of the request implied that the commissioners desired power to *regulate* the riparian rights which they thought were then existing. Now, with all the intervening transactions, comes the letter to the President, showing beyond peradventure the construction and interpretation affixed to the Maryland act by those to whom it was addressed. Could Washing-

ton, could Jefferson, have remained silent if the letter of the commissioners was an incorrect statement of the understood law on the subject? The declaration of what the rights of the water lotowners were as to wharfage is as full and complete it seems to me as human language could make it.

The draft of the proposed regulations adopted by the commissioners and which was submitted by them to the President is not in the record, although the communication to the President indicates its character. Correspondence, however, on the subject ensued between the President represented by the Secretary of State and the commissioners. It is to be inferred that the draft of the regulations sent to the President contained a provision forbidding water lotowners, in the construction of their wharves any buildings whatever, the intent appearing to be that the warehouses would be built on the water lot to which the wharfing privilege was attached. This would indicate that the commissioners intended by their regulations to so arrange that any projected street would not cut off the water rights and right of wharfage, but would serve merely as a building line.

Complaint on this subject was made by a Mr. Barry, and such complaint was thus referred to in a letter of Commissioners Scott and Thornton to Secretary of State Randolph on May 26, 1795:

"Mr. Barry had purchased on the Eastern
[332] Branch, under *an idea of immediately building, and carrying on trade, but refuses to build, on being informed of the restrictions to which everyone must be subject in support of a Water street, which we presume it was the intention of the executive to keep open to the wharves, as is the case in Bordeaux and some other cities in Europe. The inconvenience pointed out by Mr. Barry is that in unlading vessels it would be necessary to go through three operations: 1st, taking out the load; 2d, conveying it across the wharves *and Water street* to the warehouses; 3dly, by taking it up into the warehouses. Whereas, if the stores or warehouses were to stand on the water edge of the wharves, the unlading into the warehouses would only be one operation, and it would save five per centum, and the same in loading."

Observe that there is not an intimation in this communication that the commissioners or anybody else had the faintest conception that the right to wharf did not exist in favor of the owner of the water lot because of a proposed street, but there was simply a question as to whether the regulations should restrict the water lotowner from building warehouses on his wharves. The wharfing regulations, as adopted, are annexed in the
[333] margin.† As approved, they contained no *restriction on the right of water lotowners to erect warehouses on their wharves, thereby clearly implying that the complaint of Barry was treated by President Washington as well founded, and that the regulations were corrected in that respect before final approval. Comment at much length upon the regulations is unnecessary, but their perusal refutes the idea that a street marked upon the plan of the city as running in front of water lots operated to deprive such water lots of riparian privileges. The regulations warrant the inference that the right of wharfage was intended to attach to such lots *at the boundary of the lot on the water side*, and that the water street was designed to be superimposed upon the water privileges. The requirement was that when the proprietor of the water lot wharfed out *in front of his lot*, he should leave a space for the street, which, *upon the plan of the city*, appeared as bounding the lot on the water, and if in so wharfing it became necessary to fill up and make the street, he was to have the exclusive right of occupancy until reimbursed "the expense of making such street."

It will also be observed that in the regulations the right is recognized, without qualification or reservation of any kind, of all proprietors of water lots to wharf into the river and the Eastern Branch.

While President Washington had under consideration proposed wharfing regulations, Commissioners Scott and Thornton addressed a letter to Commissioner White on August 12, 1795. A sentence in this communication illustrates the important nature of the riparian privileges and refutes the thought that anyone then supposed that such a right was received as a favor and was a mere temporary license, revocable at the pleasure of the commissioners or of Congress. The letter discussed the advisability of not requiring a space of sixty feet to be left between the termination of the wharves and the channel, and in the course of the comments it was *said: "Mr. Hoban, agent [334]
for Mr. Barry, says the intended wharf in his case, which he estimates to cost *upwards of twenty thousand dollars*, will terminate in four feet water." The regulations, as finally approved, were sent to the commissioners on September 18, 1795, by President Washington, with the following communication:

Mount Vernon, 18 September, 1795.

Gentlemen:—The copy of the letter which you wrote to the Secretary of State on the 21 ult., enclosing regulations relative to the wharves and buildings in the Federal city, came to my hands yesterday.

If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire

†Building Regulation No. 4.
(Proceedings of Commissioners, p. 408.)
City of Washington, July 20th, 1795.

The Board of Commissioners in virtue of the powers vested in them by the act of the Maryland legislature to license the building of wharves in the city of Washington, & to regulate the materials, the manner and the extent thereof, hereby make known to those interested the following regulations:

That all the proprietors of water lots are permitted to wharf and build as far out into the river Potomac & the Eastern Branch as they think convenient & proper, not injuring or interrupting the channels or navigation of the said waters, leaving a space wherever the gen-

approbation, and of their ideas on this head you have no doubt made some inquiries and decided accordingly. . . .

Can this letter be reconciled with the theory that proprietors of water lots had no riparian privileges and no right to extend their wharves because of a proposed street? Does not the letter declare the existence of such rights in unequivocal terms, and also clearly point out that the words "water lots" meant property fronting on the river, to which riparian rights and consequently rights of wharfage attached, despite the presence of the proposed street?

Mark the declaration of President Washington that he considers the regulations as relating to the *extension* of wharves and buildings thereon, clearly implying the right to extend out the wharves from in front of the water lots, and also showing that he had in his mind the change which had been made in the regulations in consequence of the complaint of Mr. Barry, allowing buildings to be erected by the owners of water lots on the wharves which they were entitled to construct. In addition to these considerations, however, there is one of much greater import which arises from the letter of Washington, that is, the great importance which he attached to doing nothing to impair the riparian rights of the owners of water lots, for he expressly says:

[335] *"If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation."

If the rights of the owners of water lots were not deemed by him a matter of grave importance, why should one so scrupulously careful as Washington always was have declared, in a public document, that the satisfaction of the lotowners with the regulations constituted one of the moving causes for affixing his approval to them? Can it be said that Washington would have subordinated the execution of a public duty to the approval of private individuals who had no especial rights in the matter?

It seems to me that this declaration on his part obviously implied that, as by the results of the contracts made with the former proprietors, under his influence and at his suggestion, they had given up their property upon the condition of an unequal division, he was unwilling that anything should be done to deprive them of a part of their equal rights, and therefore he would not approve any regulations which he considered had such an effect. In other words, from reasons of public honor and public faith, he deemed it his duty to protect the rights of the owners of water lots. This obligation of public faith thus, it seems to me, expressly declared by Washington, rests, in my judgment, upon the nation to-day and should be regarded. As I see the facts, it ill becomes the nation now, when the rights have been sanctified by years of possession, to treat them as if they had never existed, and thus disregard the obligations of the public trust which Washington sought so sedulously to fulfil.

Mr. Barry, whose proposal to build a wharf has been above set forth, and at whose complaint the regulations were presumably amended so as to allow the building of a warehouse on the wharves, it would seem after the adoption of the regulations feared another difficulty. Certain lots situated in square No. 771, which had been sold by the commissioners to Greenleaf under the express statement that they were entitled to the wharfing privilege, had been conveyed to Barry *as the assignee of Greenleaf. The [336] regulations, as I have observed, provided that the wharf owner should, where the plan of the city exhibited a street and at every three hundred feet, leave a space for a street. Barry, perceiving the idea that a projected street (Georgia avenue) which would run across his wharf, would under his complaint previously made impair the utility of his wharf, entered into negotiations with the commissioners on the subject. The majority of the commissioners addressed him the following letter:

City of Washington, 5th Oct. 1795.

Sir:—We have had your favor of the 3rd inst., too late on that day to be taken up, as the board were about rising.

It will always give us the greatest pleasure to render every possible aid to those who are improving in the city, especially on so large a scale as you have adopted. We think with you that an imaginary continuation of Georgia avenue through a considerable depth of tide water, *thereby cutting off the water privilege of square 771 to wharf to the channel*, too absurd to form a part of the plan of the city of Washington. That it never was a part of the plan that such streets should be continued through the water, and that your purchase in square 771 gives a perfect right to wharf to any extent in front or south of the property purchased by you not injurious to the navigation and to erect buildings thereon agreeably to the regulations published.

In other words, the commissioners agreed to relieve him from the effect of the wharfing regulations. Because, in the letter of the commissioners, the words are used "thereby cutting off the water privilege of square 771 to wharf to the channel," it has been argued that the commissioners must have thought that the existence of a street in front of a water lot, between it and the water, would

---

eral plan of the street in the city requires it, of equal breadth with those streets; which if made by an individual holding the adjacent property shall be subject to his separate occupation and use until the public shall reimburse the expense of making such street, and where no street or streets intersect said wharf to leave a space of sixty feet for a street at the termination of every three hundred feet of made ground; the building on said wharves or made ground to be subject to the general regulations for buildings in the city of Washington, as declared by the President, wharves to be built of such material as the proprietors may elect.

By order of the Commissioners:

(Signed) T. Johnson, Jr., Sec'y.

technically operate to deprive the lot of its riparian privileges. But this overlooks the entire subject-matter to which the letter of the commissioners related. They were dealing with the operation which a projected street would have, as complained of by Barry, on a wharf *when built*, and not with
[337] the riparian right to wharf *to the channel, which was conceded. Indeed, this becomes perfectly clear when it is considered that the square referred to had been the subject not long before of express representations by the commissioners to various would-be purchasers that it possessed wharfing privileges. This letter of the commissioners also contains a statement which shows their estimate of the theory that a merely projected street in front of a water lot should cut off riparian privileges, since they declare that such an effect to be given to an imaginary street was, to use their language, "too absurd" to be considered.

The period following the approval of the wharfing regulations by General Washington affords other illustrations of the sale of water lots and the granting of licenses to lot-owners to wharf across the street in front of their property—in other words, to enjoy their riparian rights—which I do not deem it essential to enumerate in detail, as they are simply cumulative of the examples which I have already given.

There is an interval of about fifteen months during this time where the records of the commissioners no longer exist, and therefore approach is at once made to the Dermott map, which was transmitted by the commissioners to the President on March 2, 1797. The court has inserted a reduced reproduction simply of that portion of this map on which is delineated the water front from the Long Bridge up the Eastern Branch, and this will answer the purpose of elucidating what I have to say in connection with the map.

On June 15, 1795, Dermott had been "directed to prepare a plat of the city with every public appropriation plainly and distinctly delineated." In consequence of departures made from the Ellicott map, resulting from changes in the public reservations or corrections of mistakes which were developed as existing by subsequent surveys, as well as from the creation of new squares and the obliteration of some old ones, it resulted that the Ellicott plan no longer accurately portrayed the exact situation of the city, and the Dermott map, when completed, exhibited the result of all such changes.

It was strenuously claimed in argument that this map was the final and conclusive
[338] plan of the city, and that an inspection *of it disclosed that the proposed water street marked on the plans of L'Enfant and Ellicott was omitted. The court finds that this map was only one step in the evolution of the city, and that whilst it is true that it did not mark Water street along the whole front of the city, it nevertheless delineated a line binding the front, which the court considers indicates that a Water street was either then projected or contemplated in the future to exist in accordance with the face of the L'Enfant and Ellicott maps. Whilst to my mind the line in question is but a demarcation of the tide line, this is immaterial; for it is conceded *arguendo* that the plan is what it is now decided to be.

One thing, however, is plainly noticeable on the Dermott map, *viz.*, that whilst the line which it is now held indicates the fixed purpose to there locate a street is patent, Water street is not named upon the map at that locality, and such a street is only named in a short space from square 1079 to square east of square 1025. How the Water street came to be delineated and named at this particular locality by Dermott is shown by an order made by the commissioners on March 22, 1796, directing the surveyor to "run Water street to eighty feet wide from square 1079 to square east of square 1025, and run out the squares next to the water and prepare them for division." In other words, at the one place on Dermott's map where a Water street is specifically stated to exist, it is shown that it was the result of a precise order to that effect given by the commissioners. That the commissioners could not have considered that this order cut off riparian rights from the water lots within the area in question is shown by the evidence in the record, which establishes that the lots there abutting on Water street were sold by the commissioners as water lots subsequent, to the order referred to and with water privileges attached. (Square 1067, August 15, 1798, 1079, and 1080, November 9, 1796, and October 24, 1798; east of 1025, December 5, 1798.)

On the Dermott map was noted, as already mentioned, the changes and corrections which had taken place in the intervening time to which I have referred.

The Dermott map also makes clear this
fact that, as by the *result of the surveys, in [339]
most instances, the measurement of the squares—certainly in front of Notley Young's land—carried them down to, or substantially to, the water line along the river bank, that the projected Water street, taking the line as delineating such street, was proposed to be established, in great part at least, in the water.

It seems to me, after what has been said, nothing further is required to show that, granting that the line on the Dermott map was intended to indicate a proposed street, it was not thereby the intention to abolish the distinctive characteristics of water lots and the riparian privileges which were appurtenant to them. Dermott himself was familiar with all the previous transactions, having been in the service of the city from early in 1792. He had made changes as reported in the situation of particular pieces of property in order to preserve the riparian rights and give them fruition. He stated to the commissioners in 1799 (long after it is alleged his plan was approved by Washington) that riparian rights had been the basis of purchases, and that assurances and explanations as to their existence had caused purchases to be made which otherwise would not have taken place. He had supervised the divi-

sion in Carrollsburgh, which preserved the riparian rights. In other words, he had dealt with the whole matter, as an officer of the city, upon the assured assumption of the existence of the riparian rights attached to water lots. In no instance, except in a few cases of an exceptional character, had he questioned such rights. And when, in 1799, he gave a summary of the prior dealings of the commissioners in relation to water property—as to which, as stated, he was personally familiar—he observed, after stating that in some special instances squares touching or binding upon the water were not given the privilege of wharfing, in which case they were sold and divided *as upland lots*, he said as a sure criterion that a lot was a "water lot" and, as a corollary, was entitled to "water privileges;" that "where squares were entitled to water privileges, in the sales *these were sold by the front foot*, or the privilege generally mentioned to the purchasers."

[340] *Under these circumstances to suppose that the line drawn, on Dermott's plan, along the river, whether it indicated a projected street or the line of tide water, was intended to cut off the riparian rights, would attribute to him a conduct so inconsistent, not to use harsher words, as to be beyond explanation. And when the approval by President Washington of the Dermott plan is weighed, it strikes me as an express sanction by him of the existence of the riparian rights and wharfing privileges, as attached to water lots especially in view of all the transactions to which reference has been made, and particularly in view of his language in approving the wharfing regulations, in which he said: "If the proprietors of water lots will be satisfied with the rules therein established for the extension of wharves and buildings thereon, the regulations will meet my entire approbation."

During this period occurred the controversy between Nicholas King and the commissioners, which led to a communication on June 25, 1798, which it is claimed contains language importing generally that the commissioners denied that wharfing privileges attached to a lot when separated from the water by a street. But this inference, in view of all the circumstances, is unwarranted. Mr. King left the employ of the city in September, 1797, and thereafter looked after the interests of some of the original proprietors. As representing Robert Peter, he wrote to the commissioners on June 27, 1798, urging in substance that the wharfing regulations should be made more definite and complete. He enumerated a number of water squares owned by Mr. Peter as entitled to riparian privileges, and without expressly declaring that square 22 was a water square, suggested that the dimensions of that square as then platted should be enlarged rather than that a new square should be formed from the low ground on the south, thus implying that the square *as enlarged* would be bounded on the water side by a street. In answering this communication the commissioners said in reference to square 22:

"With respect to square No. 22, we do not conceive that it is entitled to any water privileges as a street intervenes between it and the water; but, as there is some high ground *between the Water street and the water, we [341]
have no objection to laying out a new square between Water street and the channel, and divide such square, when laid out, so as to make it as beneficial to Mr. Peter and the public as circumstances will admit."

That the commissioners did not intend to assert that a merely projected street appearing on a plan of the city would take a square adjacent to the water out of the category of water property is evident from the fact that they did not dispute Mr. King's assertion that the other squares enumerated in his letter which were bounded, on the plan of the city, on all sides by streets, were possessed of riparian privileges. The commissioners evidently assumed that there was fast land of the entire dimensions of a street south of square 22, and also other fast land between that street and the water, and that the particular locality justified treating square 22 as upland property, and called for the creation of a new square to the south. It is to be remarked also that the commissioners were dealing, not with would-be purchasers, but with the representative of the former proprietor, with whom it was competent to agree that in view of circumstances, such as stated, a square might be laid partly in the water below a street, which square should be the "water square" to which the riparian privileges should attach. As these very commissioners, about this very time, sold lots as possessed of riparian privileges where a street was contemplated towards the water and where some fast land existed (as in the case of squares 1067, 1079, 1080 and east of 1025, to which we have already referred as facing that portion of Water street expressly named on the Dermott map), it is evident that the statement in question was not meant as a general declaration in the broad sense which might be ascribed to it if the circumstances under which it was made were not considered.

The examination of the events which transpired in the second period is concluded with mentioning that the commissioners, at various times, made reports to the President, by whom they were transmitted to Congress. In each of these reports they gave a statement of the public property in the *city of [342]
Washington, distinguishing between "upland" and "water" property, describing the latter by the number of feet frontage on the water, and stating the average price which had been realized on the sales of water lots in the past by the front foot. This latter was a criterion which Dermott had previously declared to the commissioners was one of the conclusive tests for determining whether a lot was entitled to be classed as a water lot, possessed of riparian rights and wharfing privileges. In none of these reports was the claim made that the public possessed all riparian rights as appurtenant to an existing or proposed street. Certainly such a claim would have been advanced—especially as the reports in question were made with a

view to legislation authorizing the borrowing of money on the security of all the public property. The same remarks also apply to the forwarding of a copy of the plan of the city, in the same period, to a firm in Amsterdam, through whom the representatives of the city were endeavoring to negotiate a loan. The public property was marked upon that plan, but no intimation was given of the existence of riparian rights distinct from the squares appearing upon the plan. Can it be considered that when all the public property was being tendered as a security for money proposed to be borrowed, that so valuable a right as the entire wharfing privileges and riparian rights of the city, if believed to be concentrated in its hands as appurtenant to a proposed street, would not even have been referred to or tendered in order to aid in the consummation of the desired loan?

The facts which I have reviewed are not the only ones establishing the universal admission and acceptance of the existence of riparian rights as attached to water lots during the period examined. Many others tending in the same direction are found in the record, and are not referred to because they are merely cumulative. Among one of the facts not fully reviewed is the presumption which it seems to me arises from the book described as the register of squares. The importance and sustaining power of the results of this book are substantially conceded by the court, but it is held that the
[343]*book ought not to be treated as controlling. Grant this to be so, yet the power of the implications resulting from the book when considered in connection with the other proof to which I have adverted seems unquestionable. The book, however, is not reviewed at length, since it simplifies examination to refer only to such matters of proof as are unquestioned in the record and are undenied in the opinion of the court; and all the facts which I have above stated come under this category.

By these means, which have been merely outlined, the difficulties which beset the establishment of the city were overcome, and the seat of government at the time provided in the act of Congress was transferred to its present location.

Before passing to the third period of time it seems to me well for a moment to analyze the situation as resulting from the events which have been narrated. One or two considerations arise by necessary implication from them. Either that all parties concerned in the foundation of the city contemplated that a space should separate the building line from the wharves, so as to have free communication along the river front, without impairing the rights of the owners of the water lots, or that they contemplated a street, the fee of which would be in the public along the whole river front, and, ignorant of the legal consequence of such a street, proceeded to dispose of the greater part of the water lots upon the express understanding that riparian rights would attach across the street just as if the street had not been contemplated, and that upon this understanding everybody contracted and the rights of everyone were adjusted and finally settled. For the purpose of this dissent it becomes wholly immaterial to determine which of these propositions is true, because if either be so—as one or the other must be—then the riparian rights, in my opinion, should be adjudged to exist. It seems to me, however, that the first hypothesis is the one naturally to be assumed. It must be borne in mind that L'Enfant, the engineer selected by President Washington to draw the plan of the city, was a Frenchman. It is in evidence that he requested Mr. Jefferson to send him plans of European cities, *and that his request was complied [344]
with. Thus Mr. Jefferson wrote: "I accordingly send him by this post plans of Frankfort-on-the-Main, Carlsruhe, Amsterdam, Strasburg, Paris, Orleans, Bordeaux, Lyons, Montpelier, Marseilles, Turin, and Milan, on large and accurate scales, which I procured while in those towns respectively." The fair presumption is that L'Enfant's request of Mr. Jefferson was the result of a previous communication to him by Mr. Jefferson that he possessed the desired information, for it is impossible to conceive, with all this information in his possession, that Mr. Jefferson, who must have come in contact with L'Enfant, would not have stated to him the fact. It is also fairly to be assumed that as Mr. Jefferson had procured in person when abroad the plans of all these foreign cities, that he was looking forward to them as means of information and guidance to be used for the future Federal city; otherwise he would not have undertaken such a labor. That Mr. Jefferson was familiar with the plans is of course manifest, for with his phenomenal faculty of reaching out for sources of information on all subjects and storing his mind therewith for future use, it is impossible to conceive that he had not vividly before him the method by which the cities in question were laid out. Now, it is especially to be remembered that every one of the cities mentioned by Mr. Jefferson, the plans of which he had forwarded, were on the continent of Europe, that is, were situated in countries governed by the general principles of the civil law. By that law, whilst lotowners fronting on a navigable river have the enjoyment of riparian rights, this right vested in them is subject to what the civilians denominate a legal servitude, that is, an easement, by which they are compelled to leave around the entire river front an open space or way in order to afford convenient access to the water by the public. Whilst this open way may be used by everybody, it does not cut off the riparian rights, but is simply superimposed upon those rights, the lotowner having the enjoyment of the rights, but being obliged to furnish the open space which the public may use. Civil Code of Louisiana, art. 665; *Dubose* v. *Levee Commissioners*, 11 La. Ann. 166; Code Napoleon, art. 650, *and note to the article [345]
in question in the Annotated Code by Fuzier-Herman (Paris, 1885) p. 880.

Is it not natural to presume, in view of the country from which L'Enfant came, in the light of the plans which Mr. Jefferson sent

him and of the knowledge which Mr. Jefferson had acquired of these plans, and by the personal investigation which he had made in procuring them, that the L'Enfant plan but exhibited the principle of legal service as embodied in the civil law? When one looks at the L'Enfant plan and bears in mind the civil-law rule, it strikes me that the plan but illustrates and carries out that rule.

Strength is added to this view by considering the Maryland law of 1791 conferring authority upon the commissioners to regulate wharfage and giving other directions as to the city. That law was passed at the request of the commissioners, preferred at a meeting held when Mr. Jefferson and Mr. Madison were present. It may properly be assumed that the draft of so important a law was, before its passage, submitted to President Washington and his advisers. Now, the Maryland statute contains two provisions, then and now existing in substantially all civil-law countries, but at that time not usual in countries controlled by the common law; that is, a provision for a builder's lien, and one directing that houses or buildings should be erected in accordance with the rule of party walls. Was this then new departure discovered by a member of the Maryland legislature, or was it not rather suggested because it prevailed in the continental cities, the mind of Jefferson being then directed to the rule in those cities, as it was upon the plans prevailing in them that the proposed capital was to be laid out? This view is greatly fortified by the wharfing regulations, which were formulated by the commissioners and approved by the President. It will be seen that they provided that when a wharf was to be extended by the proprietor of a water lot a space should be left for a street wherever the general plan of the city required it, and at intervals of three hundred feet a space of sixty feet should be left for new streets. There is an analogy between the regulations in question and section 38 of
[346] the French ordinance of 1669 on *the same subject. Code Civil, by Fuzier-Herman (Paris, 1885) p. 880, note 1 to article 650, where the text of the French ordinance is stated in full.

But we are not left to mere resemblance on this subject, for there exists the express declaration of the commissioners to the effect that they considered that the continental rule governed in the plan of the city as to the wharves, which declaration was in effect approved by Washington himself. After the proposed wharfing regulations had been submitted to the President and while they were under consideration, the complaint of Mr. Barry was made, to which reference has been made, and the letter was written by the commissioners to the Secretary of State regarding such complaint and explaining the nature thereof. Now, in that letter, in giving their reasons why, by the regulations which they finally submitted, the commissioners had restricted the erection of buildings on the wharves, they referred to the open space, and added "which we presume it was the intention of the executive to keep open to the wharves as is the case in Bordeaux and some other cities of Europe." This must have been derived from an antecedent knowledge of the purposes of the plan. It must have been approved by Washington, for it is impossible to believe that with this important explanation made to the Secretary of State for submission to the President, when he was considering whether he would approve the regulations, he should not have corrected such a misapprehension if it was such. Besides, the general conditions involved in the foundation of the Federal city persuasively indicate why Washington and Jefferson and Madison should have established the city upon the continental plans, with which not only Jefferson but L'Enfant was familiar. The contracts with the proprietors required an equal division, those with the lotowners in Carrollsburgh and Hamburgh an allotment of one half the quantity of their former land in a like or as good a situation. As the laying off of a street so as to take away the riparian privileges of former water lotowners would be incompatible with an equal division or one in like situation, there was a serious difficulty in so doing. On the other hand, not to *keep an [347]
open way for public access might well have been conceived as injurious to the public interests. The theory of an easement furnished a ready solution for this otherwise insuperable difficulty. It afforded an apt means of protecting all the rights of the water lotowners by preserving their riparian rights and wharfing privileges, and at the same time it afforded full protection to the rights of the public by keeping an open space on the water front, subject, it is true, to the exercise of riparian rights, but in no way interfering with public utility. Another consideration bears this view out. That it was hoped that the means for establishing the city to be derived from the sale of lots would be readily aided by the purchase of lots by residents of France and Holland is shown by the record, for among the first uses made of the engraved plan was to send copies thereof to the continent in the hope of stimulating there a desire to purchase, and the record shows that a member of the Amsterdam firm, heretofore referred to, actually purchased lots in the city with reference to the plan. Now, the sagacious men who were Washington's advisers must have seen at once that the plan preserving the riparian rights, and giving access at the same time to the river front, in accordance with the system which, it may be assumed, existed in the countries where it was hoped that money would be obtained, was much more likely to accomplish the desired result than the adoption of a contrary plan.

But the strongest argument in support of this theory of the purpose of Washington and the object contemplated by the plan is that if it be adopted all the facts in the record are explained and rendered harmonious, one with the other. The plans over which controversy has arisen all then coincide. The reason why so much of Water street was laid in the water becomes apparent. The contracts for the sale of water lots with riparian rights attached, the reports of the sur-

veyors and the action of the commissioners all blend into a harmonious and perfect whole, working from an original conception to a successful consummation of a well-understood result. The contrary view produces discord and disarrangement, and leads [348]*to the supposition either that the plan of a street, cutting off riparian rights, was devised in ignorance of its legal result—and, of course, I have not the audacity to make such suggestion as to Washington and Jefferson and Madison, and Mr. Justice Johnson of this court, and all the other wise men who lent their aid to the establishment of the city—or that the plan of the street, in that sense, having been devised it was at once departed from because it was discovered that it was not only in conflict with the rights of the lotowners, but also would destroy the sale of the water lots, hence all the contracts and dealings and declarations to which I have referred ensued. But if the theory that the plan of establishing an easement was adopted be not true, and it be conceded that it was the intention to lay out a street, in the fullest sense of that word, which would cut off the riparian rights, such conclusion, in my judgment, would not at all change the result in this case, for in that event, I submit, that the contracts and dealings and representations and admissions, upon which the lotowners dealt and upon which everybody acted in changing their respective positions, brings into play the principle of estoppel, and compels, in accordance with the elementary principles of equity, that the riparian rights and rights of wharfage which were bought and paid for, and which were solemnly declared to exist in every conceivable form, should now be respected.

It would thus seem from the events of the two periods that the riparian rights of the water lotowners were conclusively established, and that it is unnecessary for me, in considering the last and final period, to do anything more than to state that nothing therein occurred by which the water lotowners abandoned or were legally deprived of their rights. But, from abundant precaution, let me, in condensed form, refer to the events of the third period, simply to show that the riparian rights of water lotowners continued to be recognized down to so recent a period as the year 1863, and were not thereafter interfered with in such manner as to give even color to the contention that the rights were transferred to the government.

3. *Events subsequent to March 2, 1797.*

The legislation by Congress and the mu-[349]nicipality of Washington *with respect to wharfing practically constitutes the only facts necessary to be considered in any review of this period. That legislation, I submit, until a comparatively recent date, in nowise imported a denial of private ownership of wharfing rights as attached to water lots, but, on the contrary, establishes their existence.

I first premise as to the existence of *public* wharves.

On one of the water lots of Hamburgh there existed in June, 1794, what was termed the "City Wharf." On the plat of survey of square 89 this wharf appeared, on lot 10, as "Commissioners' Wharf." Lot 10 was retained for the public. On January 26, 1801, the proceedings of the commissioners recite that a "representation," which was set out, had that day been sent to the President. In it the public property of the city was enumerated, and in the course of such enumeration the statement was made that "four wharves have been built at the expense of $3,221.88, *which remain in a useful state.*" As I have heretofore shown, a number of private wharves had been built prior to 1800, three of which appear on the Dermott map, but in the representation no claim is advanced that such wharves were *public* property.

The act of Congress of May 1, 1802 (2 Stat. at L. 175, chap. 41), abolished the commissioners and vested their powers in a superintendent. The act of May 3, 1802 (2 Stat. at L. 195, chap. 53), incorporated the inhabitants of the city. In 1802, as we have seen, there were at least four, and perhaps five, wharves, which were owned *by the public.* While authority was given to the corporation of Washington, by the act of May 3, 1802, to "regulate the stationing, anchorage, and mooring of vessels," no authority to license or regulate the building of wharves was given. Presumably, as to *private* wharves, the regulations of 1795 were deemed to be in force.

I pause here to interrupt the chronological review of the legislation as to wharfing, to call attention to a report, bearing date September 25, 1803, made by Nicholas King, as surveyor of the city, to President Jefferson on the subject of a water street and wharves, simply because this communication is referred to in the opinion of the court. It is submitted *that on the face of the com- [350]munication, instead of tending to show that there was question as to the existence of the wharfing rights, it, on the contrary, expressly asserts their existence and relates only to their definition and regulation. Indeed, the main purpose of the communication seems to have been a complaint that the wharfing regulations as originally proposed should have been approved by President Washington without striking out the clause which forbade the wharf owners from building on their wharves. And all this becomes very clear when it is considered that Surveyor King, by whom the letter was written, was the same person who in previous years had avowedly asserted the existence of riparian rights in favor of a former proprietor, Robert Peter, and made claim in relation thereto.

The act of February 24, 1804 (2 Stat. at L. 254, chap. 14), gave the city councils power to "preserve the navigation of the Potomac and Anacostia rivers, adjoining the city; to erect, repair, and regulate public wharves, and to deepen docks and basins." While, under the authority conferred "to preserve navigation," private wharves could have been regulated, manifestly no such power could have been exercised under an authority to "*erect* and *repair* and regulate *public* wharves."

That private wharves were not regarded

as public wharves is clearly evidenced in the ordinance of July 29, 1819 (Burch's Dig. 126), passed under the authority granted by the act of 1804 "to preserve the navigation of the Potomac." The act reads as follows:

"Sec. 1. That the owners of private wharves or canals, and canal wharves, be obliged to keep them so in repair as to prevent injury to the navigation. . . .

"Sec. 2. That no wharf shall hereafter be built, within this corporation, without the plan being first submitted to the mayor, who, with a joint committee from the two boards of the city council, shall examine the same, and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf, then, and in that case, it shall be the duty of the mayor to issue a written permission for the accom-
[351] plishment of the object, which permit *shall express how near such wharf shall approach the channel."

How and where, may I ask, did the private wharves originate, if no such wharves existed?

That the authority conferred with respect to public wharves was not supposed to vest power over *all* wharves is also indicated in the act of May 15, 1820 (3 Stat. at L. 583), which expressly distinguished the two classes. The corporation was empowered "to preserve the navigation of the Potomac and Anacostia rivers adjoining the city; to erect, repair, and regulate public wharves; to regulate the manner of erecting and the rates of wharfage at private wharves; to regulate the stationing, anchorage, and mooring of vessels."

The distinctive character of *private* wharves was still further recognized in the act of the city councils of May 22, 1821 (Rothwell's Laws, D. C. 275), by section 1 of which the mayor was authorized and requested "to appoint three intelligent and respectable citizens, *not being wharf owners*, as commissioners to examine and report to the two boards a suitable plan to be adopted for the manner of erecting wharves *upon the shores* of the Anacostia and Potomac rivers."

And, by section 2, the mayor was solicited to wait upon the President, and to request his appointment of such persons as he might deem proper, to co-operate with those commissioners.

Again, by resolution of the councils, approved September 3, 1827, it was enacted "that a committee of two members from each board be appointed to act, in conjunction with the mayor, in regulating the mode of erecting wharves," conformably to section 2 of the act of councils approved July 29, 1819.

Similar recognition of private ownership of wharves is contained in the resolution of the councils of March 19, 1823, which established "*as fish docks*," amongst other sites, "the steamboat wharf on the Potomac, near the bridge over the Potomac, and at Cana's wharf."

That the preservation of navigation was the controlling object in the regulation of private wharves is very distinctly evidenced in the act of councils, approved January 8, 1831, which, in section 6, repealed the act
*of councils of July 19, 1819, and in the first [352]
section enacted as follows:

"Sec. 1. That it shall not be lawful for any person or persons to build or erect any wharf or wharves within the limits of this corporation, who shall not first submit the plan of such wharf or wharves to the mayor, who, with a joint committee of the two boards of the city council shall examine the same; and if it shall appear to their satisfaction that no injury could result to the navigation from the erection of such wharf or wharves, then, in that case, it shall be the duty of the mayor to issue a written permission for the accomplishment of the object, which permit shall express how near such wharf or wharves shall approach the channel, and at what angle they shall extend from the street on which they are erected."

Four years after the enactment last referred to a slight controversy was precipitated as to the existence of rights of wharfage as attached to water lots on the Potomac river between the Long Bridge to the Arsenal grounds. On April 13, 1835, a resolution to the effect that the city had never attempted, and, without injury to the general interests, could not admit, the existence of "water rights" of individuals, between the Long Bridge and the Eastern Branch, was indefinitely postponed. A Mr. Force, then a member of the lower board of the city council, protested against the action thus taken. We have seen how unfounded was the assumption contained in this proposed resolution. In 1839, however, Mr. Force, as mayor of the city, approved a plan of William Elliott for the establishment of Water street and for the regulation of wharfing thereon. I shall, as briefly as possible, outline the history of the plan:

As surveyor of the city of Washington in 1833, William Elliott (the subject of "water privileges" then being before the councils of the city) suggested to William A. Bradley, mayor of the city, "that system" which was deemed by the former "best for securing those privileges in the most equitable manner amongst those who own property facing on Water street, as well as securing the public rights." It was proposed by Elliott, in his plan No. 2, that Water street, besides
being *conformed to certain particular out- [353]
lines, be rendered everywhere not less than one hundred feet in width, between the Long Bridge and the then Arsenal grounds, and that the construction of wharves and docks —of wharves, by individuals owning lots on the north side of Water street, and of wharves or docks, by the public, opposite public appropriations, or the ends of streets terminating at the north line of Water street —between that bridge and those grounds, be governed by the principle that the Water street front of any such lot, appropriation, or end of street should furnish it a channel front, only in the proportion existing between the total frontage of Water street, estimated at 5,280 feet, and the chord, estimated at 5,050 feet, measuring the total channel front—between the Long Bridge and

the then Arsenal grounds. The plan was described on its face as of that part of the city "exhibiting the water lots and Water street and the wharves and docks thereon, along the Potomac, from E to T street south." It assigned, in the ratio proposed by Elliott, to every square on the north side of Water street a wharfing site from the south side of that street to the "edge of the channel" of the Potomac, and to public appropriations and the ends of streets terminating at Water street, sites for docks or other like uses. It represented Water street as of varying width, and reduced, on its southern limits, to a curve lying parallel to that describing the edge of the channel; and the squares, on the north side of Water street, to which wharfing sites are assigned, are designated as "water lots" on the face of the plan. A more complete recognition of the pre-existing riparian rights of the water lotowners than is shown on and established by this plan my mind cannot conceive.

On February 22, 1839, the city councils adopted the following resolutions:

"*Resolutions* in relation to the manner in which wharves shall be laid out and constructed on the Potomac river:

"*Resolved*, That the plan No. 2, prepared by the late William Elliott, in eighteen hundred and thirty-five, while surveyor of the city of Washington, regulating the manner in which wharves on the Potomac, from the
[354]bridge to T Street *south, and the plan of Water street, shall be laid out, be, and the same is, adopted as the plan to be thereafter followed in laying out the wharves and the street on the said river: *Provided*, The approbation of the President of the United States be obtained thereto.

"*Resolved, also*, That the wharves hereafter to be constructed between the points specified in the said plan shall be so built as to allow the water to pass freely under them; that is to say, they shall be erected on piers or piles from a wall running the whole distance on the water line of Water street." Sheahan's Laws, D. C. 178 (*an.* 1857).

These resolutions were approved by the mayor of the city, Mr. Peter Force.

Before their passage and on February 15, 1839, Secretary of the Treasury Woodbury, afterwards a justice of this court, had referred plan No. 2 of William Elliott to William Noland, Commissioner of Public Buildings, and (intermediately) the successor in office of the commissioners, for the opinion of that commissioner upon the judiciousness of the improvement contemplated in the plan.

On February 21, 1839, the day following the passage of the ordinance, Mr. Noland, acknowledging the receipt of the plan and returning it to the Secretary, reports, "that after due deliberation," he believes "*the improvement proposed would be judicious and proper.*"

On February 23, 1839, the day following the passage of the resolutions, the plan *approved by the President*, was transmitted by Mr. Woodbury to Mayor Force.

When it is considered that up to the time when the Elliott plan received the approval of President Van Buren, Water street, though contemplated, had not been further laid down than by the establishment of the upper boundary or building line, this action manifestly possesses great significance. The fact that action with respect to Water street was incomplete was expressly stated by Attorney General Lee in his opinion to President Adams on January 7, 1799, when he said, referring to the Dermott map:

"It is not supposed that this is incomplete in any respect, *except in relation to the [355]
rights appurtenant to the water lots and to the street that is to be next to the watercourses. . . . The laying off of Water street, whether done in part or in whole, will stand in need of the sanction of the President."

As in the President of the United States therefore was vested the authority to complete the plan of the city in any particular in which it was defective, the approval of President Van Buren may properly be referred to the exercise of that power, and as entitled to be regarded as a distinct declaration that Water street was not to have the operation now asserted of devesting the water lots fronting towards the river on Water street of riparian rights. From Washington, then, to Van Buren, in every form in which it could be done, the riparian rights of the lot holders have been continuously and solemnly sanctioned. I cannot now by any act of mine destroy them on the theory that they have never existed.

On May 26, 1840, a permit was issued by Mayor Force, by virtue of the act of June 8, 1831, to William Easby to wharf in front of some of the water squares which originally formed part of the land of Robert Peter, situate on the Potomac river near Rock creek. I set out in the margin† the document referred *to, which exhibits that it was for an [356]
unlimited time, and with no provision that

†Mayor's Office,
Washington, May 26, 1840.

William Easby, of the city of Washington, having made application for permission to erect a wharf in front of square No. 12, and extend a wharf in front of square south of square No. 12, and having submitted to me a plan of said wharves, which plan has been examined by a joint committee of the board of aldermen and board of common council, who have certified that "no injury will result to the navigation of the river from the erection and extension of the wharves upon said plan."

Permission is therefore granted to the said William Easby to erect a solid wharf the whole extent of square No. 12, in front thereof, and to extend a wharf in front of square south of square No. 12, thirty feet, fifteen feet of which to be solid, as laid down upon said plan which exhibits the situation of the wharves aforesaid as proposed to be built by his letter of 3rd of February, 1840.

Which permission is granted on the terms and subject to all the conditions prescribed by the act entitled "An Act to Preserve the Navigation of the Potomac and Anacostia Rivers, and to Regulate the Anchoring and Mooring Vessels Therein," approved January 8, 1831; and of any act or joint resolution that may hereafter be passed relating to wharves in the city of Washington.

Peter Force.

the wharf should revert to the government as in permits of very recent date.

That on May 25, 1846, a committee of police, of the lower part of the city councils, presented to that board a report which in effect denied the existence of private rights of wharfing may be conceded. Like the resolution of 1835 it was based upon a superficial inquiry into the subject, and like its predecessor, the resolution of 1835, was "laid upon the table." Various acts of the city council, one dated March 8, 1850, another September 30, 1860, and the other May 3, 1866, appropriating in the aggregate $2,600.-00 for the repair of sea walls along the Potomac at points between the Long Bridge and the Arsenal grounds, are set out as evidence of an assertion by the city of the right of ownership to all the riparian privileges in that locality. I am unable, however, to see that these circumstances are entitled to the weight claimed for them. Under the wharfing regulations of 1795 the ultimate cost of making a Water street was to be borne by the city, and a sea wall may well be treated as part of such street. The evidence in the record also shows that a goodly portion of tho sea walls along the Potomac in the locality referred to was built opposite to the water lots on the north side of Water street and by the owners of such lots, and that some of such owners had graded Water street in front of their lots in order to the exercise of their wharfing privilege. There is nothing in the record to support the claim that if the city had at any time constructed a sea wall, it claimed that the wharfing privileges in front of such wall had been taken away from the opposite lots. And the ordinance of the city councils of February 22, 1839, adopting the plan of William Elliott, clearly rebuts such an inference, for it is there provided that wharves thereafter "to be constructed" should "be erected on piers or piles from a wall running the whole distance of the water line of Water street." In
[357] other words, although, in *the most solemn form, it was declared that the owners of the water lots should enjoy their wharfing rights by extending their wharves from the sea wall towards the channel, yet it is now argued that the construction of the sea wall destroyed the right of the lotowners to the wharves built by them in accordance with the provisions of the ordinance.

That since the act of March 13, 1863, referred to in the opinion of the court, various enactments have been passed by the corporation or its representatives, asserting power in the nature of private ownership over the wharves on Water street, and not merely the possession of power as trustee for the purposes of public regulation or the protection of navigation, may be conceded. But it is not claimed nor does it appear from the evidence that there has been such interference with or disturbance of the actual possession of the rightful occupants as would constitute an adverse possession in the city operative to bar the lawful claims of the real owners of the wharfing privileges. Similar observations are also applicable to the licenses issued by the chief of engineers for the time being during a part of the period last referred to.

It is not necessary to review the evidence showing the unequivocal possession enjoyed by the wharf owners up to this *time* or to state the proof, as to the expenditures of time, labor, or money by the owners of the water lots along the Potomac river—upon the faith of the wharfing regulations and the possession of riparian privileges—the filling in by them of Water street, the erection of sea walls, the filling in of parts of the bed of the river beyond Water street, as well as various other expenditures. Indeed, so self-evident are these things that the court deems it proper that the defendants should be compensated by the government before being ousted of the possession of such improvements, as wharves and structures thereon. If the demands of equity require that the structures be paid for by the government, far greater and stronger is the reason for concluding that the right of property, on the faith of which the structures were made, should not be denied or taken away without just compensation. Neither equity nor reason are subserved, it seems to me, by protecting the mere *incidental right whilst up- [358]
rooting the fundamental principle of property upon which the incident depends.

Having in what has preceded fully expressed my view of the existence of the riparian rights as developed from this record, it remains only to consider certain previous decisions of this court relied upon and referred to in the opinion of the court. Nothing in the views above expressed is in any way affected hy the case of *Van Ness* v. *Mayor, etc., of Washington*, 4 Pet. 232 [7: 842]. That case determined that the public streets in the city of Washington were public property. But the question in this case lies beyond that, and is, first, Was there a public street proposed around the entire river front or a mere creation of an easement superimposed upon the riparian rights? or, second, Granting there was such public street, in view of the contracts between the original proprietors of the division of the squares and lots, and of all the contracts and dealings, can the government be heard in a case of the character of that before the court, to deny the existence of riparian rights and rights of wharfage in the owners of water lots fronting on the alleged street? True it is that in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.* 109 U. S. 672 [27: 1070], the question whether a lot fronting on the Potomac river, lying in that portion of the city formerly constituting the land of Notley Young, had riparian rights, was considered and determined adversely to the lotowner, on the ground that the lots being bounded by Water street on the return and plat of survey, were thereby separated from the river, and hence not entitled to riparian rights. As I have said from the principle of law therein enunciated I do not dissent, but rest my conclusion on the facts as they are disclosed in this record. That many of the facts which have been considered and stated were not present in the record in the case, is patent from the opinion in that case. Cer-

tainly, however, it is not contended that the defendants in this record were either parties or privies to the case there decided. A conclusion on one condition of fact is not binding as to another condition of fact between different parties in a subsequent lawsuit. I cannot bring my mind to adopt the inferences deduced by the court in the case [359] just *referred to, in view of what I conceive to be the absolutely conclusive proof establishing the existence of riparian rights in favor of the owners of water lots in the city of Washington. To deny them, it seems to me, in view of the record now here, as was said at the outset, would be an act of confiscation. Of course this is said only as conveying my appreciation of the facts.

As it is beyond my power by this dissent to enforce the rights of the owners of water lots to riparian and wharfing privileges, it would serve no useful purpose for me to measure the claims of such owners by the principle which I have endeavored to demonstrate, that is, the existence of the riparian rights. Suffice it for me to say, therefore, that in my judgment, even granting that such rights exist, the owners thereof would not be entitled to compensation if the right was impaired or destroyed as the consequence of work done by the government in the bed of the river for the purpose of improving navigation, for all riparian rights are held subject to this paramount authority. As a consequence, if injury resulted to riparian rights in the exercise of this controlling governmental power, such injury would be *damnum absque injuria.* But I think that where it is simply proposed, as is the case with many if not all the lots between the Long Bridge and the Arsenal grounds, to appropriate the riparian rights simply by an arbitrary line running along the edge of the water on the map, thereby cutting off all wharves and buildings thereon upon the theory that none of the riparian rights segregated by the line were private property, this is but an appropriation of private property requiring just compensation. By these general principles, in my judgment, the rights of the parties should be determined.

---

[360] RATON WATERWORKS COMPANY, *Appt.*,
v.
TOWN OF RATON.

(See S. C. Reporter's ed. 360-364.)

A suit in equity cannot be sustained for a legal cause of action.

Warrants of a town in the form of drafts drawn on the treasurer of the town, signed by the mayor and countersigned by the recorder of the town, are, if valid, legal causes of action, enforceable in a court of law; and it is error in a court to consider and determine such legal controversy in a suit in equity for specific performance and for an injunction, but it should dismiss the suit without prejudice to the right to bring an action at law.

[No. 272.]

Argued April 28, 1899. Decided May 15, 1899.

APPEAL from a decree of the Supreme Court of the Territory of New Mexico reversing the decree of the District Court of Colfax County for the specific performance of warrants issued by the town of Raton, etc., in a suit in equity brought by the Raton Waterworks Company against the town of Raton, and directing the District Court to dismiss the suit. Decree of the Supreme Court of the Territory *reversed,* and case remanded to that court with directions to amend its decree by directing the District Court to dismiss the bill without prejudice to the right of plaintiff to his action at law.

See same case below, 9 N. M. —, 49 Pac. 898.

Statement by Mr. Justice **Shiras:**

In August, 1895, the Raton Waterworks Company, a corporation organized under the laws of the territory of New Mexico, filed, in the district court of the county of Colfax, territory of New Mexico, a bill of complaint against the town of Raton, a municipal corporation of that territory.

It was narrated in the bill that a contract had been entered into, in July, 1891, between the waterworks company and the town of Raton, whereby the company agreed to erect and maintain waterworks and to supply the town and its inhabitants, and the town agreed to pay rental for the use of hydrants in certain amounts during a period of twenty-five years; that the waterworks company had fully performed and complied with the contract on its part, at an expenditure of $115,000; that the town, from time to time, made certain payments of rental for hydrants furnished; that on January 1, 1895, the town, in pursuance of ordinances, issued to the waterworks company in payment warrants of said town, of that date, and falling due one every six months, and aggregating several *thousand dollars. Each of said warrants [361] was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town; that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town, in his hands for disbursement, the amount of each of said warrants, in the order in which the same were presented to him for payment; that, subsequently, the board of trustees of said town wrongfully and without authority of law, and in disregard of the contract rights of the waterworks company, undertook to repeal the ordinance in which the terms and method of payment for the rent of hydrants were prescribed, and to pass certain other ordinances in conflict with the preceding ordinances under which the rights of the company had accrued; that, in pursuance of the latter ordinances, the town treasurer refused to register warrants held by the company and presented for registration; that, in addition to the amount of said war-

rants, there will accrue and become due to the company semi-annually during the continuance of said contracts the sum of $1,962.50; that said town refuses to pay the said several amounts heretofore accrued and payable, and refuses to pay the said several amounts which will hereafter accrue, and gives out and pretends that the said contract is inoperative and invalid, and refuses to perform the same on its part, although in the possession, use, and enjoyment of the said water plant under said contract.

The bill prayed that the town of Raton should be decreed specifically to perform the said contract, and to pay the amounts of said rental which had theretofore accrued and become payable, and might thereafter accrue and become payable, in pursuance of the terms of the contract, and should be enjoined from enforcing said repealing ordinances.

The defendant, in its answer, admitted the making of the contract, the performance thereof by the company; that the board of trustees issued to the company the several warrants, drawn in manner, amount, and
[362]number as alleged in the bill; *that it was the duty of the treasurer of the town to keep in his office a book of registry, but denied that it was the duty of the treasurer to enter and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of the town in his hands for disbursement the amount of each of said warrants in the order in which the same were presented, or in any other order, said warrants being illegal, null, and void. Also admitted the passage of the original ordinance prescribing the method of payment of rental by the issuance of warrants, and the passage of the repealing ordinance complained of, and that it has been and now is in the possession, use, and enjoyment of the water plant of the waterworks company. The answer likewise admitted that it has given out that said contract, so far as it calls for the payment of $1,962.50 semi-annually, is inoperative and invalid, and that it has refused to pay said sum semi-annually.

By way of defense, the answer alleged that defendant, as a municipal corporation of the territory of New Mexico, is authorized by law to levy each year and collect a special tax sufficient to pay off the water rents agreed to be paid to the complainant, provided that said special tax shall not exceed the sum of two mills on the dollar for any one year; that said alleged semi-annual rental of $1,962.50 claimed by the complainant is far in excess of the amount derivable from a two-mill tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal; that said original ordinance, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax, or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers conferred upon them by the statutes of New Mexico; and that the warrants issued to complainant were and are null and void, because issued in excess of the amount derivable from a two-mill tax levy on each dollar of taxable property.

*Having thus answered, the defendant [363]
pleaded "that all and every the matters the complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that it shall have the same benefit of this defense as if it had demurred to the complainant's bill."

The cause was heard on bill and answer, and in September, 1896, the said district court entered a decree in accordance with the prayer of the bill, decreeing that the said original ordinance, contract, and agreement should in all things be specifically performed by and on the part of the town of Raton, and that the town should issue and pay the warrants out of any funds or moneys in the treasury of the town, whether derived from general or special taxes. From this decree an appeal was taken to the supreme court of the territory, where the decree of the lower court was reversed and an order was entered directing the lower court to dismiss the bill at the costs of the waterworks company. The cause was then brought to this court on an appeal from the decree of the supreme court of the territory.

Mr. **Henry A. Forster,** for appellant:

The bill made out a proper case for equitable relief.

National Waterworks Co. v. *Kansas City,* 27 U. S. App. 165, 62 Fed. Rep. 853, 10 C. C. A. 653, 27 L. R. A. 827; *Fazende* v. *Houston,* 34 Fed. Rep. 95.

Specific performance of the contract contained in ordinance No. 10, at least to the extent of declaring it a valid and subsisting contract, binding and obligatory on the town, and ordering the town to pay the hydrant rentals, should have been granted.

National Waterworks Co. v. *Kansas City,* 27 U. S. App. 165, 62 Fed. Rep. 853, 10 C. C. A. 653, 27 L. R. A. 827.

The town should have been enjoined from further breaches of the contract.

Boston Water Power Co. v. *Boston & W. R. Corp.* 16 Pick. 525; *St. Louis R. Co.* v. *Northwestern St. Louis R. Co.* 69 Mo. 65; *Newburgh & C. Turnp. Road* v. *Miller,* 5 Johns. Ch. 101, 9 Am. Dec. 274.

A court of equity should restrain the enforcement of an invalid ordinance, whenever vested rights granted by a prior ordinance would be thereby impaired.

New Orleans Waterworks Co. v. *Rivers,* 115 U. S. 674, 683, 29 L. ed. 525, 528; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 673, 29 L. ed. 524; *Walla Walla City* v. *Walla Walla Water Co.* 172 U. S. 1, *ante,* 341; *Foster* v. *Joliet,* 27 Fed. Rep. 899; *Quincy* v. *Bull,* 106 Ill. 337; *Baltimore* v. *Radecke,* 49 Md. 217, 33

Am. Rep. 239; *People, Davis,* v. *Sturtevant,* 9 N. Y. 263, 59 Am. Dec. 536.

Mr. **N. B. Laughlin,** for appellee:

There is not any equity in complainant's bill because the principal object sought is specific performance; and on the allegations, as therein averred, the court has no jurisdiction to enforce the relief prayed for.

Phyfe v. *Wardell,* 2 Ed. Ch. 47; *Pierce* v. *Plumb,* 74 Ill. 326.

There was nothing to act on in the case at bar but the validity of the warrants issued under the contract, and that can be determined in an action at law.

State, Great Falls Waterworks, v. *Great Falls,* 19 Mont. 518.

Appellant has not exhausted his remedy at law.

Leadville Illuminating Gas Co. v. *Leadville,* 9 Colo. App. 400; *Leadville Water Co.* v. *Leadville,* 22 Colo. 297.

This court should affirm the decree of dismissal with costs, with the modification that the dismissal is without prejudice to the rights of the appellant or the legal holders of said warrants to bring an action at law.

Lacassagne v. *Chapuis,* 144 U. S. 119, 36 L. ed. 368; *Sanders* v. *Devereux,* 19 U. S. App. 630, 60 Fed. Rep. 311, 8 C. C. A. 629; 6 Enc. Pl. & Prac. 895.

[363] *Mr. Justice **Shiras** delivered the opinion of the court:

The waterworks company, when it filed its bill in this case, was in possession of warrants that had been issued to it by the town of Raton in pursuance of the provisions of a contract existing between the company and the town. Those warrants were in the form of drafts drawn on the treasurer of the town, signed by the mayor and countersigned by the recorder of the town. They were for specific sums of money, payable at fixed periods, bearing interest from date, and some of them past due when the bill was filed.

[364] *In short, the warrants, if valid, were legal causes of action enforceable in a court of law. The defendant did not waive the question, but averred in its answer that the matters complained of in the bill were matters which could be tried and determined at law. And the supreme court of the territory in its opinion says: "If the warrants upon which payment is sought here are valid, an action at law is the proper remedy to enforce their payment. They have been issued, and are claimed to be outstanding obligations against defendant town, and it says they are void, and therefore declines to pay them. Then, if in any action at law judgment should be entered in favor of the legal holders, and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy." [9 N. M. —, 49 Pac. 898.]

In this state of facts we think the courts below erred in considering and determining the legal controversy in a suit in equity, but should have dismissed complainant's bill without prejudice to its right to bring an action at law. *Barney* v. *Baltimore,* 6 Wall. 280 [18: 825]; *Kendig* v. *Dean,* 97 U. S. 423 [24: 1061]; *Rogers* v. *Durant,* 106 U. S. 644 [27: 303].

Accordingly, and without expressing or implying any opinion of our own on the merits of the controversy, *the decree of the Supreme Court of the Territory is reversed,* and the cause is remanded to that court with directions to amend its decree by directing the District Court to dismiss the bill without prejudice to the right of the complainant to sue at law.

FIRST NATIONAL BANK OF CONCORD, New Hampshire, *Plff. in Err.,*

v.

EDWARD HAWKINS, Receiver of the Indianapolis National Bank, of Indianapolis.

(See S. C. Reporter's ed. 364-373.)

One national bank cannot acquire the stock of another—assessment of such stock.

1. One national bank cannot lawfully purchase and hold the stock of another as an investment.
2. In the case of such an actual purchase by a national bank, it is not estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the Comptroller of the Currency.

[No. 187.]

Argued and Submitted January 20, 1899. Decided May 15, 1899.

IN ERROR to the United States Circuit Court of Appeals for the First Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of New Hampshire in favor of Edward Hawkins, receiver of the Indianapolis National Bank, against the First National Bank of Concord for the recovery of an assessment on the stock of the Indianapolis bank held by the First National Bank of Concord; said assessment being ordered by the Comptroller to enforce the individual liability of stockholders. Judgment of the Circuit Court of Appeals and of the Circuit Court *reversed,* and cause remanded to the Circuit Court, with directions to enter a judgment in accordance with the opinion of this court.

See same case below, 33 U. S. App. 747, 79 Fed. Rep. 51, 24 C. C. A. 444.

Statement by Mr. Justice **Shiras:**

*In May, 1895, Edward Hawkins, as receiver of the Indianapolis National Bank, brought a suit, in the Circuit Court of the United States for the District of New Hampshire, against the First National Bank of Concord. At the trial a jury was waived, and the court found the following facts: [365]

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national bank association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893: the plaintiff was duly appointed and qualified

receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month.

"The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the Comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of stockholders, and an order made to pay such assessment on or before the 25th day of November, 1893; and the defendant was duly notified thereof.

"The defendant, being a national banking association, duly organized, and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the
[366] defendant bank received annual dividends declared by the Indianapolis bank *prior to July, 1893. The defendant has not paid said assessment or any part thereof."

After argument the court, on July 28, 1896, entered judgment in favor of the plaintiff for the sum of $11,646.67 and costs. From that judgment a writ of error from the United States circuit court of appeals for the first circuit was sued out, and by that court the judgment of the trial court was, on March 5, 1897, affirmed. 33 U. S. App. 747. From the judgment of the circuit court of appeals a writ of error was allowed to this court.

Mr. **Frank S. Streeter** for plaintiff in error:

The recent decision in *California Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, determines the point raised in this case.

No power is granted by U. S. Rev. Stat. § 5136 to national banks to buy and sell stocks generally; nor is such power incidental to the business of banking.

First Nat. Bank v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 73, 35 L. ed. 107, 110; *Re Royal Bank of India*, L. R. 4 Ch. 252; *Fowler* v. *Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Weckler* v. *First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *Nassau Bank* v. *Jones*, 95 N. Y. 115, 47 Am. Rep. 14.

Upon principle and authority a stockholder's liability to assessment is a contractual liability.

Richmond v. *Irons*, 121 U. S. 27, 30 L. ed. 864; *Flash* v. *Conn*, 109 U. S. 371, 27 L. ed. 966; *Hodgson* v. *Cheever*, 8 Mo. App. 321; *Manville* v. *Edgar*, 8 Mo. App. 324; *Queenan* v. *Palmer*, 117 Ill. 619; *Aultman's Appeal*, 98 Pa. 505; *Sackett's Harbour Bank* v. *Blake*, 3 Rich. Eq. 225; *Woods* v. *Wicks*, 7 Lea, 40; *Ex parte Van Riper*, 20 Wend. 614; *Grand Rapids Sav. Bank's Appeal*, 52 Mich. 557; *Lowry* v. *Inman*, 46 N. Y. 119; *Corning* v. *McCullough*, 1 N. Y. 47.

The Concord Bank had no power to make the contract, and it cannot be enforced against it.

Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Bank of United States* v. *Dandridge*, 12 Wheat. 64, 6 L. ed. 552; *Head* v. *Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229; *Beaty* v. *Knowler*, 4 Pet. 152, 7 L. ed. 813; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 L. ed. 274; *Perrine* v. *Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107; *Wiley* v. *First Nat. Bank*, 47 Vt. 546; *Whitney* v. *First Nat. Bank*, 50 Vt. 388, 28 Am. Rep. 503; *Talmage* v. *Pell*, 7 N. Y. 328; *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Me. 43, 28 Am. Rep. 9; *Crocker* v. *Whitney*, 71 N. Y. 161.

The Concord Bank is not estopped to insist upon the defense of *ultra vires*.

Central Transp. Co. v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Thomas* v. *West Jersey R. Co.* 101 U. S. 85, 25 L. ed. 953; *Atty. Gen.* v. *Great Eastern R. Co.* L. R. 5 App. Cas. 473; *Small* v. *Smith*, L. R. 10 App. Cas. 119; *Wenlock* v. *River Dee Co.* L. R. 10 App. Cas. 354; *Trevor* v. *Whitworth*, L. R. 12 App. Cas. 409; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817; *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265.

Messrs. **John G. Carlisle** and *J. W. Kern*, for defendant in error:

This court, recognizing the policy of the law in this respect, has decided that the comptroller has authority to make assessments upon the shareholders to pay debts, and that an assessment made for that purpose is conclusive both as to necessity for making it and as to the amount of each shareholder's liability.

Kennedy v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *Casey* v. *Galli*, 94 U. S. 673, 680, 24 L. ed. 168, 170; *National Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Waite* v. *Dowley*, 94 U. S. 527, 24 L. ed. 181.

National banks are not expressly prohibited by the law from acquiring or holding shares of stock in other corporations, but on the contrary, are permitted to do so under certain circumstances.

California Bank v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198; *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478; *National Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden* v. *Johnson*, 107 U. S. 251, 27 L. ed. 386.

One is estopped from denying his liability by voluntarily holding himself out to the public as the owner of stock.

Pullman v. *Upton*, 96 U. S. 328, 24 L. ed. 818; *Sanger* v. *Upton*, 91 U. S. 56, 23 L. ed. 220; *Upton* v. *Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Webster* v. *Upton*, 91 U. S. 65, 23 L. ed. 384; *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168.

The express language of the act of Congress imposing the liability on the party to whom the shares are transferred on the

books of the bank estops the plaintiff in error to deny its obligation to pay the amount, and thus deprive the creditors of the failed bank of a security which the law clearly intended to afford them. The liability is not contractual, but statutory.

Bank of Redemption v. *Boston*, 125 U. S. 60, 31 L. ed. 689; *Welles* v. *Larrabee*, 36 Fed. Rep. 866, 2 L. R. A. 471; *Witters* v. *Sowles*, 32 Fed. Rep. 767; *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844; *Citizens' State Bank* v. *Hawkins*, 34 U. S. App. 423, 71 Fed. Rep. 369, 18 C. C. A. 78; *Cooper Ins. Co.* v. *Hawkins*, 34 U. S. App. 428, 71 Fed. Rep. 373, 18 C. C. A. 81; *Keyser* v. *Hitz*, 133 U. S. 138, 33 L. ed. 531.

[366] *Mr. Justice **Shiras** delivered the opinion of the court:

The questions presented for our consideration in this case are whether one national bank can lawfully acquire and hold the stock of another as an investment, and, if not, whether, in the case of such an actual purchase, the bank is estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the Comptroller of the Currency.

By section 5136 of the Revised Statutes a national banking association is authorized "to exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

In construing this provision, it was said
[367] by this court, in **First National Bank* v. *National Exchange Bank*, 92 U. S 122 [23: 679], that "dealing in stocks is not expressly prohibited, but such prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stock may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

And in the recent case of *California Nat. Bank* v. *Kennedy*, 167 U. S. 362 [42: 198], it was said to be "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Accordingly it was held in that case that a provision of the laws of the state of California, which declared a liability on the part of stockholders to pay the debts of a savings bank, in proportion to the amount of stock held by each, could not be enforced against a national bank, in whose name stood shares of stock in a savings bank, it being admitted that the stock of the savings bank had not been taken as security, and that the transaction by which the stock was placed in the name of the national bank was one not in the course of the business of banking for which the bank was organized.

*It is suggested by the learned circuit [368]
judge, in his opinion overruling a petition for a rehearing in the circuit court of appeals, that the question considered in the case of *California Nat. Bank* v. *Kennedy* was the liability of a national bank as a stockholder in a state savings bank, while the question in the present case is as to its liability as a stockholder in another national bank, and that therefore it does not follow beyond question that the decision in the former case is decisive of the present one. 50 U. S. App. 178.

No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant states, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful. Thus, it is enacted, in section 5146, that "every director must, during his whole term of service, be a citizen of the United States, and at least three fourths of the directors must have resided in the state, territory, or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office."

One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are

invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus in-
[369] vested, would not be *managed by directors of their own selection, but by distant and unknown persons. Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one.

Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association."

This provision forbidding a national bank to own and hold shares of its own capital stock would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another.

Without pursuing this branch of the subject further, we are satisfied to express our conclusion, upon principle and authority, that the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds as an investment, and hold as such, shares of stock in the Indianapolis National Bank of Indianapolis.

The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the
[370] Indianapolis National Bank, *can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

This question has been so recently answered by decisions of this court that it will be sufficient, for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached.

In *Central Transportation Company* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55], after an examination of the authorities, the conclusion was thus stated by Mr. Justice Gray:

"It was argued on behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgment of this court. . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped *to deny that it has complied with the [371]
legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

The principles thus asserted were directly applied in the case of *California Nat. Bank* v. *Kennedy*, 167 U. S. 367 [42: 198], where the question and the answer were thus stated by Mr. Justice White:

"The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

There is then quoted a passage from the decision of the court in *McCormick* v. *Market National Bank*, 165 U. S. 549 [41: 821], as follows:

"The doctrine of *ultra vires*, by which a

contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken, and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The conclusion reached was thus expressed:

"The claim that the bank, in consequence
[372] of the receipt *by it of dividends on the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified."

In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory.

Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

However, whether, in the case of persons *sui juris*, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case.

If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act.

It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the
[373] validity of all the contracts by *which the registered shareholders acquired their respective shares.

The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted.

The judgment of the Circuit Court of Appeals is reversed, the judgment of the Circuit Court is also reversed, and the cause is remanded to that court with directions to enter a judgment in conformity with this opinion.

WILLIAM M. PRICE, Administrator of Henry C. Miller, Deceased, *Appt.*,
v.
UNITED STATES and the Osage Indians.

(See S. C. Reporter's ed. 373-379.)

Act of March 3, 1891—jurisdiction of court of claims—property destroyed by Indians—construction of the act.

1. Under the act of March 3, 1891, a claimant may recover the value of his property taken from him by the Indians, but cannot recover consequential damages to other property resulting from the taking.
2. The jurisdiction of the court of claims cannot be enlarged by implication.
3. Consequential damages to property not taken or destroyed are not within the scope of the act authorizing recovery for damages to property taken or destroyed.
4. The terms "damaged or destroyed" in the act of March 3, 1885, respecting allowances by the Interior Department of claims for Indian depredations, do not apply to property not damaged or destroyed, but which the owner was prevented from sending to market because his means of transportation were destroyed.

[No. 247.]

Argued April 19, 1899. Decided May 15, 1899.

APPEAL from a judgment of the Court of Claims in favor of William M. Price, administrator, etc., against the United States *et al.* for the taking of certain property of the claimant by the Osage Indians. *Affirmed.*

See same case below, 33 Ct. Cl. 106.

Statement by Mr. Justice **Brewer:**

This case comes to us on appeal from the Court of Claims. The matter of dispute is disclosed by the second and fourth findings of the court, which are as follows:

Second. "On the 26th day of June, 1847, near the Arkansas river, on the route from western Missouri to Santa Fé, at a place in

what is now the state of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of said decedent, which at the time and place of taking [374] *were reasonably worth the sum of four hundred dollars ($400).

"At the time said oxen were taken they were being used by said decedent in the transportation of goods along the route aforesaid, and in consequence of such taking decedent was compelled to abandon the trip and to sell his portion of said goods and four (4) wagons belonging to him for the sum of one thousand two hundred dollars ($1,200).

"The goods and wagons of said decedent at the time of the depredation were reasonably worth the sum of seven thousand six hundred dollars ($7,600).

"Said property was taken as aforesaid without just cause or provocation on the part of the owner or his agent in charge and has not been returned or paid for."

Fourth. "A claim for the property so taken was presented to the Interior Department in June, 1872, and evidence was filed in support thereof."

Judgment in that court was entered for $400 (33 Ct. Cl. 106), to review which judgment the petitioner appealed.

Messrs. **John Goode** and *F. N. Judson*, for appellant:

The damages found by the Secretary of the Interior were the damages actually sustained by the plaintiff from the Indian depredation.

Price v. *United States*, 33 Ct. Cl. 106; *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *McAfee* v. *Crofford*, 13 How. 447, 14 L. ed. 217; Hale, Dam. p. 43; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256.

The term "consequential," as applied to these damages, is essentially misleading. They were in no sense remote.

1 Sedgw. Dam. (8th ed.) §§ 110, 124, 133; *Derry* v. *Flitner*, 118 Mass. 131; *Griffin* v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

The act of 1891 and the act of 1885 must be construed together, and the words "taken and destroyed," in the act of 1891, must be construed as the equivalent of "damaged or destroyed," in the act of 1885.

Valk v. *United States*, 28 Ct. Cl. 241, 29 Ct. Cl. 62; *Swope* v. *United States*, 33 Ct. Cl. 223; *Friend* v. *United States*, 29 Ct. Cl. 425; *Johnson* v. *United States*, 160 U. S. 550, 40 L. ed. 531.

The court of claims erred in holding that the act of March 3, 1891, limited the jurisdiction of the court in allowance of damages from the depredation to cases of total loss or annihilation.

Pumpelly v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504; *Story* v. *New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Re Chestnut Street*, 118 Pa. 593; *Spencer* v. *Point Pleasant & O. River R. Co.* 23 W. Va. 415; *Jones* v. *Erie & W. Valley R. Co.* 151 Pa. 46, 17 L. R. A. 758; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 456, 33 L. ed. 980, 3 Inters. Com. Rep. 209.

The purpose of the statute of 1891 was remedial, and the construction which the court of claims placed upon it in the case at bar defeats the primary purpose of the enactment.

United States v. *Northwestern Express Stage & Transp. Co.* 164 U. S. 686, 41 L. ed 599; *United States* v. *Gorham*, 165 U. S. 316, 41 L. ed. 729; *Corralitos Stock Co.* v. *United States*, 33 Ct. Cl. 342; *Salois* v. *United States*, 32 Ct. Cl. 68.

Messrs. **Frank B. Crosthwaite** and *John G. Thompson*, Assistant Attorney General, for appellees.

*Mr. Justice **Brewer** delivered the opinion of the court: [374]

The fourth finding simply shows that a claim was presented to the Interior Department and evidence filed in support thereof. The petition alleges, not merely the fact of the presentation of the claim and of the filing of evidence to sustain it, but also an award by the Secretary of the amount of $6,800, a sum covering both the value of the property taken by the Indians and the consequential damages resulting therefrom. A demurrer by the defendants having been overruled, a traverse was filed, denying all the allegations of the petition. *Taking the [375] pleadings with the findings we might justly assume that there had never been any award by the Secretary of the Interior, but only a presentation of a claim and evidence in support thereof; but we notice that the court of claims speaks of the award as though it was a fact found. We feel, therefore, constrained to consider the case on that basis.

The conclusions of the Secretary, both as to liability and amount, were placed before the court for consideration by the election of the defendants to reopen the case. This election opened the whole case. *Leighton* v. *United States*, 161 U. S. 291 [40: 703].

The liability of the defendants is not disputed. The single question presented is as to the amount which may be recovered. The value of the property taken was awarded, and the only question is whether the plaintiff was entitled, not merely to the value of that property, but also to the damages to other property which resulted as a consequence of the taking. The property which was not taken or destroyed, which remained in the possession of the plaintiff's intestate, which he could do with as he pleased, the title and possession of which were not disturbed, was, as the findings show, reasonably worth $7,600. Because out in the unoccupied territory in which the taking of the oxen took place there was no market, and because he had no means of transporting the property not taken to a convenient market, he was subject to the whim or caprice of a passing traveler, and sold it to him for $1,200. The loss thereby entailed upon him he claims to recover under the provisions of the statute of March 3, 1891. 26 U. S. Stat. at. L. chap. 538, p. 851.

The right of the plaintiff to recover is a

purely statutory right. The jurisdiction of the court of claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the government, or the Indian tribe whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The govern-
[376]ment *is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, *Schillinger* v. *United States* (155 U. S. 163, 166 [39: 108, 110]), in which this court said: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

Now the jurisdiction given by the act of 1891 to the court of claims is over "all claims for property of citizens of the United States taken or destroyed by Indians," etc. So far as any property was taken or destroyed by the Indians the judgment of the court of claims awards full compensation therefor, and no question is made as to the judgment in that respect. The single contention of the plaintiff is that because of the taking of certain property the value of other property not taken or destroyed was, under the conditions surrounding the petitioner and such property, diminished. This diminution in value did not arise because of any change in its quality or condition, but simply because the petitioner left in possession of that property was, in consequence of the taking away of the means of transportation, unable to carry it to a place where its full value could be realized. In other words, the damages which he thus claims do not consist in the value of property taken or destroyed, but are those which flow in consequence of the taking to property which is neither taken nor destroyed. In brief, he asks consequential damages. Now, as we have said, we are not at liberty to consider whether there may not be some equitable claim against the government or the Indians for such consequential damages. We are limited to the statutory description of the obligations which the government is willing to assume and which it has submitted to the court of claims for determination. We may not enter into the wide question of how far an individual taking or de-
[377]stroying property *belonging to another may be liable for all the damages which are consequential upon such injury or destruction. If Congress had seen fit to open the doors of the court to an inquiry into these matters doubtless many questions of difficulty might arise, but as it has only declared its willingness to subject the government to liability for property taken or destroyed we may not go beyond that and adjudge a liability not based upon the taking or destruction of property, but resulting from the destruction or taking of certain property to other property not taken or destroyed. Questions, such as arose in *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166 [20: 557], as to the scope of constitutional limitations upon the right to take property without full compensation, are not pertinent to the present inquiry; for, while if the court had free hand and could adjudge a liability upon the government commensurate to the wrong done, one conclusion might follow therefrom, yet we are limited by the other fact that the liability of the government to suit is a matter resting in its discretion, and cannot be enlarged beyond the terms of the act permitting it. Consequential damages to property not taken or destroyed are not within the scope of the act authorizing recovery for damages to property taken or destroyed.

We have thus far considered the case as though it were one *de novo* and in no way affected by prior proceedings in the Interior Department. As heretofore indicated, notwithstanding the limited scope of the findings, we think we ought, in view of the opinion of the Court of Claims, to consider the case in the attitude of one for which an award had been made by the Secretary of the Interior; that award including, not merely damages for the property taken and destroyed, but also what, as we have shown, were merely consequential damages. Here we are met by the contention of the plaintiff that larger jurisdiction is given to the court of claims in respect to matters thus determined by the Secretary of the Interior. Beyond the general jurisdiction given to the extent heretofore indicated by the quotation from the statute is this, expressed in the subsequent part of the same section:

"Second. Such jurisdiction shall also extend to all cases *which have been examined [378]
and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

It is contended that in cases coming under this clause the court of claims may award all damages which the Secretary of the Interior has or might have given to the petitioner. Conceding, for the purpose of the argument, that this contention is justified, we cannot see that therefrom any new measure of liability is established, or, at least, none that will avail this petitioner. The act of March 3, 1885 (23 U. S. Stat. at

L. chap. 341, page 376), which provided for the investigation by the Interior Department of claims on account of Indian depredations, and under which it is alleged that the Secretary acted in making his award, authorized the Secretary "to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid." The contention is that the terms "damaged or destroyed" enlarge the scope of the liability assumed by the government. We are unable to perceive that this is of any significance in this case. The property left in the possession of the petitioner was neither damaged nor destroyed by the action of the Indians in taking away the other property. Its inherent intrinsic value was in no manner disturbed. The damages were not to the property, considered as property, but simply consequential from the wrong done, and consisted solely in the fact that the petitioner, wronged by the taking away of certain property, was unable to realize the real value of property not taken, damaged, or destroyed. Nothing was done by the Indians to disturb the intrinsic value of the property left in possession of the petitioner. It remained his with full right of control and disposition, in no
[379] manner *marred or changed in value, and the sum of the injury results only from the fact that he could not remove it to a suitable market. The property, in itself considered, was neither taken, damaged, nor destroyed. The only result was that his ability to make use of that value was taken away because his means of transportation were destroyed. The damages were, therefore, consequential, and not to the property itself. We do not perceive how, under the statute, the liability of the government was enlarged by this fact.

The judgment of the Court of Claims is therefore affirmed.

Mr. Justice **White,** Mr. Justice **Peckham,** and Mr. Justice **McKenna** dissented.

NORTHERN PACIFIC RAILROAD COMPANY, *et al.*, *Plffs. in Err.*,
v.
SERETTE O. FREEMAN *et al.*

(See S. C. Reporter's ed. 379-384.)

Contributory negligence.

Where a person approached a railway crossing well known to him, when a coming train was in full view, and he could have seen it while 40 feet distant from the track if he had used his senses, but did not look, or took the chance of crossing the track before the train reached him, and was killed, he was guilty of contributory negligence.

[No. 241.]

Argued and Submitted April 13, 1899. Decided May 15, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Washington in favor of Serette O. Freeman *et al.*, widow and minor children of Thomas A. Freeman, against the Northern Pacific Railway Company for damages for the death of said Thomas A. Freeman caused by the negligence of said railway company. *Reversed* and cause remanded, with directions to grant a new trial.

See same case below, 48 U. S. App. 757, 83 Fed. Rep. 82, 27 C. C. A. 457.

Statement by Mr. Justice **Brown:**

*This was an action by the widow and mi- [380]
nor children of Thomas A. Freeman, originally brought in the circuit court for the District of Washington against the receiver of the Northern Pacific Railroad Company, and subsequently, after the discharge of the receiver, continued against the Northern Pacific Railway Company, purchaser at the foreclosure sale, which, by virtue of the provisions of the decree of sale, had assumed the liabilities of the receiver. The object of the action was to recover damages on account of the death of Thomas A. Freeman, which was alleged to have occurred by reason of the negligence of the company.

The accident occurred at a highway crossing near the eastern corporate limits of the town of Elma, in the county of Chehalis, in the state of Washington, at a point where the highway crosses the railway track nearly at right angles.

Upon the trial, counsel for the railway company asked the court to instruct the jury to return a verdict for the defendant, upon the ground that the undisputed testimony showed that the deceased, as he approached the railway crossing, did not look up or down the track, and did not see the train which was approaching in full view, and therefore was guilty of such contributory negligence as to preclude the plaintiffs from recovering damages. This the court refused, but left the case to the jury under the following instruction, to which exception was taken: "Where a party cannot see the approach of a train on account of intervening objects, he may rely upon his ears, and whether he should have stopped and listened under the circumstances is for you; and if you believe from the evidence that deceased, Thomas A. Freeman, acted as a man of ordinary care and prudence would have done as he approached the crossing, then your verdict should be for the plaintiffs, in case you find that the defendants were negligent and that the collision was due to their negligence."

Counsel further excepted to the following instruction: "There has been some testimony tending to show that the deceased might have seen the approaching train some feet before he reached the track. If you believe that the deceased could have seen the approaching train when he was within a few *feet of the track, then it is for you to say, under all the circumstances, whether he used reasonable precaution and care to avoid the collision."

Exception was also taken to an instruc-

tion to the jury upon the subject of damages, which does not become material here.

Plaintiffs recovered a verdict, upon which judgment was entered for $9,000. The judgment was affirmed on writ of error by the circuit court of appeals for the ninth circuit, one judge dissenting. 48 U. S. App. 757.

Mr. **C. W. Bunn,** for plaintiff in error:

The facts conclusively proved here are that the deceased did not look and did not see the train until just as the collision occurred.

Chicago, R. I. & P. R. Co. v. *Houston,* 95 U. S. 697, 24 L. ed. 542; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Texas & P. R. Co.* v. *Gentry,* 163 U. S. 353, 41 L. ed. 186; *Cleveland, C. C. & I. R. Co.* v. *Elliott,* 28 Ohio St. 340; *Pennsylvania R. Co.* v. *Beale,* 73 Pa. 504, 13 Am. Rep. 753; *Schaefert* v. *Chicago, M. & St. P. R. Co.* 62 Iowa, 624.

Under the circumstances, ordinary care required that he should have stopped and looked and listened at some place, since there was nothing to prevent his doing so and nothing to distract his attention.

Brown v. *Milwaukee & St. P. R. Co.* 22 Minn. 165; *Abbett* v. *Chicago, M. & St. P. R. Co.* 30 Minn. 482; *Mantel* v. *Chicago, M. & St. P. R. Co.* 33 Minn. 62; *Haas* v. *Grand Rapids & I. R. Co.* 47 Mich. 401; *Brady* v. *Toledo, A. A. & N. M. R. Co.* 81 Mich. 616; *Nelson* v. *Duluth S. S. & A. R. Co.* 88 Wis. 392; *Moore* v. *Keokuk & W. R. Co.* 89 Iowa, 223; *Salter* v. *Utica & B. River R. Co.* 75 N. Y. 273; *Cincinnati, H. & I. R. Co.* v. *Duncan,* 143 Ind. 524; *Philadelphia, W. & B. R. Co.* v. *Hogeland,* 66 Md. 149, 59 Am. Rep. 159; *Tully* v. *Fitchburg R. Co.* 134 Mass. 499; *Butterfield* v. *Western R. Corp.* 10 Allen, 532, 87 Am. Dec. 678; *Tolman* v. *Syracuse, B. & N. Y. R. Co.* 98 N. Y. 198, 50 Am. Rep. 649; *Powell* v. *New York C. & H. R. R. Co.* 109 N. Y. 613.

Messrs. **Stanton Warburton,** *J. B. Bridges, O. V. Linn, Sidney Moor Heath,* and *Hudson & Holt,* for defendant in error:

There was sufficient evidence for the court to submit the case to the jury.

Chesapeake & O. R. Co. v. *Steele,* 54 U. S. App. 550, 84 Fed. Rep. 93, 29 C. C. A. 81; *Mount Adams & E. P. Inclined R. Co.* v. *Lowry,* 43 U. S. App. 408, 74 Fed. Rep. 463, 20 C. C. A. 596; *Travelers' Ins. Co.* v. *Mitchell,* 47 U. S. App. 260, 78 Fed. Rep. 754, 24 C. C. App. 305; *Dublin, W. & W. R. Co.* v. *Slattery,* L. R. 3 App. Cas. 1155.

Contributory negligence cannot avail the defendant unless shown by a preponderance of the evidence.

Washington & G. R. Co. v. *Gladmon,* 15 Wall. 401, 21 L. ed. 114; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Inland & S. Coasting Co.* v. *Tolson,* 139 U. S. 551, 35 L. ed. 270; *Texas & P. R. Co.* v. *Volk,* 151 U. S. 73, 38 L. ed. 78; *Texas & P. R. Co.* v. *Gentry,* 163 U. S. 353, 41 L. ed. 186; *Indianapolis & St. L. R. Co.* v. *Horst,* 93 U. S. 298, 23 L. ed. 900.

As a general rule the question of contributory negligence is one for the jury.

Washington & G. R. Co. v. *McDade,* 135 U. S. 571, 34 L. ed. 241; *Texas & P. R. Co.* v. *Cody,* 166 U. S. 606, 41 L. ed. 1132.

Contributory negligence of the party injured would not prevent him from recovering if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence.

Inland & S. Coasting Co. v. *Tolson,* 139 U. S. 551, 35 L. ed. 270; *Washington & G. R. Co.* v. *McDade,* 135 U. S. 554, 34 L. ed. 235; *Grand Trunk R. Co.* v. *Ives,* 144 U. S. 429, 36 L. ed. 493; *Delaware, L. & W. R. Co.* v. *Converse,* 139 U. S. 469, 35 L. ed. 213.

The question of negligence on the part of defendant was one of fact for the jury to determine. So also the question of whether there was negligence in the deceased which was the proximate cause of the injury was such a question for the jury.

Cincinnati, N. O. & T. P. R. Co. v. *Farra,* 31 U. S. App. 306, 66 Fed. Rep. 496, 13 C. C. A. 602; *Chicago & N. W. R. Co.* v. *Tripkosh,* 32 U. S. App. 168, 406, 67 Fed. Rep. 665, 14 C. C. A. 615; *Lynch* v. *Northern P. R. Co.* 29 U. S. App. 664, 69 Fed. Rep. 86, 16 C. C. A. 151; *Texas & P. R. Co.* v. *Spradling,* 30 U. S. App. 698, 72 Fed. Rep. 152, 18 C. C. A. 496; *Northern C. R. Co.* v. *Herchiskel,* 38 U. S. App. 659, 74 Fed. Rep. 460, 20 C. C. A. 593; *Cobleigh* v. *Grand Trunk R. Co.* 75 Fed. Rep. 247; *St. Louis & S. F. R. Co.* v. *Barker,* 40 U. S. App. 739, 77 Fed. Rep. 810, 23 C. C. A. 475; *Baltimore & O. R. Co.* v. *Griffith,* 159 U. S. 603, 40 L. ed. 274.

The question presented in this case is whether plaintiff looked and listened within a reasonable distance of the crossing. What is a reasonable distance is a question to be determined with regard to all the circumstances of this particular case, and is not a matter of legal judgment, but one of practical experience.

Wood, Railroads, 1522, 1530, 1548; *Nosler* v. *Chicago, B. & Q. R. Co.* 73 Iowa, 268; *Lindeman* v. *New York C. & H. R. R. Co.* 42 Hun, 306; *Cleveland, C. & C. R. Co.* v. *Crawford,* 24 Ohio St. 631, 15 Am. Rep. 633; *Eagan* v. *Fitchburg R. Co.* 101 Mass. 315; *Lehigh Valley R. Co.* v. *Hall,* 61 Pa. 361; *Eilert* v. *Green Bay & M. R. Co.* 48 Wis. 606.

In the absence of positive evidence to the contrary it will be presumed that deceased did all that a prudent man would have done under the circumstances.

Texas & P. R. Co. v. *Gentry,* 163 U. S. 353, 41 L. ed. 186; *Schum* v. *Pennsylvania R. Co.* 107 Pa. 8, 52 Am. Rep. 468; *Cleveland, C. & C. R. Co.* v. *Crawford,* 24 Ohio St. 636, 15 Am. Rep. 633; *Continental Improv. Co.* v. *Stead,* 95 U. S. 161, 24 L. ed. 403.

*Mr. Justice **Brown** delivered the opinion of the court: [381]

There was testimony from several witnesses in the neighborhood tending to show that no whistle was blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer, and fireman that the whistle was blown. As the majority of plaintiffs' witnesses were so located that they would probably have heard the whistle if it had been blown, there was a conflict of testimony with

respect to defendant's negligence which was properly left to the jury.

The real question in the case was as to the contributory negligence of plaintiffs' intestate. For several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country, through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching, either from the north or the south, was cut off by the banks of the excavation on either side of the highway; but at
[382] a distance of about forty *feet before reaching the track the road emerged from the cut, and the view up the track for about 300 feet was unobstructed.

At the time of the accident, Freeman was driving along the highway, going eastward from the town of Elma in a farm wagon drawn by two horses at a slow trot. He was a man thirty years of age, with no defect of eyesight or hearing, and was familiar with the crossing, having frequently driven the same team over it. The horses were gentle and were accustomed to the cars.

The duty of a person approaching a railway crossing whether driving or on foot, to look and listen before crossing the track, is so elementary and has been affirmed so many times by this court, that a mere reference to the cases of *Chicago, R. I. & P. Railroad Company* v. *Houston*, 95 U. S. 697 [24: 542], and *Schofield* v. *Chicago M. & St. Paul Railway Co.* 114 U. S. 615 [29: 224], is a sufficient illustration of the general rule.

There were but three witnesses to the accident. Two of these were women who were walking down the highway, and approaching the crossing on the opposite side, facing the team. At the time the deceased was struck by the train, they were from 200 to 250 feet away. They testified that the horses were coming down at a slow trot, not faster than a brisk walk, and that their speeed was uniform up to the time of the accident; that the deceased looked straight before him, without turning his head either way; that the team did not swerve but trotted directly on to the crossing, and that the deceased made no motion to stop until just as the engine struck him. The other witness was a little girl, ten years of age, who was standing on the hill on the opposite side of the track, near the point where the descent of the highway into the cut began, and was consequently from 130 to 150 feet from the railway track. The deceased passed her and two other young children who were with her. She testified that as he passed his head was down, and he was looking at his horses; that "they went down aways, and then they run and flew back;" that they were going at a slow trot; that when Freeman saw the train he tried to
[383] pull the horses around, as *if he were trying to get out of the way, when the train struck them.

Another witness was driving behind the team, but he testified to nothing which bore upon the material question whether the deceased took any precaution before crossing the track.

So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked, nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the court has no right to assume, especially in face of all the oral testimony, that such precautions were taken. The comments of Mr. Justice Field in *Chicago, R. I. & P. Railroad Company* v. *Houston*, 95 U. S. 697, 702 [24: 542, 544], are pertinent in this connection: "Negligence of the company's employees in these particulars" (failure to whistle or ring the bell) "was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty *of cul- [384]
pable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track.

Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. The disposition we have made of this question renders it unnecessary to express an opinion upon the instruction as to damages.

The judgment of the court below must therefore be reversed, and the cause remanded to the Circuit Court for the District of Washington, with directions to grant a new trial.

The CHIEF JUSTICE and Mr. Justice **Harlan** dissented from the opinion of the court.

---

[385] UNITED STATES, *Appt.*,
v.
JOHN KRALL.

(See S. C. Reporter's ed. 385–391.)

Judgment, when not final.

A judgment of the circuit court of appeals in an action by the United States, adjudging that defendant had acquired a valid right to the waters of a non-navigable stream, wholly on the public domain, as against the plaintiff, subject to the appropriation thereof by a military reservation, and remanding the cause to a lower court for further proceedings, is not a final judgment for the purposes of an appeal to this court, as it leaves the actual rights of the parties to be settled by the lower court, where defendant alleges that more water was taken to the reservation than is required, and used for other purposes, and this question remains to be determined.

[No. 216.]

Argued and Submitted April 3, 1899. Decided May 15, 1899.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree of that court reversing a decree of the Circuit Court of the United States for the District of Idaho and decreeing that the defendant, John Krall, had acquired a valid water right as against the United States in a stream of water known as Cottonwood Creek, which was non-navigable; and remanding the cause to said Circuit Court for further proceedings. *Dismissed* for want of jurisdiction.

See same case below, 48 U. S. App. 351, 79 Fed. Rep. 241, 24 C. C. A. 543.

The facts are stated in the opinion.

Messrs. **Charles W. Russell** and *John K. Richards*, Solicitor General, for appellant.

Mr. **Edgar Wilson** for appellee.

*Mr. Justice **White** delivered the opinion of the court: [385]

The United States alleged in its bill substantially as follows:

That in July, 1864, in Boise county, territory of Idaho (now Ada county, state of Idaho), a tract of land was duly set aside as a military reservation for the establishment of a military post, and that the reservation was subsequently occupied as such post and so continued to be used by the government of the United States, for the purpose in question, up to the time when the bill was filed. It was alleged, moreover, that flowing across the reservation was a stream of water known as Cottonwood creek, which was non-navigable, but which afforded "an ample supply for the agricultural, domestic, and practical purposes of the officers and troops of said military post, and no more, and that said stream of water, together with all the uses and privileges aforesaid, belong to and are the property of plaintiffs; and that from the time of the occupancy and location of said post, to wit, the month of July, A. D. 1864, the waters of said stream have been continually used and appropriated, and now are used and appropriated, for all *agricultural, domestic, and [386] practical purposes by plaintiff, through its said officers and troops."

The bill then averred that at a point on said stream above the reservation the defendant, his agents, and employees "are now, and have been since June, 1894, actually engaged in wrongfully and unlawfully diverting the waters of said Cottonwood creek, and the whole thereof, from their natural course over and across the premises hereinbefore described. And the said defendant, his agents, and employees have, since said June, 1894, been and now are actually engaged in diverting and appropriating the waters of said stream, and the whole thereof, and preventing and obstructing the same from flowing in its natural channel across the said military reservation, and thereby rendering the said premises unfit for use and occupancy as a military post."

Averring the illegality of defendant's acts in diverting the water from the stream, and that all the water flowing in its natural course was essential for the purpose of the reservation, the bill asserted the title of the United States to all the water in the stream, and prayed that the defendant be enjoined from appropriating any portion thereof for his use "as aforesaid." In his answer the defendant denied that the water drawn off by him deprived the reservation of water necessary for any of its purposes and on the contrary charged that there was sufficient water in the stream to meet the demands, not only of the water right, which he asserted was vested in him, but also to supply every demand for water which the reservation might need. He alleged that pursuant to the laws of the territory of Idaho, in 1877, he had located a perpetual water right for five hundred cubic inches of water, at a point on the stream

above the place where it flowed through the reservation, and that this location of water right was sanctioned by the laws of the United States. It was besides averred that during the years 1894 and 1895 "one Peter Sonna, and his associates, whose names are unknown to this defendant, without defendant's consent, diverted a large amount of the waters of said stream from the head waters thereof and above the point on said stream where plaintiff alleges this defendant has ob-
[387] structed and diverted the *same, and led the same through pipes to a reservoir, on said military post, and that said military post, the officers and troops thereon stationed, have used the waters so stored in part, and have permitted large quantities thereof to pass across said reservation and to be used by the said Peter Sonna for mechanical and other purposes."

A stipulation was entered into between the parties containing an agreed statement of facts, which showed substantially this: That the reservation in question was established prior to the initiation by the defendant of his alleged water right; that "in 1877 the defendant located for agricultural, irrigation, and other and domestic and useful purposes, 500 inches of the waters flowing in Cottonwood creek, and diverted them upon the lands adjacent and in the vicinity of the easterly and southeasterly side of the military reservation, and has continuously used, and is now using, such waters, or portions thereof, for agricultural and irrigating purposes ever since that time upon such lands. His lands consist of a homestead of 160 acres, a desert entry of 160 acres, and his wife's desert of about 70 acres; he has expended between $8,000 and $10,000 in the construction of necessary ditches, flumes, reservoirs, laterals, and other improvements necessary for the reclamation of such lands, which were all desert in character, and of a class known as 'arid lands,' incapable of producing crops of fruit without the application of water. By means of the use of this water and the rights claimed under such location, he and his grantee have acquired title to said desert lands, and have been enabled to cultivate large annual crops of farm produce annually, and to propagate large orchards, which without the water they could not have done."

The statement, moreover, indicated the mode in which the reservation drew its supply of water from the stream, some of it being taken above the point where the defendant's water right was located, and contained the following:

"On or about the year 1894 one Peter Sonna and his associates, without the consent of the defendant, went upon the head waters of said 'Five-Mile Gulch,' one of the main tributaries of Cottonwood Gulch, and
[388] at sundry points gathered and *appropriated the waters of large and flowing springs there situated, and which are supply springs of said 'Five-Mile Gulch,' and the stream there situated, and about four miles above the point of the defendant's diversion, and conveyed the waters of said springs by means of pipes and mains, the latter being commonly known as '2-inch pipe,' down the mountains to the reservoir before mentioned as located above the officers' quarters on the reservation. The reservoir has a capacity of about 570,000 gallons. The waters so gathered and conducted were and now are stored in said reservoir, and distributed therefrom from time to time as hereafter shown. A portion of the waters from the springs, if not diverted, would eventually flow into Cottonwood creek above defendant's point of diversion.

"The waters stored in the Sonna reservoir aforesaid are used for fire purposes only on the reservation, and, are also conveyed through mains about three-quarters mile into Boisé City, where they are used in the running of a passenger elevator in one of the largest office buildings of the city, for drinking and closet purposes therein and for domestic [uses] in several city residences, and, in case of danger, for fire purposes, through hydrants located along the line of said main."

The lower court concluded that, as the stream was not navigable and was wholly on the public domain, the defendant had no right to appropriate any of the waters as against the United States, and therefore enjoined the taking by him of any water from the stream above the reservation except to the extent that license to do so might be given by the commandant of the post.

The circuit court of appeals, to which the cause was taken, referring to *Atchison* v. *Peterson*, 20 Wall. 507, 512 [22: 414, 416]; *Basey* v. *Gallagher*, 20 Wall. 682 [22: 454]; *Broder* v. *The Natoma Water & Min. Company*, 101 U. S. 274 [25: 790]; and *Sturr* v. *Beck*, 133 U. S. 541 [33: 761], concluded that the defendant had acquired a valid water right, even as against the United States, and therefore reversed the judgment of the trial court, and remanded the cause to that court for further proceedings in accordance with the views expresed in its opinion. The opinion of the court, after stating the right of *the defendant to acquire a water privi- [389]
lege, on public lands of the United States, even as against the United States, declared as follows:

"His [the defendant's] appropriation was, of course, subject to the prior appropriation and use of the waters of the stream made by the government officials for the purpose of the military post reservation, which consisted of 640 acres of land, and was located on the stream in question below the point of the appellant's diversion."

It is charged in the assignment of errors that the decision of the court of appeals was erroneous, first, because it recognized the right of the defendant to acquire a water right as against the United States; and, second, because it held that the water right of the defendant, which originated after the establishment of the reservation, could deprive the reservation of water necessary for its purposes. This is asserted to be the consequence of the decree, because it is argued it may be construed as depriving the government of the right to use but a quantity of water which had been previously actually ap-

propriated for the use of the reservation, thus preventing it from enjoying the water essential for the purposes of the post, and rendered necessary by its expansion and development. To the first question the argument at bar was principally addressed.

Before considering the assignments, however, we are met on the threshold of the case with the question whether the record is properly here, because of the want of finality of the judgment rendered by the circuit court of appeals. On its face the decree of that court is obviously not a final judgment, since it did not dispose definitely of the issues presented, but simply determined one of the legal questions arising on the record, and remanded the case to the lower court for further proceedings. When the state of the record, upon which the state of appeals passed, is considered in the light of the pleadings and agreed statement of facts, it becomes obvious that the decree by that court rendered was not only not in form, but also was not in substance, a final disposition of the controversy. The cause of action al-
[390]leged in the complaint was the *diversion of water by the defendant from the stream, to the detriment of the requirements of the reservation, by a water right acquired by the defendant after the establishment of the reservation. The agreed statement of facts, although it made it unquestioned that the defendant's asserted water right had been located on the stream above the reservation, after its establishment, also made it equally clear that after such location, above the point where the defendant's water right was fixed, water had been drawn off and carried to the reservation, and there retained in a reservoir and supplied in part, at least, to Boisé City for purposes wholly foreign to the military post. There was nothing whatever in the agreed statements of facts by which it could be determined whether the amount of water thus drawn and carried to the post and used for purposes foreign to its wants would, if used for the purposes of the post alone, not have been entirely adequate to supply every present or potential need. Concluding on the general question of law that the defendant could acquire a water right, as against the United States, subject to the paramount and previous appropriation of the reservation, the court manifestly, from the state of the record, was not in a position to adjudge the rights of the parties without further proof as to exactly what would be the situation if water had not, subsequent to the establishment of the water right of the defendant, been taken from the sources of supply above his location and carried to the reservation and there distributed for other than reservation purposes. This condition of things rendered it therefore essential to remand the cause in order that the exact situation might be ascertained before the rights of the parties were finally passed upon. The fact that the decree appealed from was not final is moreover conclusively demonstrated by considering that if on the present appeal we should conclude that the judgment of the court of appeals was correct, we would be unable to dispose of the controversy, and we would be obliged, as did the court of appeals, to remand the case to the trial court for further proceedings. The gravamen of the complaint was that the alleged water right of the defendant had deprived the reservation of water required for its purposes. *Certain- [391]
ly if on a further trial the proof should establish that the deficiency of supply at the reservation arose, not from the drawing off by the defendant of water covered by his water right, but from the act of those who, subsequent to the location of the defendant's asserted water right, tapped the sources of the supply of the stream and carried the water to the reservation, whence it was distributed to Boisé City, a very different condition of fact from that stated in the complaint would be presented. It follows, from these conclusions, that the judgment below was not final, and the appeal taken therefrom must be, and it is, *dismissed* for want of jurisdiction.

GEORGE M. ISRAEL, *Plff. in Err.*,
v.
CHARLES F. GALE, as Receiver of the Elmira National Bank.

(See S. C. Reporter's ed. 391-397.)

Diversion of an accommodation note from its proper use—consideration for its discount.

1. An accommodation note is not shown to have been diverted from the use for which it was given, by discounting it at a bank at which it was made payable, merely because the person who obtained it told the maker that he wanted it for the purpose of a building he was putting up.
2. A bank which discounts an accommodation note cannot be said to have given no consideration for it because of a large overdraft of the account of the person from whom it was taken, when the overdraft was the same day substantially covered by other credits and more than the amount of the accommodation note was subsequently paid out on the same account.

[No. 265.]

Argued April 25, 26, 1899. Decided May 15, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Southern District of New York in favor of the plaintiff, Charles F. Gale, as receiver of the Elmira National Bank, against the defendant, George M. Israel, for the amount of a promissory note. *Affirmed.*

See same case below, 45 U. S. App. 219, 77 Fed. Rep. 532, 23 C. C. A. 274.

The facts are stated in the opinion.

Mr. **Frank Sullivan Smith**, for plaintiff in error:

Robinson's transaction with the bank did not bind the maker of the note.

The note in suit was without consideration and never had a legal inception.

Daniel, Neg. Inst. § 174; *Wilson* v. *Ells-*

worth, 25 Neb. 246; *Eastman* v. *Shaw,* 65 N. Y. 522; *Arden* v. *Watkins,* 3 East, 317; *Willis* v. *Freeman,* 12 East, 656; *Second Nat. Bank* v. *Howe,* 40 Minn. 390; *Spear* v. *Myers,* 6 Barb. 445; *White* v. *Springfield Bank,* 1 Barb. 225; *Stewart* v. *Small,* 2 Barb. 559; *Youngs* v. *Lee,* 18 Barb. 187; *Phœnix Ins. Co.* v. *Church,* 81 N. Y. 225, 37 Am. Rep. 494; *Atlantic Nat. Bank* v. *Franklin,* 55 N. Y. 235.

The question of the bona fides of the bank was for the jury.

Canajoharie Nat. Bank v. *Diefendorf,* 123 N. Y. 191, 10 L. R. A. 676; *Vosburgh* v. *Diefendorf,* 119 N. Y. 357; *Kavanagh* v. *Wilson,* 70 N. Y. 177; *Joy* v. *Diefendorf,* 130 N. Y. 6; *Farmers' & C. Nat. Bank* v. *Noxon,* 45 N. Y. 762.

The note having been obtained through fraud and without consideration, the *onus* was upon the holder of showing that the bank acquired the same in good faith.

American Exch. Nat. Bank v. *New York Belting & Pkg. Co.* 148 N. Y. 698; *Grant* v. *Walsh,* 145 N. Y. 502; *Nickerson* v. *Ruger,* 76 N. Y. 282; *Ocean Nat. Bank* v. *Carll,* 55 N. Y. 441; *First Nat. Bank* v. *Green,* 43 N. Y. 298.

Whether the notice of fraud to the bank, through its cashier, was actual or constructive, it is equally antagonistic to the claim of good faith.

Angle v. *North Western Mut. L. Ins. Co.* 92 U. S. 342, 23 L. ed. 560; *Witter* v. *Sowles,* 32 Fed. Rep. 762; *Loring* v. *Brodie,* 134 Mass. 453; *People's Nat. Bank* v. *Clayton,* 66 Vt. 541; *Palmer* v. *Field,* 76 Hun, 230; *Garfield Nat. Bank* v. *Colwell,* 57 Hun, 169; *Produce Bank* v. *Bache,* 30 Hun, 351; *Re Carew,* 31 Beav. 39.

The bank is chargeable with knowledge of its cashier.

First Nat. Bank v. *Blake,* 60 Fed. Rep. 78; *Third Nat. Bank* v. *Harrison,* 10 Fed. Rep. 243; *Merchants' Nat. Bank* v. *Tracy,* 77 Hun, 443.

Messrs. **Martin Carey** and *Wilson S. Bissell* for defendant in error.

[391] *Mr. Justice **White** delivered the opinion of the court:

The receiver of the Elmira National Bank, duly appointed by the Comptroller of the Currency, sued George M. Israel, the plaintiff in error, on a promissory note for $17,000, dated New York, May 14, 1893, due on demand, and drawn by Israel to the order of the Elmira National Bank, and payable at that bank. The defenses to the action were in substance these:

First. That the note had been placed by
[392] Israel, the maker, *in the hands of David C. Robinson, without any consideration, for a particular purpose, and that if it had been discounted by Robinson at the Elmira National Bank such action on his part constituted a diversion from the purposes for which the note had been drawn and delivered; that from the form of the note (its being made payable to the bank), from the official connection of Robinson with the bank, he being one of its directors, and his personal relations with the cashier of the bank, as well as from many other circumstances which it is unnecessary to detail, the bank was charged with such notice as to the diversion of the note by Robinson as prevented the bank from being protected as an innocent third holder for value.

Second. Even if the discount of the note was not a diversion thereof from the purpose contemplated by the drawer, the bank was nevertheless subject to the equity arising from the want of consideration between Israel the drawer and Robinson, because, although the note may have been in form discounted by the bank, it had in reality only been taken by the bank for an antecedent debt due it by Robinson. And from this it is asserted that as the bank had not parted, on the faith of the note, with any actual consideration, it was not a holder for value, and was subject to the equitable defenses existing between the original persons.

At the trial the plaintiff offered in evidence the note, the signature and the discount thereof being in effect admitted, and then rested its case. The defendant thereupon offered testimony which it was deemed tended to sustain his defenses. At the close of the testimony the court, over the defendant's exception, instructed a verdict in favor of the plaintiff. On error to the court of appeals this action of the trial court was affirmed.

Both the assignments of error and the argument at bar but reiterate and expand in divers forms the defenses above stated and which it is asserted were supported by evidence competent to go to the jury, if the trial court had not prevented its consideration by the peremptory instruction which it gave.

The bill of exceptions contains the testimony offered at the trial, and the sole question which arises is, Did the court *rightly [393]
instruct a verdict for the plaintiff? From the evidence it undoubtedly resulted that the note was delivered by the maker to D. C. Robinson, by whom it was discounted at the Elmira National Bank. It also established that Robinson at the time of the discount was a director of the bank, had large and frequent dealings with it, that he bore close business and personal relations with the cashier, and occupied a position of confidence with the other officers and directors of the bank. The occasion for the giving of the note and the circumstances attending the same are thus shown by the testimony of the defendant:

"I reside in Brooklyn. I am forty-two years of age. I am at present engaged in the insurance business. In the months of April and May, 1893, I was employed in the banking house of I. B. Newcomb & Co., in Wall street, New York, as a stenographer and typewriter. I was not then and am not now a man of property. I know D. C. Robinson. At the time I made this note I did not receive any valuable thing or other consideration for the making of it; I have never received any consideration for the making of the note. I had a conversation with D. C. Robinson at the time of the making of the note. He stated to me the object or purpose for which he desired the note. He said to

me that he desired some accommodation notes, and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation note was that he had exceeded his line of discount and could not get any more accommodation; that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and that it we would give him these notes it would enable him to accomplish that. He also added that we would not be put in any position of paying them at any time; that he would take care of them, and gave us positive assurance on that point, and naturally, knowing the man, and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes."

There was no testimony tending to refute these statements or in any way calculated to enlarge or to restrict them.

[394] *The defense, then, amounts to this: That the form of the paper and Robinson's relation with the bank and its officers were such as to bring home to the bank the knowledge of the transaction from which the note arose, and that such knowledge prevents a recovery because Robinson, taking the transaction to be exactly as testified to by the defendant, was without authority to discount the note. Granting, *arguendo*, that the testimony tended to show such a condition of fact as to bring home to the bank a knowledge of the transaction, the contention rests upon a fallacy, since it assumes that the note was not given to Robinson to be discounted, and that his so using it amounted to a diversion from the purpose for which it was delivered to him. But this is in plain conflict with the avowed object for which the defendant testified the note was drawn and delivered, since he swore that he furnished the note because he was told by Robinson that he needed accommodation, that his line of discount on his own paper had been exceeded, and that if he could get the paper of the defendant he would overcome this obstacle; in other words, that he would be able successfully to discount the paper of another person when he could not further discount his own. This obvious import of the testimony is fortified, if not conclusively proved, by the form of the note itself, which, instead of being made to the order of Robinson, was to the order of the Elmira National Bank. The premise, then, upon which it is argued that there was proof tending to show that the discount of the note by Robinson at the Elmira National Bank was a diversion, is without foundation in fact. The only matters relied on to sustain the proposition that there was testimony tending to establish that the note was diverted, because it was discounted at the bank to whose order it was payable, are unwarranted inferences drawn from a portion of the conversation, above quoted, which the defendant states he had with Robinson when the note was drawn and delivered. The part of the conversation thus relied upon is the statement that Robinson said, when the note was given, "that he was building a power house up there (in Elmira) and needed some money to accomplish that purpose, and if we would give him these notes it *would [395] enable him to accomplish that." This, it is said, tended to show that the agreement on which the note was given was not that it should be discounted at the Elmira National Bank, but that it should be used by Robinson for obtaining money to build the power house. In other words, the assertion is that the mere statement, by Robinson, of the causes which rendered it necessary for him to obtain a note to be discounted at the Elmira National Bank had the effect of destroying the very purpose for which the note was confessedly given. When the real result of the contention is apprehended its unsoundness is at once demonstrated. Other portions of the record have been referred to, in argument, as tending to show that it could not have been the intention of the defendant, in giving the note, that Robinson should discount it, but on examining the matters thus relied upon we find they have no tendency whatever to contradict or change the plain result of the transaction as shown by the defendant's own testimony.

As the discount of the note at the Elmira National Bank was not a diversion, but on the contrary was a mere fulfilment of the avowed object for which the note was asked and to consummate which it was delivered, it becomes irrelevant to consider the various circumstances which it is asserted tended to impute knowledge to the bank of the purpose for which the note was made and delivered. If the agreement authorized the discount of the note, it is impossible to conceive that knowledge of the agreement could have caused the discount to be a diversion, and that the mere knowledge that paper has been drawn for accommodation does not prevent one who has taken it for value from recovering thereon is too elementary to require citation of authority.

The contention that although it be conceded the note was not diverted by its discount, nevertheless the bank could not recover thereon because it took the note for an antecedent debt, hence without actual consideration, depends, first, upon a proposition of fact, that is, that there was testimony tending to so show, and, second, upon the legal assumption that even if there was such testimony it was adequate as a legal defense. *The latter proposition it is wholly unneces- [396] sary to consider, because the first is unsupported by the record. All the testimony on the subject of the discount of the note was introduced by the defendant in his effort to make out his defense. It was shown, without contradiction, that the note had been discounted by Robinson at the bank, and that the proceeds were placed to his credit in account. It was also shown that for some time prior to the day of the discount his account with the bank, to the credit of which the proceeds of the discount were placed, was overdrawn. The exact state of the account on the day the discount was made was stated by the cashier and a bookkeeper of the bank, and was moreover referred to by Robinson. On the morning of the discount the debit to the account of Robinson, by way of overdraft, is fixed by the cashier at $35,400, and

by the bookkeeper at $35,000. Robinson made the following statement: "The amount of other notes wiped out the overdraft and made a balance." The bookkeeper's statement is as follows:

"There was an overdraft of $35,000 against Mr. Robinson upon the books of the bank on the morning of May the 4th. There were items coming through the exchanges that amounted to about $73,000, and there was a deposit made of $33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night for about $50,000 if it had not been for the entry on the books of the proceeds of these notes."

No other testimony tending to contradict these statements, made by the defendant's own witnesses, is contained in the record. They manifestly show that, although at the date of the discount there was a debit to the account resulting from an overdraft, nearly the sum of the overdraft was covered by items of credit, irrespective of the note in controversy, and that subsequent to the credit arising from the note more than the entire sum of the discount was paid out for the account of Robinson, to whose credit the proceeds had been placed. With these uncontradicted facts in mind, proved by the testimony offered by the defendant, and with
[397] no testimony tending *the other way, it is obviously unnecessary to go further and point out the unsoundness of the legal contention relied upon.

Affirmed.

JOHN W. McDONALD, as Receiver, *Appt.*,
v.
GEORGE G. WILLIAMS and John B. Dodd.

(See S. C. Reporter's ed. 397-408.)

When receiver of national bank cannot recover back from a stockholder a dividend paid him out of the capital—U. S. Rev. Stat. § 5204.

1. A receiver of a national bank cannot recover back from a stockholder a dividend paid him, not out of the profits, but entirely out of the capital, prior to the appointment of the receiver, when such stockholder receiving such dividends acted in good faith, believing the same to be paid out of the profits made by the bank, and when the bank, at the time such dividend was declared and paid, was solvent.
2. The stockholder by the mere reception of his proportionate part of such dividend, does not withdraw any of the capital of the bank within the meaning of U. S. Rev. Stat. § 5204.

[No. 257.]

Argued April 21, 1899. Decided May 15, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions to this court for instruction in an action brought by John W. McDonald, as receiver of the Capital National Bank, plaintiff, against George G. Williams and John B. Dodd, stockholders of the bank, to recover the amount of certain dividends received by them before the appointment of a receiver. *First question answered in the negative.*

Statement by Mr. Justice **Peckham:**

This suit was commenced in the circuit court of the United States for the southern district of New York. It was brought by the plaintiff, as receiver of the Capital National Bank of Lincoln, Nebraska, for the purpose of recovering from the defendants, who were stockholders in the bank, the amount of certain dividends received by them before the appointment of a receiver.

Upon the trial of the case the circuit court decreed in favor of the plaintiff for the recovery of a certain amount. The defendants appealed from the decree, because it was not in their favor, and the plaintiff appealed from it, because the recovery provided for in the decree was not as much as he claimed to be entitled to. Upon the argument of the appeal in the circuit court of appeals certain questions of law were presented as to which that court desired the instruction of this court for their proper decision.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stockholders, including *the defendants, having been assessed to [398]
the full amount of their respective holdings, but the money thus obtained, added to the amount realized from the assets, will not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver, to pay seventy-five per cent of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of $5,000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends and the amount thereof paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement, and it is added that all dividends, except the last (July 12, 1892), were paid to the defendant Williams, a stockholder to the amount of $5,000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams's stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions:

First question. Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the
[399] same to be paid out of *profits, and when the bank, at the time such dividend was declared and paid, was not insolvent?

Second question. Has a United States circuit court jurisdiction to entertain a bill in equity, brought by a receiver of a national bank against stockholders to recover dividends which, as claimed, were improperly paid when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?

Mr. **Edward Winslow Paige,** for appellant:

The capital of a national bank is a trust fund for the security of the creditors, and can be followed into the hands of any volunteer.

Story, Eq. Jur. § 1252; *Mumma* v. *Potomac Co.* 8 Pet. 286 (8: 947); *Wood* v. *Dummer*, 3 Mason, 308; *Vose* v. *Grant*, 15 Mass. 522; *Spear* v. *Grant*, 16 Mass. 14; *Curran* v. *Arkansas*, 15 How. 307 (14: 707); *Scammon* v. *Kimball*, 92 U. S. 362 (23: 483); *Sawyer* v. *Hoag*, 17 Wall. 610 (21: 731); *Barings* v. *Dabney*, 19 Wall. 1 (22: 90) *Finn* v. *Brown*, 142 U. S. 56 (35: 936); *Bartlett* v. *Drew*, 57 N. Y. 587; *Tinkham* v. *Borst*, 31 Barb. 407; 2 Kent, Com. 307; *Hollins* v. *Brierfield Coal and Iron Co.* 150 U. S. 371 (37: 1113); *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587 (29: 235); *Fogg* v. *Blair*, 133 U. S. 534 (33: 721); *Hawkins* v. *Glenn*, 131 U. S. 319 (33: 184).

The statutes of the United States make the payment of a dividend out of the capital of a national bank illegal and *ultra vires*.

U. S. Rev. Stat. § 5204; *California Bank* v. *Kennedy*, 167 U. S. 362 (42: 198); *Trevor* v. *Whitworth*, L. R. 12 App. Cas. 409; *Stringer's Case*, L. R. 4 Ch. 475; *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Co.* L. R. 1 Ch. Div. 682; *Guinness* v. *Land Corp. of Ireland*, L. R. 22 Ch. Div. 349; *Macdougall* v. *Jersey Imperial Hotel Co.* 2 Hem. & M. 528; *Re Alexandra Palace Co.* L. R. 21 Ch. Div. 149; *Gooch* v. *London Bkg. Asso.* L. R. 32 Ch. Div. 41; *Ooregum Gold Min. Co.* v. *Roper* [1892] A. C. 125; *Trevor* v. *Whitworth*, 12 App. Cas. 409.

Messrs. **Theodore De Witt** and *George G. De Witt* for appellees.

[399] *Mr. Justice **Peckham,** after stating the facts, delivered the opinion of the court:

It will be noticed that the first question is based upon the facts that the bank, at the time the dividends were declared and paid, was solvent, and that the stockholders receiving the dividends acted in good faith and believed that the same were paid out of the profits made by the bank.

The sections of the Revised Statutes which are applicable to the questions involved herein are set forth in the margin.†

*The complainant bases his right to recover [400]
in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion
*thereof, and having been paid in the way [401]
of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his rights to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.

In *Graham* v. *La Crosse & M. Railroad Company*, 102 U. S. 148, 161 [26: 106, 111],

†Sec. 5199. The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Sec. 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Sec. 5205. (As amended by section 4 of the act approved June 30, 1876, 19 Stat. at L. 63 [chap. 156]). Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such as-

it was said by Mr. Justice Bradley, in the course of his opinion, that "when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. And a court of equity, at the instance of the proper parties, will
[402]*then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

And in *Hollins* v. *Brierfield Coal & Iron Company*, 150 U. S. 371, 383 [37: 1113, 1116], it was stated by Mr. Justice Brewer, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows:

"In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of a trust, first for the creditors and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also:

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or, sometimes, even mere mismanagement in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and if there be any exceptions thereto they are not presented by any of the facts in this case. Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock *subscriptions, nor all [403]
together, gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Wabash, St. L. & P. Railway Company* v. *Ham*, 114 U. S. 587, 594 [29: 235, 238], Mr. Justice Gray, in delivering the opinion of the court, said:

"The property of a corporation is doubt-

---

sociation, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four: *And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

Sec. 5140. At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business: and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each, on the whole amount of the capital, as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

Sec. 5141. Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancelation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancelation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount vested in such shares. (The balance of this section is immaterial.)

less a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property.

The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complaint, however, that if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the assets of the corporation has sunk below the amount of its debts, although as yet unknown to anybody, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however,
[404] *the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank in paying could bestow no title in the money it paid to one who did not receive it bona fide and for value. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say that if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations, and with the latter as with the former the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be and it sometimes is quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and when that fact is established at that instant the trust arises. To prove the instant of creation may be almost impossible and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is even in such case may be somewhat difficult to accurately define, but it may be admitted in some form and to some extent to exist in a case of insolvency.

Hence, it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different *principles than in [405]
a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn in the form of a dividend any portion of the capital of the bank when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he in such case within the meaning of the statute withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is in effect the assertion by the board of directors that the dividend is made out of profits. Believing that the dividend is thus made, the shareholder in good faith receives his portion of it. Can it be said that in thus doing he withdraws or permits to be withdrawn any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate

part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the
[406] declaration. We think this language *implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that Congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to include the case of the passive receipt of a dividend by a shareholder in the bona fide belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof in addition to the amount invested therein. (These shareholders have already been assessed un-
[407] der *this section). And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses or *otherwise*, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the Comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204 to hold that in a case such as this a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn or permitted to be withdrawn any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal, but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered themselves liable to prosecution, but the liability of the shareholder is different in such a case, and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *First National Bank of Concord* v. *Hawkins, Receiver*, just decided [174 U. S. 364, *ante* 1007].

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it is to assert that it is payable out of the profits. As the statute has provided a remedy under section 5205 for the impairment of the capital, which includes the case of an impairment produced by the payment of a dividend, *we think the payment [408]
and receipt of a dividend under the circumstances detailed in the question certified do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative.

The second question relates to the jurisdiction of a court of equity over an action of this nature. It is evident that the question was propounded to meet the case of an affirmative answer to the first question.

In that event the second would require an answer. As we answer the first question in the negative, and the second question was scarcely touched upon in the argument, we think it unnecessary to answer it in order to enable the court below to proceed to judgment in the case. *The first question will be certified in the negative.*

[409]SAMUEL H. STONE, Auditor, *et al.*, *Appts.*,
v.
FARMERS' BANK OF KENTUCKY.

FARMERS' BANK OF KENTUCKY, *Appt.*,
v.
SAMUEL H. STONE, Auditor, *et al.*

(See S. C. Reporter's ed. 409-412.)

Res judicata as to taxes.

An adjudication that an irrevocable contract exists which precludes the enforcement of a tax law in conflict with the contract is *res judicata* as to an attempt to enforce such tax law in succeeding years against the parties to such an adjudication, but it is not *res judicata* as to those who were not parties thereto.

[Nos. 385, 386.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEALS from a decree of the Circuit Court of the United States for the District of Kentucky in a suit in equity brought by the Farmers' Bank of Kentucky against Samuel H. Stone, auditor of that state, and others constituting the state board of valuation and assessment, *et al.*, decreeing that a certain adjudication constituted *res judicata* as to the city of Frankfort, the county of Franklin, the city of Henderson, and the county of Henderson, preventing the collection of certain taxes, but did not constitute such *res judicata* as to the defendants the county of Scott and the city of Georgetown. Decree, so far as it granted relief against the defendants other than the county of Scott and the city of Georgetown, affirmed by a divided court; and so far as it adjudicated in favor of defendants the county of Scott and the city of Georgetown, affirmed.

See same case below, 88 Fed. Rep. 987.

Statement by Mr. Justice **White:**

These appeals were taken from a decree rendered in a suit in equity brought by The Farmers' Bank of Kentucky against Samuel H. Stone, Auditor, Charles Finley, Secretary of State, and G. W. Long, Treasurer of the Commonwealth of Kentucky, constituting a State Board of Valuation and Assessment; the Board of Councilmen of the City of Frankfort; the County of Franklin; the City of Henderson; the County of Henderson; the City of Georgetown; and the County of Scott. The object of the bill and of an amended and supplemental bill was to restrain the valuation of the franchise of the complainant under the provisions of a revenue act of Kentucky, enacted November 11, 1892, as also the certification of such valuation and the collection of taxes thereon for the years 1895, 1896, 1897, and 1898.

It was averred in the bill that the complainant was chartered on February 16, 1850, to endure until May 1, 1880; and that in and by the fifteenth section of the charter of complainant it was provided as follows:

"It shall be the duty of the cashier of the principal bank, *on the 1st day of July, 1851, [410]
and on the 1st day of July in each succeeding year during the continuance of this charter, to pay to the treasury of this commonwealth fifty (50) cents on each one hundred dollars of stock held and paid for in said bank, which shall be in full for all tax or bonus: *Provided,* That no tax shall be paid until said bank goes into operation: *And provided further,* That the tax or bonus hereby proposed to be imposed on each share of stock in this bank, or such as shall hereafter be imposed on each share, is hereby set apart and forever dedicated to the cause of education on the common school system; and that whenever the same, or any part thereof, shall be diverted otherwise by legislative enactment, said bank shall then be exonerated from the payment of any tax or bonus whatever."

It was further averred that on March 10, 1876, the charter of the bank was extended to May 1, 1905, by the following enactment:

"Sec. 1. That the charter of the Farmers' Bank of Kentucky as amended be extended for the period of twenty-five (25) years from the termination of its charter as therein fixed: *Provided,* That said charter and amendments shall be subject to amendment or repeal by the general assembly by general or special acts: *And provided further,* That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It was then averred that after the extension of the charter, in consequence of an attempt of the county of Franklin to collect a tax from the bank for county purposes, under the authority of an act of Kentucky passed in 1876, which statute, it was alleged by the bank, was in violation of the charter exemption of the bank, the complainant brought, and carried to a successful termination in 1888, in the court of appeals of Kentucky, a suit to enjoin the county named from collecting the taxes complained of. The judgment rendered was pleaded as *res judicata.*

The enactment, on May 17, 1886, of a law, commonly denominated as the Hewitt act, relating to the taxation of *banks, was next [411]
stated in the bill. An acceptance of the terms of that act was averred, which it was claimed constituted an irrevocable contract with the complainant. It was next alleged that on November 11, 1892, the legislature of Kentucky passed a revenue act which subjected banks in the state to county and municipal taxation, and to a much greater rate of taxation than was provided in the Hewitt act. Complainant then pleaded as *res judicata* judgments rendered in 1895 and 1896 in its favor by courts of the state of Kentucky, in suits brought by the bank to enjoin attempts to collect from it alleged franchise taxes under the supposed authority of the revenue act of 1892. The defendants, who were par-

ties to the suits in question, were averred to be the county of Franklin and the sheriff of that county; the board of councilmen of the city of Frankfort; the city of Henderson; and the county of Henderson and its sheriff. The several decrees, it was alleged, conclusively established that the acceptance of the Hewitt act constituted an irrevocable contract with the bank as respected taxation, and that the revenue act of 1892, in certain particulars, impaired such contract, and in so far as it did so was in violation of the Constitution of the United States and void.

Certain of the defendants filed pleas to the jurisdiction. All the defendants demurred to the bill, and some filed answers, to which plaintiff filed replications. The demurrers and pleas were overruled, and the cause was heard upon the pleadings and attached exhibits. On January 21, 1898, a final decree was entered sustaining the claims of *res judicata* made in the bill, and granting the relief prayed for so far as respected the assessment, certification, and collection of franchise taxes for the benefit of the defendants the board of councilmen of the city of Frankfort, the county of Franklin, the city of Henderson, and the county of Henderson. It was held that by the judgments relied upon by complainant it had been conclusively adjudicated as to those defendants that the Hewitt act constituted an irrepealable contract, and that the provisions of the revenue act of 1892 in conflict with that act impaired the terms of such contract, and were void. 88
[412] Fed. Rep. 987. *The decree adjudged that as to the defendants the county of Scott and the city of Georgetown, who were found not to have been either parties or privies to the records and decrees constituting *res judicata*, that no irrevocable contract had been established, by judgment or otherwise, and as to those defendants the bill was therefore dismissed. From the decree thus entered both parties appealed to this court.

Messrs. **Ira Julian**, *W. H. Julian*, *L. L. Bristow*, *J. C. B. Sebree*, *W. S. Taylor*, Attorney General of Kentucky, *T. H. Crockett*, and *James H. Polsgrove* for Samuel H. Stone, *et al.*

Messrs. **John W. Rodman** and *W. S. Prior* for Farmers' Bank of Kentucky.

[412] *Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court:

The decree below, so far as it granted the relief prayed as against the defendants other than the city of Georgetown and the county of Scott, is affirmed by a divided court. The decree, so far as it adjudicated against the complainant and in favor of the defendants the city of Georgetown and the county of Scott, those defendants not having been parties or privies to the judgments pleaded as *res judicata*, must be affirmed upon the authority of the decision in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro and A. M. C. Simmons, Tax Collector* [173 U. S. 636, *ante*, 840].

And it is so ordered.

SAMUEL H. STONE, Auditor, *et al.*, *Appts.*,
v.
BANK OF COMMERCE.

(See S. C. Reporter's ed. 412-428.)

Invalid agreement as to abiding the result of a test suit in relation to taxes—authority of city attorney—when estoppel does not arise from payment of taxes—omission to sue as ground for estoppel.

1. The agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the Bank of Commerce, that the rights of those institutions to certain limitations of taxation should abide the result of test suits to be brought, was beyond the power of such commissioners and attorney, and invalid; and the decree of the test suit brought in pursuance of such agreement is not *res judicata* as to those not actually parties to the record.
2. A city attorney whose duties by statute are to give legal advice to the city officers and boards, and to prosecute and defend suits for the city, has no power to bind the city by such an agreement.
3. The payment of the money for taxes to the commissioners of the sinking fund pursuant to such agreement, not exceeding the amount really legally due, although disputed, does not estop the city of Louisville from asserting the invalidity of such agreement or its legal rights, nor make the decree in such test case *res judicata* in favor of the bank.
4. The bank not having been legally damaged by the payment of the money due for taxes, there is no basis for an estoppel, and no equity for a decree relieving it from future taxation.
5. The omission to sue formed no ground for an estoppel, as it must be assumed that the bank knew the agreement to be invalid, there being no dispute as to the facts and no misrepresentations made.

[No. 362.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEAL from a judgment of the Circuit Court of the United States for the District of Kentucky decreeing that the Bank of Commerce, plaintiff in an action against Samuel H. Stone, auditor, *et al.*, is entitled to the benefit of the decision in the case of the *Louisville Banking Company* v. *Thompson*, under which its right to be taxed under the Hewitt law, and not otherwise, is *res judicata*, and its shares of stock exempt from all other taxation. *Reversed*, and case remanded, with instructions to dismiss the suit.

See same case below, 88 Fed. Rep. 398.

Statement by Mr. Justice **Peckham:**

*The bill in this case was filed in 1897 by [413]
the Bank of Commerce, a citizen and resident of the city of Louisville in the state of Kentucky, for the purpose of obtaining an injunction restraining the defendants from assessing the complainant and from collecting or attempting to collect any taxes based

upon the assessment spoken of in the bill, and for a final decree establishing the contract right of the complainant to be taxed in the method prescribed by the act of May 17, 1886, known as the Hewitt act, the terms of which it alleged it had accepted. The bill sought to perpetually enjoin the defendants from assessing the franchise or property of the complainant in any other manner than under that act. The material provisions of the Hewitt act are set out in the opinion of the court, delivered by Mr. Justice White, in the case of the *Citizens' Savings Bank of Owensboro, Plaintiff in Error, v. City of Owensboro,* 173 U. S. 636 [*ante,* 840].

In 1891 Kentucky adopted a new Constitution, section 174 of which, providing for the taxation of all property in proportion to its value, is also set forth in the above-cited case.

The legislature of the state in 1892 passed an act in relation to the taxation of banks and other corporations which was in conflict with the Hewitt act, and provided for
[414] taxing the*banks in a different manner from that act, and also subjected the banks to local taxation, the total being much more onerous than that enforced under the Hewitt act.

The complainant was incorporated under an act of the legislature of Kentucky approved February 10, 1865, and it had all the powers granted by that act and the several amendments thereof as alleged in its bill.

There were various other banks in the city of Louisville which also alleged that they had accepted the terms of the Hewitt act, and by reason thereof had a valid contract with the state that they should be taxed only under the provisions of that act.

The complainant alleges in its bill that early in the year 1894 a demand was made on the part of the defendant the city of Louisville, based upon the act of 1892 and the ordinance adopted in pursuance thereof, for the payment of a license tax equal to four per cent of its gross receipts into the sinking fund of the city. The banks denied their liability to pay any tax other than that provided in the Hewitt act, and hence arose the differences between the city and the banks.

No litigation had been commenced for the purpose of testing the questions at issue between the city and the banks, although negotiations looking to that end had been in progress between the city attorney of Louisville and the members of the sinking fund board, on the one hand, and the counsel for the various banks and trust companies on the other. There is set forth in the bill of the complainant the action of the sinking fund board as follows:

Sinking Fund Office, Feb'y 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund *from any **[415]**
embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the state for state taxes and the amount they would be required to pay for state taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations, agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and *will receive therefor the obliga- **[416]**
tions of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such procedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy. Attest:

J. M. Terry,
Secretary and Treasurer.

Following the above, the complainant's bill contains what is termed a "stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville," which stipulation reads as follows:

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

[417] *Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third National Bank, representing class C, and these banks respectively applied for a writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further *reliance upon said agreement all [418] said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation, until the question thus raised should be finally disposed of.

Humphrey & Davie,
Helm & Bruce,
For Banks, Trust and Title Companies of the City of Louisville.
H. S. Barker, City Att'y.
Approved: C. H. Gibson,
Pres't Com'rs Sinking Fund City of Lou.
A true copy. Attest: Huston Quinn.
Arthur Peter.
M. McLoughlin.

The Louisville Banking Company was one of the banks which brought an action for the purpose of testing the question of its liability to taxation. The charter of that company was granted subsequent to the year 1856, and, in that respect, it was like the defendant bank. It also claimed to have accepted the provisions of the Hewitt act. In the litigation which followed, the Louisville Banking Company was adjudged by the court of appeals of Kentucky to have an irrepealable contract throughout its charter existence to be taxed under the Hewitt act, and judgment pursuant to that adjudication was entered in favor of that company. The complainant herein claimed the benefit of the foregoing adjudication, and the circuit court allowed it, and gave judgment as follows:

"1. That the complainant is entitled to the benefit of the proceedings taken in the case of the *Louisville Banking Company* v. *R. H. Thompson, Judge, etc.*, in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the court of appeals of Kentucky, wherein the Louisville Banking Company was appellant and the said R. H. Thompson, judge, etc., and the city of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

*"2. That it is *res judicata* between the [419] complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law, and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Findley, and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11, 1892, or certifying the same to the city of Louisville upon

any rights, properties, or franchises, or shares of stock of the complainant, and that any provisions of the Constitution of the state of Kentucky and any provision of the said act of November 11, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than is allowed by the said Hewitt law, is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant."

The defendants appealed directly to this court from the judgment of the circuit court, under the provisions of section 5 of the act of 1891 (26 Stat. at L. 826), because the case involved the application of the Constitution of the United States, and because a law of the state of Kentucky was claimed to be in contravention of that Constitution.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellants.

Messrs. **James P. Helm** and *Helm Bruce* for appellees.

[419] *Mr. Justice **Peckham,** after stating the facts, delivered the opinion of the court:

We have already decided, in *Citizens' Savings Bank of Owensboro* v. *City of Owensboro*, 173 U. S. 636 [*ante*, 840], that in the case of a bank whose charter was granted
[420] subsequently to the *year 1856, and which had accepted the provisions of the Hewitt act, and had thereafter paid the tax specified therein, there was nevertheless no irrepealable contract in favor of such bank that it should be thereafter and during its corporate existence taxed under the provisions of that act. And in the same case we held that the bank was properly taxed under the act of the legislature of Kentucky passed in 1892. Unless the complainant is right in its contention that it is a privy to the judgment in the case of the Louisville Banking Company (mentioned in the foregoing statement), and that the question is *res judicata* in its favor, the complainant has failed to make good its claim to be exempted from the provisions for its taxation under the act of 1892. The circuit court has held that the complainant was entitled to be regarded as privy to the judgment above mentioned in favor of the Louisville Banking Company (88 Fed. Rep. 398), and that it could therefore avail itself of the judgment in that case as *res judicata*.

The sole question to be determined in this case is as to the validity and effect of the agreement above set forth. The complainant herein was not in fact a party to the judgment in the *Louisville Banking Company Case*, and it can only obtain the benefit of that judgment by virtue of the agreement.

The commissioners of the sinking fund form a separate and distinct corporation from the city of Louisville, and no right is shown to sign or make the agreement for itself or to bind the city thereby. The agreement is not signed by the mayor, nor is it pretended that there was any action on the part of the general council of the city authorizing the making of the agreement. It was signed by the city attorney, and if he had no power to sign on behalf of the city there is nothing to create any liability on its part by virtue of the agreement, unless the payment of the money therein spoken of operates by way of estoppel to prevent the city from setting up the invalidity of such agreement. The effect of the payment of the money will be adverted to hereafter.

Upon its face there is no agreement even formally made between the city of Louisville and the banks of which the complainant herein is one, unless the signature of the city *attorney makes a valid agreement for the [421]
city. When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted, and what suits commenced, for the purpose of establishing the rights of the various parties, as claimed by them. The question as to what course should be pursued was not one of law only. It was also one of policy. The stipulation actually entered into was of an administrative as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide, and concerning which he would have no power to make any agreement.

An attorney, in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit, or the giving of authority to commence one, there is nothing upon which the authority of an attorney to act for his client can be based. If before the commencement of any suit an attorney assumes to act for his principal it must be as agent and his actual authority must appear, and if it be not shown it cannot be inferred by comparison with what his authority to act would have been if a suit were actually pending and he had in fact been retained as attorney by one of the parties. The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal. This was directly decided in *Starr* v. *Hall*, 87 N. C. 381, and *Reed* v. *Reed*, 19 S. C. 548, so far as regards a personal defendant, but the same rule would follow in case of a corporation unless authority to appear were specially given.

*When an attorney has been retained he has [422]
certain implied powers to act for his client,

in a suit actually commenced, in the due and orderly conduct of the case through the courts. In cases of suits actually pending he may agree that one suit shall abide the event of another suit involving the same question, and his client will be bound by this agreement. *Ohlquest* v. *Farwell*, 71 Iowa, 231; *North Missouri R. Company* v. *Stephens*, 36 Mo. 150 [88 Am. Dec. 138]; *Eidam* v. *Finnegan*, 48 Minn. 53 [16 L. R. A. 507]; *Gilmore* v. *American C. Insurance Company*, 67 Cal. 366; 1 Lawson, Rights, Rem. & Pr. § 173, p. 292; 1 Thompson, Trials, § 195.

One case has gone to the extent of holding the attorney's authority to agree that the case of his client should abide that of another included his right to agree that the case should abide that of another involving the same question, although his client was not a party to that case and had no power to interfere in its prosecution or defense. *Scarritt Furniture Company* v. *Moser*, 48 Mo. App. 543, 548.

There might perhaps be some doubt about the correctness of a decision which so extended the power of the attorney. It would be carrying the authority of an attorney a good way to thus hold. It is not, however, in the least necessary for us to decide the question in this case.

All the above cases relate to the authority of the attorney after the actual commencement of suit and after the jurisdiction of the court has attached and the agreements made were in the discharge of the duties owing as between attorney and client, and subject to the supervision and power of the court itself.

Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of an attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that, and of a different nature. As we have said, the question to be determined was one of policy as well as of law; eminently one for the con-
[423]sideration of the city authorities, its *mayor, and its general council, aided and assisted by the advice of the attorney of the city. But it was a decision of a corporate nature, and not one to be decided by any but the corporation, and it was one which we think was beyond the power of an attorney to make while acting merely in his capacity as attorney before suit brought and without specific authority.

We are also of opinion that as city attorney he had no greater power to bind the city by that agreement than would an attorney have in the case of an individual. The power of an attorney to conduct an actually existing suit, and in its proper conduct to agree to certain modes or conditions of trial, cannot be enlarged by implication, so as to embrace a power on the part of an attorney, before litigation is existing and before he has been retained to conduct it, to enter into an agreement of the nature of this one. It might be convenient to have such power and the commencement of a suit and a retainer to defend may be a mere technicality, but the power of an attorney depends upon the authority given him to commence a suit or to defend a suit actually brought, and he has no power as an attorney until such fact exists.

Section 2909, Revised Statutes of Kentucky, provides that—

"There shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing, and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

We do not think this section gave him the power to bind the city by the agreement in question. He is undoubtedly the retained attorney of the city in every suit brought against it, and it would have been his duty to take charge of the litigation when it should arise between the banks and the commissioners of the sinking fund or the city of Louisville. That is, when the suit was commenced, the statute operated in place *of a [424]
retainer in case of a personal client. When suits were commenced against the city it was his duty to defend them, but he had no power to appear for the city as a defendant in a suit which had not been commenced or to accept service of process and waive its service upon the proper officer, without authority from that officer. Merely as city attorney, he had no larger powers to bind his clients before suit was commenced than he would have had in the case of an individual in like circumstances. There must be something in the statute providing for the election or appointment of an attorney for a corporation that would give such power; otherwise it does not exist. We find nothing of the kind in the statute cited. The supreme court of New York held, at special term, that the counsel to the corporation of the city of New York had no greater powers than an ordinary attorney to bind his client. *People* v. *Mayor, etc. of New York*, 11 Abb. Pr. 66.

The agreement here in question, it is perceived, is much more extensive than a mere agreement to abide the event of another suit, and it is quite plain that it embraces more than the attorney had the right to bind the city to, even if an action had then been commenced and the agreement was made in that action. However imperative may have been his duty to save costs and expenses to the city, he was not authorized on that account to enter into agreements of the nature of this one, where no suits had been commenced against the city and the commencement of which he had no power to provide for.

Nor do we see that the commissioners of the sinking fund were granted any power to make the stipulation in question; certainly none to bind the city of Louisville. Our attention has not been drawn to any statute

giving them power to make an agreement of this nature.

Parties dealing with a municipal corporation are bound to know the extent of the powers lawfully confided to the officers with whom they are dealing in behalf of such corporation, and they must guide their conduct accordingly. *Murphy* v. *City of Louisville*, 9 Bush, 189.

As a result, we think the stipulation was
[425]not a valid one, *binding either the commissioners of the sinking fund or the city of Louisville.

It is contended, however, on the part of complainant that the payment of the money to the commissioners of the sinking fund, pursuant to the provisions of the stipulation and its receipt by them estops the city of Louisville from asserting the invalidity of the stipulation. The claim of complainant on this branch of the case is in substance that it has the right under the agreement to the benefit of the judgment in favor of the Louisville Banking Company as *res judicata* in its favor, because the city, having received the money by virtue of the agreement, is estopped by that fact from insisting upon its invalidity.

The money was paid to the commissioners of the sinking fund and not to the city, which is a separate and distinct corporation. No corporate act on the part of the city is shown since the payment which recognizes or approves it. There is no ratification by the city of Louisville of this unauthorized act of its attorney. In speaking of the act of the attorney as unauthorized we do not mean to reflect in the slightest degree unfavorably upon the conduct of the city attorney, which seems by this record to have been prompted solely by a regard for the best interests of the city and by the most scrupulous good faith. We speak only of the act as one for which the law would not hold the city answerable.

But let us look for a moment at the position occupied by the respective parties and the facts which surround this alleged estoppel upon the city, and for this purpose the invalidity of the agreement is assumed. The banks of which complainant was one, at the time this agreement was entered into, conceded that they were liable to the payment of taxes under the Hewitt act, and denied that they were liable to pay taxes under the act of 1892. The city, on the contrary, asserted the right to tax under the act of 1892, and the question became one for judicial decision. The banks paid the moneys spoken of in the agreement, and proceedings were inaugurated to test the legal question involved in
[426]the dispute. *It is alleged on the part of the complainant that the taxes under the act of 1892 were and are greater in amount than under the Hewitt act, and it is not alleged or contended that the amount of moneys paid by the various banks was any greater than would have been due and payable under the act of 1892. That is, the banks have in fact paid no more than they ought to have paid if they had complied with the provisions of the act of 1892. This court has just decided in the *Owensboro Case* (above cited) that the claim, on the part of the banks, of an irrepealable contract under the Hewitt act was not well founded, and that the banks (so far as concerns that contention) have been liable to pay taxes under the act of 1892 ever since that act was passed. The complainant now asserts that because the banks paid the money which they did under the agreement above mentioned (although such money was certainly no more than they were legally bound to pay under the act of 1892) that therefore the city is estopped from setting up the invalidity of this agreement. The result would be that complainant by virtue of the judgment in the *Louisville Banking Company Case* could only be taxed under the Hewitt act for the remainder of its corporate existence, although the act of 1892 is a perfectly valid act under which, but for the judgment above mentioned, the complainant would be liable to much greater taxation than the Hewitt act provides for. We think these facts form no basis for the equitable estoppel claimed by the complainant. The payment of money by complainant under the agreement, when it ought to have paid at least as large a sum under the act of 1892, but which it refused to pay under that act, because it denied the validity thereof, we think is not the basis for an appeal to the equitable powers of a court. As a result of the judicial inquiry, it is seen that the banks have been at all times liable to pay taxes under the act of 1892. The fact that they disputed this liability and paid the money under an agreement which did not admit the validity of the act of 1892 forms no basis for this equitable estoppel, when the fact appears that the moneys actually paid were certainly no more than the banks were liable to pay under *the disputed act. If, however,[427]
it were found that the banks had paid at any time an amount greater than they would have been liable to pay under the act of 1892, the city, by the passage of the ordinance approved August 6, 1895, provided a means for crediting any bank with the amount of such overpayment. In no way, therefore, has the complainant been legally damaged by the payment of the money to the sinking fund. The only thing that may be said is, that by virtue of the agreement, the complainant paid, and the sinking fund received, the money at the times mentioned, which otherwise would have been refused; but when we come to consider that, although the legal question was in dispute, the right was really with the city, and the banks were really liable to pay taxes under the act of 1892, we think the payment they then made under the agreement would form no equitable estoppel in favor of complainant. If so, it would thereby be enabled to secure for itself the benefit of the plea of *res judicata*, and would thus prevent the application of the act of 1892 to it during its corporate existence. This result would not, in our opinion, be an equitable one, and as complainant has not in reality suffered legal injury by the

payment of the money, there is no basis for the support of an estoppel.

An equitable estoppel which is to prevent the state from receiving the benefit of an exercise of its power to alter the rule or rate of taxation for all the time of the existence of a business corporation should be based upon the clearest equity. It is fitly denominated an equitable estoppel, because it rests upon the doctrine that it would be against the principles of equity and good conscience to permit the party against whom the estoppel is sought to avail himself of what might otherwise be his undisputed rights. The payment of money under the circumstances of this case, not exceeding the amount really legally due for taxes, although disputed at the time, does not seem to work such an equitable estoppel as to prevent the assertion of the otherwise legal rights of the city.

Nor does the fact that the complainant bank, upon the execution of the agreement,
[428] omitted to sue and obtain *judgment against the city, add any force to the claim of estoppel.

The complainant, it must be assumed, knew the invalidity of the agreement because of the lack of power on the part of those who signed it to bind the city or the sinking fund as a corporation. There was no dispute as to facts, and no misrepresentations were made. The law made the invalidity. Knowing the agreement to be invalid, the omission to sue forms no ground upon which to base the estoppel. The complainant had no valid agreement upon which to stand, and if it omitted to sue it was at its own risk. There would seem to be no reason of an equitable nature springing out of the facts herein why the complainant should not hereafter be bound to pay the taxes prescribed in the act of 1892.

We think *the judgment of the Circuit Court should be reversed*, and the case remanded, with instructions to dismiss the bill, and it is so ordered.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

CITY OF LOUISVILLE, *Appt.*,
v.
BANK OF COMMERCE.

(See S. C. Reporter's ed. 428.)

Stone v. *Bank of Commerce, ante,* 1028, followed.

[No. 363.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEAL from judgment of the Circuit Court of the United States for the District of Kentucky.

See same case below, 88 Fed. Rep. 398.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellant.

Messrs. **James P. Helm** and *Helm Bruce* for appellee.

In the above case the same question is involved that has just been determined in No. 362, [*ante,* 1028], and there will be a like order *reversing* the judgment and remanding the case to the Circuit Court with directions to dismiss the bill.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

FIDELITY TRUST & SAFETY VAULT COMPANY, *Appt.*, **[429]**
v.
CITY OF LOUISVILLE.

FIDELITY TRUST & SAFETY VAULT COMPANY, *Appt.*,
v.
SAMUEL H. STONE, Auditor of Public Accounts, *et al.*

LOUISVILLE TRUST COMPANY, *Appt.*,
v.
CITY OF LOUISVILLE.

LOUISVILLE TRUST COMPANY, *Appt.*,
v.
SAMUEL H. STONE, Auditor of Public Accounts, *et al.*

(See S. C. Reporter's ed. 429-431.)

Illegal agreement as to taxes—corporations to which the agreement does not extend.

1. The commissioners of the sinking fund and the city attorney of the city of Louisville had no power to make the agreement with the trust companies, appellants, upon which they rely to establish that they were privies to the decree in favor of the Louisville Banking Company, which established, by estoppel, an irrevocable contract springing from the Hewitt act and the want of power to impair it by assessing or collecting the taxes in controversy.
2. No such contract arose from that act as to corporations chartered after 1856, or whose charters were extended subsequent to that year.

[Nos. 406, 407, 408, 409.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEALS from decrees of the Circuit Court of the United States for the District of Kentucky sustaining demurrers to the complaint in each of the above-entitled cases, and dismissing the same; they being actions brought by the above-named appellants to enjoin the assessment and collection of certain taxes. *Affirmed.*

See same case below, 88 Fed. Rep. 407.

Statement by Mr. Justice **Peckham:**

In these cases the respective trust companies who are appellants, all four being Kentucky corporations chartered subsequent to the year 1856, filed their respective bills

to enjoin the assessment and collection of certain taxes. The want of power to assess and collect the taxes complained of was in each bill made to depend upon two substantially identical grounds, which were briefly these:

First. That a legislative act of the state of Kentucky, passed in 1886, and designated as the Hewitt act, had created an irrevocable contract between the state and the complainants, from which it arose that the taxes sought to be enjoined could not be assessed and collected without violating the clause of the Constitution of the United States forbidding impairment by a state of the obligations of a contract.

Second. That in a suit previously brought by the Louisville Banking Company, a Kentucky corporation, it had been finally decided by the court of appeals of the state of Kentucky that the act in question (the Hewitt act) had created in favor of the corporations accepting its provisions an irrevocable contract, which could not be impaired without violating the Constitution of the United
[430]States. It was averred in each of *the bills that, although the complainants were not parties to the suit brought by the Louisville Banking Company, they were each, nevertheless, privies to the record and decree rendered therein because of a certain agreement, which, it was averred, had been entered into between the complainants, the commissioners of the sinking fund, and the city of Louisville, through the city attorney, from which the privity relied on was asserted to have been created. The agreement in question was stated in full in each of the bills. By virtue of the privity thus asserted the decree rendered in favor of the Louisville Banking Company was pleaded as establishing conclusively, by the estoppel arising from the thing adjudged, the irrevocable nature of the contract springing from the Hewitt act and the want of power to impair it by assessing or collecting the taxes in controversy. The court below decided that the complainants were not privies to the decision in the case of the Louisville Banking Company, because there was such a difference between the business of a banking company proper and that of a trust company that neither the commissioners of the sinking fund nor the city attorney of the city of Louisville had lawful power to agree that the liability of the trust companies to taxation should abide the result of the case brought by the Louisville Banking Company to test the right to tax it contrary to the contract which it was charged the Hewitt act had embodied. Because of the want of privity held not to exist, for the reason just stated, the court below decided that the plea of the thing adjudged was untenable. On the merits of the case, the court below held that, as each of the complainants had been chartered after the year 1856, subsequent to an act adopted by the Kentucky legislature in that year, reserving the right to repeal, alter, or amend all charters thereafter granted, there was not an irrevocable contract, and hence that the levy of the taxes complained of did not impair contract obligations. For these reasons the court sustained demurrers to each of the bills, and dismissed them. 88 Fed. Rep. 407.

Messrs. **James P. Helm** and *Helm Bruce* for the trust companies, appellants.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellees.

*Mr. Justice **Peckham** delivered the opinion of the court: [431]

It is unnecessary to determine whether the distinction between the business of a bank and that of a trust company was such as to cause it to be illegal to have agreed that the liability of the trust companies to taxation contrary to the Hewitt act should abide the result of the controversy as to the Louisville Banking Company, since we have just decided in *Samuel H. Stone, Auditor, et al.*, v. *Bank of Commerce*, No. 362 [174 U. S. 412, *ante*, 1028], that, irrespective of any distinction which might exist between the business of a bank *eo nomine* and that of a trust company, the commissioners of the sinking fund and the city attorney were without power to have made the agreement upon which the complainants relied in order to establish that they were privies to the decision in favor of the Louisville Banking Company. The plea of the thing adjudged depending upon the existence of privity being thus disposed of, there remains only to consider the alleged existence of an irrevocable contract arising from the Hewitt act. That no such contract arose from that act as to corporations chartered after 1856, or whose charters were extended subsequent to that year, was decided in *Citizens' Savings Bank of Ownsboro* v. *City of Owensboro*, 173 U. S. 636, *ante*, 840. Indeed, the opinion in that case and the opinion announced in *Stone* v. *Bank of Commerce, supra*, are decisive against the appellants, who were complainants below, as to every issue which arises for decision on these records, and *the decrees below rendered are therefore affirmed.*

THIRD NATIONAL BANK OF LOUISVILLE, *Appt.*, [432]
v.
SAMUEL H. STONE, Auditor of Public Accounts, *et al.*

(See S. C. Reporter's ed. 432–434.)

Decree, when not res judicata—taxes upon franchises of national banks.

1. A decree establishing the existence of an irrevocable contract exempting or limiting the taxation of a bank for the term of its original charter is not *res judicata* as to whether the bank is subject to taxation after that charter is renewed.
2. State taxes imposed upon the franchises and property of a national bank, and not upon the shares of stock in the names of the shareholders, are illegal, under U. S. Rev. Stat. § 5219.

[No. 404.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky sustaining the demurrer and dismissing a suit in equity brought by the Third National Bank of Louisville, plaintiff, against Samuel H. Stone, auditor, *et al.*, to enjoin the assessment of certain taxes. *Reversed*, and case remanded for further proceedings.

See same case below, 88 Fed. Rep. 990.

The facts are stated in the opinion.

Messrs. **James P. Helm** and *Helm Bruce* for appellant.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellees.

[432] *Mr. Justice **White** delivered the opinion of the court:

The appellant, a banking corporation organized under the national banking act, and whose charter was renewed on August 6, 1894, for a period of twenty years, filed its bill to enjoin the assessment of certain taxes for the years 1895, 1896, and 1897. The grounds of relief set out in the original and amended bills were substantially as follows: First. That the corporation had accepted the terms of an act of the general assembly of the state of Kentucky, denominated as the Hewitt act, from which it resulted that there was an irrevocable contract protecting the bank from all municipal taxation and from all state taxation except such as was imposed by the Hewitt act. The provisions of the Hewitt act thus relied on were fully stated in *Citizens' Savings Bank of Owensboro* v. *The City of *Owensboro and A. M. C. Simmons, Tax Collector* [173 U. S. 636], *ante*, 840. [433] Moreover, it was alleged that on the 18th day of June, 1894, the city of Louisville having theretofore attempted to collect from the bank certain license taxes, contrary to the terms and conditions of the contract created by the Hewitt act, the bank commenced suit to prohibit the collection of said taxes, and that these proceedings culminated in a decree of the court of appeals of the state of Kentucky prohibiting the collection of the taxes in question, on the ground that the bank had an irrevocable contract, arising from the Hewitt act, which could not be impaired. The bill specifically alleged that the decree thus rendered by the court of appeals of the state of Kentucky constituted the thing adjudged, and by the presumption arising therefrom established beyond power of contradiction the existence of the irrevocable contract right. In addition the bill alleged that the taxes in question were illegal because they were imposed on the franchise and property of the bank in violation of the act of Congress with reference to the taxation of national banks by the respective states. Rev. Stat. § 5219. The taxes were, moreover, averred to be in violation of the act of Congress, because they were discriminatory, and, in addition, were illegal because they were, in certain designated respects, repugnant to the Constitution and laws of the state of Kentucky.

An opinion was filed by the court holding that as well in this case as in another case considered at the same time relating to the taxes for the years 1893 and 1894 demurrers to the bills should be overruled and motions for preliminary injunctions granted. 88 Fed. Rep. 990. The record, however, establishes that, subsequently, on the attention of the court being directed to the fact that the term of the original charter of complainant had expired in the interval between the levy of taxes for the years 1894 and 1895 (the charter having been renewed and extended on August 6, 1894), the court entered a decree in the case at bar sustaining demurrers to the original and amended bills and dismissing the suit. From the decree so made this appeal was taken.

The assertion of an irrevocable contract arising from the *Hewitt act is disposed of [434] by the opinion in *Citizens' Savings Bank* v. *The City of Owensboro and A. M. C. Simmons, supra*. The contention that the presumption of the thing adjudged takes this case out of the ruling in that case is without foundation, because the suit brought to prohibit the collection of the taxes and in which the judgment relied on was rendered related to taxes for years prior to the expiration of the charter and before the same was renewed. Indeed, the suit wherein the judgment relied upon as constituting *res judicata* was rendered was commenced before the expiration of the original charter. Manifestly, as decided by the court below, a decree establishing the existence of an irrevocable contract, exempting or limiting the bank from taxation for one charter term, is not the thing adjudged as to whether the bank was subject to taxation during a new period of existence derived from a renewal of its original charter life, for, however persuasive the reasons supporting the conclusion that the corporation could not be taxed during its original charter, it was obviously impossible to have decided that the same rule applied to an extension, which only commenced after the initiation of the suit, wherein was rendered the decree relied on as constituting *res judicata*. A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen. For these self-evident reasons, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371 [42: 202], where a plea of *res judicata* as to a contract right of exemption was maintained, after the renewal of a charter, the court eliminated from consideration all the judgments which had been rendered prior to the period when the amended charter took effect.

These considerations would render it necessary to affirm the judgment but for the fact that the taxes which it was sought to enjoin were imposed upon the franchises and property of the bank and not upon the shares of stock in the names of the shareholders. It follows, therefore, that they were illegal, be-

cause in violation of the act of Congress. *Owensboro National Bank* v. *The City of Owensboro and A. M. C. Simmons* [173 U. S. 664], *ante* 850. *The decree below must therefore be reversed,* and the case be remanded for further proceedings in conformity to this opinion, and it is so ordered.

---

[435] CITY OF LOUISVILLE, *Appt.*,
v.
THIRD NATIONAL BANK.

(See S. C. Reporter's ed. 435.)

Taxes on franchise of national bank, when illegal.

Taxes such as are in question in this suit are illegal, because levied upon the property and franchise of the national bank, and not upon the shares of stock in the names of the shareholders. *Third Nat. Bank* v. *Stone,* No. 404, *ante,* 1035, followed.

[No. 364.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky in an action brought by the Third National Bank holding that the plaintiff has a contract with the state of Kentucky under which the corporation and its shares of stock cannot be taxed at a greater rate than that prescribed in the Kentucky act of May 17, 1886, etc. Decree which restrained the collection of the taxes *affirmed.*

See same case below, 88 Fed. Rep. 990.

The facts are stated in the opinion.

Messrs. **Henry Lane Stone** and *William S. Taylor,* Attorney General of Kentucky, for appellant.

Messrs. **James P. Helm** and *Helm Bruce* for appellee.

[435] *Mr. Justice **White** delivered the opinion of the court:

The appellee, the Third National Bank, filed its bill to enjoin the collection of certain taxes, relying upon grounds in all respects like unto those alleged in case No. 404, just decided. There was, however, this difference between the facts of the latter case and those arising on this record: In this case the taxes sought to be enjoined were levied prior to the renewal of the charter of the bank. Because of this difference the court below concluded that the want of power to assess and levy was conclusively established by the presumption of the thing adjudged arising from the decree of the court of appeals of Kentucky, to which we have referred in case No. 404. We need not, however, consider the question of *res judicata* upon which the court below based its conclusion, as we have in case No. 404, just announced, held entirely without reference to the plea of *res judicata* that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that *the decree below,* which restrained the collection of the taxes, was correct, and it *is therefore affirmed.*

CITY OF LOUISVILLE, *Appt.*, [436]
v.
CITIZENS' NATIONAL BANK.

CITIZENS' NATIONAL BANK OF LOUISVILLE, *Appt.*,
v.
SAMUEL H. STONE, Auditor of Public Accounts, *et al.*

(See S. C. Reporter's ed. 436, 437.)

Third Nat. Bank v. *Stone, ante,* 1035, and *Louisville* v. *Third Nat Bank, ante,* 1037, followed.

[Nos. 365, 405.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEALS from decrees of the Circuit Court of the United States for the District of Kentucky to the effect that the plea of *res judicata* established an irrevocable contract by virtue of the decree in the case of *Third National Bank* v. *City of Louisville,* as to taxes for years prior to the date of the extended charter, but not as to taxes imposed after the extension of the charter, because such taxes were not in controversy when said suit was tried; and that the Citizens' National Bank, seeking to enjoin the collection of certain taxes, was without right to relief in No. 405, but in the first case, No. 365, was entitled to the relief sought. Decree in No. 365 affirmed, and in No. 405 reversed, and the last-mentioned case, No. 405, remanded to the court below for further proceedings.

The facts are stated in the opinion.

Messrs. **Henry Lane Stone** and *William S. Taylor,* Attorney General of Kentucky, for the City of Louisville, appellant in No. 365, and Samuel Stone, auditor, appellee in No. 405.

Messrs. **James P. Helm** and *Helm Bruce* for appellee in No. 365, and for appellant in No. 405.

*Mr. Justice **White** delivered the opinion of the court: [436]

The Citizens' National Bank was organized on the 8th day of August, 1874, its charter being stipulated to endure for a period of twenty years. On April 1, 1894, the charter was renewed and extended for twenty years. The bank in these two cases filed its bills to enjoin the collection of certain taxes on the ground that by the effect of a statute of the state of Kentucky, usually referred to as the Hewitt act, an irrevocable contract had been entered into between the state and the bank, from which it resulted that the taxes complained of could not be levied without im-

pairing the obligations of such contract. It was, moreover, averred that the existence of this contract had been judicially determined in a suit between the Third National Bank and the city of Louisville, to which suit the Citizens' National Bank, although not a party, was a privy because of certain agreements alleged to have been made between the city of Louisville and the bank at the time the suit was brought by the Third National Bank. In consequence of this fact it was alleged that the existence of the contract between the Citizens' National Bank and the
[437] state had been *judicially determined, and the decree to that effect was pleaded as *res judicata*. In addition the taxes in question were alleged to be illegal because imposed upon the franchise and property of the bank, and because they were discriminatory, and they were averred besides to be illegal under the state Constitution and laws. The lower court held that the plea of *res judicata* established an irrevocable contract as to the taxes for years prior to the date of the extended charter, but that the thing adjudged did not conclude that there was an irrevocable contract as to taxes imposed after the date of the extension of the charter, because such taxes were not and could not have been in controversy in the cause in which the prior judgment had been rendered. Upon these grounds, in the second case, that is, No. 405, it decided that the complainant was without right to relief, and in the first case, No. 365, that it was entitled to the relief sought.

These two cases are in all material respects identical with the cases of *The Third National Bank of Louisville* v. *Samuel H. Stone, Auditor of Public Accounts, et al.* [174 U. S. 432, *ante*, 1035], and *City of Louisville* v. *The Third National Bank* [174 U. S. 435, *ante*, 1037], which have just been decided. For the reasons given in the decisions rendered in those cases it is ordered that the decree below rendered in No. 365 be, and the same is hereby, affirmed, and that rendered in No. 405 be, and the same is hereby, reversed, and that the last mentioned case (*viz.*, No. 405) be remanded to the court below with directions to take such further proceedings as may be in conformity to this opinion, and it is so ordered.

---

[438] FIRST NATIONAL BANK OF LOUISVILLE, *Appt.*,

v.

CITY OF LOUISVILLE.

FIRST NATIONAL BANK OF LOUISVILLE, *Appt.*,

v.

SAMUEL H. STONE, *et al.*

(See S. C. Reporter's ed. 438, 439.)

Tax on franchise or intangible property of national bank.

State taxes imposed on the franchises or intangible property of a national bank are illegal, and cannot be upheld as being the equivalent of a tax on the shares of stock in the names of the shareholders, and therefore not violating the act of Congress.

[Nos. 635, 634.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEALS from decrees of the Circuit Court of the United States for the District of Kentucky in two suits in equity brought by the First National Bank of Louisville to enjoin the assessment and collection of certain taxes, deciding that the taxes, although imposed on the franchise or intangible property of the bank, were the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress. *Decrees reversed*, and the cases remanded with directions for further proceedings.

See same case below, 88 Fed. Rep. 409.

The facts are stated in the opinion.

Messrs. **James P. Helm** and *Helm Bruce* for appellant.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellees.

*Mr. Justice **White** delivered the opinion of the court: [438]

In these two cases the appellant filed its bills to enjoin the assessment and collection of certain taxes. The grounds upon which the prayer for relief in each case was rested were substantially as follows:

First, that the taxes in question were levied upon the franchise and property of the bank, and not upon the shares of stock in the names of the shareholders, and were therefore illegal; second, that the taxes were discriminatory, because, as a consequence of the exemption of certain state banks from taxation by special contract, the property of the bank was taxed at a higher rate than other moneyed capital, in violation of the act of Congress; and, third, that the taxes were illegal because not in conformity to the state Constitution and certain provisions of the state laws.

The court below decided that, although the taxes were imposed *or contemplated to be [439]
assessed on the franchise or intangible property of the bank, nevertheless they were the equivalent of a tax on the shares of stock in the names of the shareholders, and hence did not violate the act of Congress. It moreover held that the remaining grounds were without merit. 88 Fed. Rep. 409.

The law under which the taxes in question were levied is the same one which was considered in *Owensboro National Bank, Plaintiff in Error*, v. *The City of Owensboro and A. M. C. Simmons*, 173 U. S. 664 [*ante*, 850]. The theory of equivalency upon which the court below decreed the taxes to be legal was in that case fully examined, and held to be unsound. It follows that the decrees below rendered in these cases were erroneous. It is therefore ordered that said *decrees be reversed*, and the cases be remanded to the lower court with directions for such further proceedings as may be in conformity with this opinion. And it is so ordered.

CITY OF LOUISVILLE, *Appt.*,
v.
BANK OF LOUISVILLE.

SAMUEL H. STONE, Auditor, *et al.*,
v.
BANK OF LOUISVILLE.

(See S. C. Reporter's ed. 439-445.)

Irrepealable contract as to taxation—charter which is subject to the power of the legislature to amend or repeal.

1. A repealable charter cannot give rise to an irrepealable contract right to an exemption from, or limitation of, taxation.
2. Where an extended charter of a bank was subject to the power of the legislature to amend or repeal it, conferred by a general law, no irrevocable contract limiting the power of the state to tax can be based upon a clause in the original charter limiting its rate of taxation.

[Nos. 359, 358.]

Argued February 28, March 2, 3, 1899. Decided May 15, 1899.

APPEALS from decrees of the Circuit Court of the United States for the district of Kentucky in an action brought by the Bank of Louisville against the city of Louisville, and in another action brought by the Bank of Louisville against Samuel H. Stone, auditor, to enjoin the collection of certain taxes, deciding that the plaintiff, by virtue of an agreement referred to in the opinion, was a privy to a decree rendered by the Court of Appeals of Kentucky in a test case, and that a plea of *res judicata* was well taken. *Reversed*, and cases remanded, with directions to dismiss the suits.

Statement by Mr. Justice **White:**

[440] *The Bank of Louisville in these two cases filed its bills to enjoin the collection of certain taxes. The matters to which the bill in the first case (No. 359) related were certain franchise taxes for the years 1893 and 1894, the assessment and certification of valuation whereof had been made prior to the filing of the bill. Those covered by the bill in the second case (No. 358) were, generally speaking, like those embraced in the preceding suit, but were for different years—that is, for 1895, 1896, and 1897, and by an amendment the taxes of 1898 were also included. These taxes, however, had not been certified at the time the bill was filed, and the relief contemplated was the enjoining of the valuation of the franchise and the certification of the same for the purposes of taxation, as well as the subsequent collection of the taxes to be levied thereon. Omitting reference to the averments distinctly relating to the jurisdiction in equity, the case made by the bills was this:

It was alleged that the bank was chartered on February 2, 1833, to endure until January 1, 1853; that pursuant to an act approved February 16, 1838, the provisions of which had been complied with, the charter existence was extended for nine years; that by an act of February 15, 1858, duly accepted by the bank, its charter privileges were continued in full force for twenty years from the 1st of January, 1863; and finally that by an act of May 1, 1880, which the bank had duly accepted, its charter was extended for twenty years from January 1, 1883. It was alleged that by the sixth section of the original charter it was provided, among other things, that the cashier of the bank "shall, on the first day of July, 1834, and on the same day annually thereafter, pay unto the treasurer of the state twenty-five cents on each share held by the stockholders in said bank, which shall be in full of all tax or bonus on said bank; provided, that the legislature may increase or reduce the same; but at no time shall the tax imposed on said stock exceed fifty cents on each share held in said bank." The tax, the bills admitted, by an act approved February 12, 1836, had been increased to fifty cents a share.

*In general language, it was averred that [441] by certain decisions rendered by the courts of Kentucky in the years 1838, 1869, and 1888, it was held that similar language to that contained in the charter of complainant constituted a contract preventing a higher rate of taxation than that provided for in the charter, and that from all or some of these decisions it resulted that the extension of an original charter, under the law of Kentucky, carried with it all the rights and privileges, including the limit of taxation, contained in the original charter. No decision, however, prior to 1880, by the Kentucky court of appeals, was referred to, holding that the mere grant of a charter, or an extension thereof, was not subject to repeal, alteration, or amendment, if such power was reserved by a general law in force when the charter was enacted or the extension was granted. There was no averment that the complainant was either a party or a privy to the suits in which the decisions referred to had been rendered.

In both bills it was averred at length that the general assembly of the state of Kentucky had enacted the statute known as the Hewitt act, and that the bank had accepted its provisions. This act and its acceptance, it was asserted, constituted an irrevocable contract, protected from impairment by the Constitution of the United States, thus securing the bank against any form of taxation other than that provided in the Hewitt act. It was in both bills then declared that in 1894 the city of Louisville asserting a right to collect taxes from the bank, in violation of the contract embodied in the Hewitt act, for the purpose of testing the right of the city to do so, an agreement was entered into between the commissioners of the sinking fund, the city of Louisville through the city attorney, and the attorneys of the complainant and of other banks and trust companies, by which representative suits were to be brought, and it was agreed that the liability of the complainant to any other taxation than that imposed by the Hewitt act should abide the result of the test suits in

question; that in compliance with this agreement a suit was brought by the Bank of Kentucky, which like the complainant had been originally chartered before 1856, in which
[442] last-named *year an act had been passed in Kentucky reserving the right to repeal, alter, or amend all charters subsequently granted, subject to certain exceptions provided expressly in the act of 1856, and that this suit had culminated in a final decree by the court of appeals of Kentucky holding that the Hewitt act was an irrevocable contract, and that the banks which had accepted it were not liable to any other taxation than that therein specified. Averring that the suit brought by the Bank of Kentucky was the test suit contemplated by the agreement, as determining the liability of the complainant to other taxation than that imposed by the Hewitt act, the decree in the suit of the Bank of Kentucky was pleaded as *res judicata.* In addition, the bills asserted that if the Hewitt act was held by this court not to constitute an irrevocable contract, then the complainant was entitled to be restored to its rights under its charter as extended, and was consequently not subject to the particular taxes, the assessing and collection of which it was the object of the bills to prevent.

The court below held that the complainant, by virtue of the agreement referred to, was a privy to the decree rendered by the court of appeals of the state of Kentucky in favor of the Bank of Kentucky in the test case in question, and hence decided that the plea of *res judicata* was well taken. From its decrees enforcing these conclusions the appeals in both these cases were taken.

Messrs. **Henry Lane Stone** and *William S. Taylor*, Attorney General of Kentucky, for appellants in both cases.

Messrs. **Alexander Pope Humphrey** and *George M. Davie* for appellee in both cases.

[442] *Mr. Justice **White,** after making the foregoing statement, delivered the opinion of the court:

The unsoundness of the plea of the thing adjudged, upon which the lower court rested its decision, results from the opinion announced in *Stone* v. *The Bank of Commerce* [174 U. S. 112, *ante*, 1028], and *City of Louisville* v. *The Same* [174 U. S. 428, *ante*,
[443] 1034]. It was there held that the *agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the rights of those institutions should abide the result of test suits to be brought, was *dehors* the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute *res judicata* as to those not actually parties to the record.

The want of foundation for the assertion that the Hewitt act created an irrevocable contract between the complainants and the city is also disposed of by the decision in *The Citizens' Savings Bank of Owensboro, Plaintiff in Error*, v. *The City of Owensboro and A. M. C. Simmons* [173 U. S. 636, *ante*, 840]. There is no ground for distinguishing this case from the one last referred to. True it is that the original charter of the complainant differs somewhat from the charter of the Citizens' Savings Bank of Owensboro, inasmuch as the charter of the Citizens' Savings Bank contained simply a limitation of taxation to a fixed rate, whilst the charter now in question, although establishing a stated rate, provided that the named rate might be reduced or increased, but *should not be increased beyond a maximum sum.* This limit as to the power to increase, it has been argued, took the case out of the reach of the act of 1856, since it was a plain expression of the legislative intent that there should be no increase beyond the maximum stated.

At the time the charter was extended, in 1880, the act of 1836 had increased the limit of taxation fixed by the original charter to the maximum therein allowed of fifty cents on each share. Conceding, *arguendo*, that the charter, as thus extended, carried with it, into the new period, the limitation of taxation fixed by virtue of the original charter and by the act of 1836 increasing the sum to fifty cents on each share, nevertheless the case is covered by the decision in the *Citizens' Savings Bank of Owensboro, supra.* There is nothing in the extending act expressing the plain intent of the legislature that the charter as extended should be not subject to the repealing power reserved by
the act of 1856. The act of *extension, there- [444]
fore, was not taken out of the general rule arising from the act of 1856, that is to say, it was not embraced in the exception mentioned in that act, saving from the power to repeal, alter, or amend "all charters and grants of or to corporations or amendments thereof" when "the contrary intent be therein plainly expressed." No such intent being plainly expressed in the extending act, it follows that the charter as extended was subject to repeal. It is impossible, in consonance with reason, to conceive of an unlimited irrepealable contract right when there is no unlimited irrepealable contract from which the right can be derived. And yet to such conclusion does the reasoning necessarily conduce which asserts that a repealable charter gave rise to an irrepealable contract right. Granting that the extending act in substance amounted to a re-enactment in so many words of the provision found in the original charter, such provision as re-enacted became but a part of a whole contract which was subject to repeal. The right to repeal, embracing the whole, covered also necessarily the provisions found in the whole. The limitation of taxation in the original charter was during the life of the corporation. If carried forward by the amendment it was only for the new period, that is, during the extended charter. But for all this extended period the charter was subject to repeal, at the will of the legislature, and the power to terminate the charter involved the correlative right of ending those stipulations which were only to last during the charter. The argument that, although the power to repeal

the charter was reserved, the power to alter the taxation, without repealing the charter, did not arise, is but a form of stating the proposition which we have already noticed, and which amounts to the assertion that the lesser is not contained in the greater power. We must construe the extending act as a whole, especially in view of the origin and implied import of acts reserving the power to repeal, alter, or amend, as fully stated in *Citizens' Savings Bank of Owensboro, ubi supra.* We think that the extending act was subject to the reserved power of repeal, free from limitations inconsistent with the exercise of the right. The elementary general
[445] rule is that *on questions of exemption from taxation or limitations on the taxing power, asserted to arise from statutory contracts, doubts arising must be resolved against the claim of exemption. We cannot imply from the mere presence in the extended charter of the limitation of taxation, found in the original charter, a restraint on the power to repeal, alter, or amend, when such restraint does not flow from the provisions of the extending act taken as a whole. It results from the fact that the extended charter was subject to repeal, that the complainant had no irrevocable contract limiting the power of the state to tax. Having no such right, it, of course, cannot assert that it must, if the Hewitt act was not an irrepealable contract, be restored to the contract rights existing at the date of the enactment of the Hewitt act. The nonexistence of the prior right precludes the thought that a restoration could be possible.

From the foregoing reasons it follows that *the decrees below rendered were erroneous, and they must be and are reversed,* and the cases be remanded with directions to dismiss the bills, and it is so ordered.

Mr. Justice **Harlan** dissents on the ground that there was privity, and therefore *res judicata.*

WILLIAM STEPHENS, Mattie J. Ayers, Stephen G. Ayers, Jacob S. Ayers, and Mattie Ayers, *Appts.*,

v.

CHEROKEE NATION.

CHOCTAW NATION, *Appt.*,

v.

F. R. ROBINSON.

JENNIE JOHNSON *et al.*, *Appts.*,

v.

CREEK NATION.

CHICKASAW NATION, *Appt.*,

v.

RICHARD C. WIGGS *et al.*

(See S. C. Reporter's ed. 445-492.)

1. Congress may provide for the review of the action of commissions and boards created by it exercising only quasi judicial powers, and can do so in respect to tribal authorities.
2. The act of July 1, 1898, in extending the remedy of appeal to this court from the United States court in the Indian Territory, is not invalid because retrospective, nor an invasion of the judicial domain, nor destructive of vested rights, although the decrees of the latter court were made final by statute, the expectation of a share in the public lands and money of the tribe not being such an absolute right of property as to prevent their review by a higher court under subsequent legislation.
3. The appeal thus granted to this court extends only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian Territory.
4. An act of Congress is not unconstitutional because it supersedes a prior treaty.
5. The acts of Congress in respect to the determination of citizenship in Indian tribes are not unconstitutional as impairing or destroying vested rights, as the lands and moneys of these tribes are public, and are not held in individual ownership.

[Nos. 423, 453, 461, 496.]

Argued and Submitted February 23, 24, 27, March 6, 7, 8, 1899. Decided May 15, 1899.

APPEALS from judgments of the United States court in the Indian territory adjudicating the rights of the several applicants named in the proceedings in the above-entitled actions to become and to be enrolled as citizens of the several tribes of Indians therein named. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

*By the sixteenth section of the Indian ap- [446]
propriation act of March 30, 1893 (27 Stat. at L. 612, 645, chap. 209), the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners "to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian territory."

The commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895 (28 Stat. at L. 939, chap. 189), two additional members *were appointed. It is com- [447]
monly styled the "Dawes Commission."

The Senate on March 29, 1894, adopted the following resolution:

"*Resolved,* That the committee on the Five Civilized Tribes of Indians, or any subcommittee thereof appointed by its chairman, is hereby instructed to inquire into the present condition of the Five Civilized Tribes of Indians, and of the white citizens dwelling among them, and the legislation required and appropriate to meet the needs and welfare of such Indians; and for that purpose to visit Indian territory, to take testimony, have power to send for persons and papers, to administer oaths, and examine witnesses under oaths; and shall report the result of such inquiry, with recommendations for legislation; the actual expenses of such inquiry to be paid on approval of the chairman out of the contingent fund of the Senate."

The committee visited the Indian territory accordingly, and made a report May 7, 1894. Sen. Rep. No. 377, 53d Cong. 2d Sess. In this report it was stated: "The Indian territory contains an area of 19,785,781 acres, and is occupied by the Five Civilized Tribes of Indians, consisting of the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles. Each tribe occupies a separate and distinct part, except that the Choctaws and Chickasaws, though occupying separately, have a common ownership of that part known as the Choctaw and Chickasaw territory, with rights and interests as recognized in their treaties as follows: The Choctaws, three fourths, and the Chickasaws, one fourth. The character of their title, the area of each tribe, together with the population and an epitome of the legislation concerning these Indians during the last sixty-five years, is shown by the report of the committee on Indian affairs, submitted to the Senate on the 26th day of July, 1892" (Sen. Rep. No. 1079, 52d Cong. 1st Sess.), and so much of that report as touched on those points was set forth.

The committee then gave the population from the census of 1890 as follows: Indi-
[448] ans, 50,055; colored Indians, colored *claimants to Indian citizenship, freedmen, and colored, wholly or in part, 18,636; Chinese, 13; whites, 109,393; whites and colored on military reservation, 804; population of Quapaw Agency, 1,281; or a total of 180,182; and said: "Since the taking of the census of 1890 there has been a large accession to the population of whites who make no claim to Indian citizenship, and who are residing in the Indian territory with the approval of the Indian authorities. It is difficult to say what the number of this class is, but it cannot be less than 250,000, and it is estimated by many well-informed men as much larger than that number and as high as 300,000." After describing the towns and settlements peopled by whites, and the character of the Indian territory, its climate, soil, and natural wealth, the report continued:

"This section of country was set apart to the Indian with the avowed purpose of maintaining an Indian community beyond and away from the influence of white people. We stipulated that they should have unrestricted self-government and full jurisdiction over persons and property within their respective limits, and that we would protect them against intrusion of white people, and that we would not incorporate them in a political organization without their consent. Every treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of the Indians from the whites and nonparticipation by the whites in their political and industrial affairs. We made it possible for the Indians of that section of country to maintain their tribal relations and their Indian polity, laws, and civilization if they wished so to do. And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

"It must be assumed in considering this question that the Indians themselves have
determined to abandon the policy of *exclu- [449]
siveness, and to freely admit white people within the Indian territory, for it cannot be possible that they can intend to demand the removal of the white people either by the government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever."

The committee next referred to the class of white people denominated by the Indians as intruders, in respect of whom there had been but little complaint in other sections of the Indian territory than that of the Cherokee Nation; and went on to say:

"The Indians of the Indian territory maintain an Indian government, have legislative bodies and executive and judicial officers. All controversies between Indian citizens are disposed of in these local courts; controversies between white people and Indians cannot be settled in these courts, but must be taken into the court of the territory established by the United States. This court was established in accordance with the provision of the treaties with the Choctaws, Chickasaws, Creeks, and Seminoles, but no such provision seems to have been made in the treaty with the Cherokees. We think it must be admitted that there is just cause of complaint among the Indians as to the character of their own courts, and a good deal of dissatisfaction has been expressed as to the course of procedure and final determination of matters submitted to these courts. The determinations of these courts are final, and, so far, the government of the United States has not directly interfered with their determinations. Perhaps we should except the recent case where the Secretary of the Interior thought it his duty to intervene to prevent the execution of a number of Choctaw citizens."

The report then recapitulated the legisla-

tion conferring certain jurisdiction over parts of the Indian territory on the district courts of the United States for the western district of Arkansas, the eastern district of Texas, and the district of Kansas; the establishment of the United States court in the Indian ter-
[450] itory; the inclusion of a portion of *the Indian territory within the boundaries of the territory of Oklahoma, and the creation of a new Indian territory, over parts of which the jurisdiction of the district courts of Arkansas and Texas remained; and, for reasons assigned, recommended the appointment of two additional judges for the United States court in the Indian territory, and of additional commissioners, and that the jurisdiction of the district courts should be withdrawn.

The matter of schools was considered; and finally the question of title to the lands in the Indian territory; and the committee stated:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises: What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection, and for the security of life, liberty, and property. If the tribe fails to administer its trust property by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights, unless the government does interfere to administer such trust.

"Is it possible because the government has lodged the title in the tribe in trust that it is without power to compel the execution of the trust in accordance with the plain provisions of the treaty concerning such trust? Whatever power Congress possessed over the Indians as semi-dependent nations, or as persons within its jurisdiction, it still possesses, notwithstanding the several treaties may have stipulated that the government would not exercise such power, and therefore Congress may deal with this question as if there had been no legislation save that which provided for the execution of the patent to the tribes.

[451] *"If the determination of the question whether the trust is or is not being properly executed is one for the courts and not for the legislative department of the government, then Congress can provide by law how such questions shall be determined and how such trust shall be administered, if it is determined that it is not now being properly administered.

"It is apparent to all who are conversant with the present condition in the Indian territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modification of the system. It cannot be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question."

On Nov. 20, 1894, and Nov. 18, 1895, the Dawes Commission made reports to Congress of the condition of affairs in the Indian territory in respect of the manner in which lands were held by the members of the tribes, and of the manner in which the citizenship of said tribes was dealt with, finding a deplorable state of affairs and the general prevalence of misrule.

In the report of November 18, 1895, the commission, among other things, said: "It cannot be possible that in any portion of this country, government, no matter what its origin, can remain peaceably for any length of time in the hands of one fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the territory
*this attempt of a fraction to dictate terms [452]
to the whole has already reached its limit, and, if left without interference, will break up in revolution."

And the commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship, the manipulation of the rolls, and proceedings in Indian tribunals, stated: "The commission is of the opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law-abiding citizens reduced to beggary."

And further:

"The commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property and that security and order in government enjoyed by the people of the United States will be in vain.

"The commission is therefore brought to the consideration of the question: What is the duty of the United States government toward the people, Indian citizens and United States citizens, residing in this territory under governments which it has itself erected within its own borders?

"No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self-reform.

"Nothing has been made more clear to the commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

"There is no alternative left to the United
[453] States but to *assume the responsibility for future conditions in this territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. Insecurity of life and person and property increasing every day makes immediate action imperative.

"The pretense that the government is debarred by treaty obligations from interference in the present condition of affairs in this territory is without foundation. The present conditions are not 'treaty conditions.' There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian territory, but, on the contrary, the whole structure and tenor of the treaties forbid it. If our government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, people and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty obligations, but is a plea for permission to further violate those provisions.

"The commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

By the Indian appropriation act of June 10, 1896 (29 Stat. at L. 321, 339, chap. 398), the commission was "directed to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress;" and it was further provided as follows:

[454] *"That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled; *Provided, however*, That such application shall be made to such commissioners within three months after the passage of this act.

"The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided, further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*,
That if the *tribe, or any person be aggrieved [455]
with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of In-

dian Affairs to remain there for use as the final judgment of the duly constituted authorities. And said commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

By the act of March 1, 1889, entitled "An Act to Establish a United States Court in the Indian Territory, and for Other Purposes" (25 Stat. at L. 783, chap. 333), a United States court was established, with a single judge, whose jurisdiction extended over the Indian territory, and it was provided that two terms of said court should be held each year at Muscogee in said territory on the first Mondays of April and September, and such special sessions as might be necessary for the despatch of business in said court at such times as the judge might deem expedient.

On May 2, 1890, an act was passed "to Provide a Temporary Government for the Territory of Oklahoma, to Enlarge the Jurisdiction of the United States Court in the Indian Territory, and for Other Purposes," (26 Stat. at L. 81, 93, chap. 182), which enacted "that for the purpose of holding terms of said court, said Indian territory is hereby divided into three divisions, to be known as the first, second, and third divisions;" the divisions were defined; the places in each division where court should be held were

[456] enumerated; and it was provided that *the "judge of said court shall hold at least two terms of said court in each year in each of the divisions aforesaid, at such regular times as such judge shall fix and determine."

March 1, 1895, an act was approved, entitled "An Act to Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory." 28 Stat. at L. 693, chap. 145. The first section of this act declared: "That the territory known as the Indian territory, now within the jurisdiction of the United States court in said territory, is hereby divided into three judicial districts, to be known as the Northern, Central, and Southern Districts, and at least two terms of the United States court in the Indian territory shall be held each year at each place of holding court in each district at such regular times as the judge for each district shall fix and determine. The Northern District shall consist of all the Creek country, all of the Seminole country, all of the Cherokee country, all of the country occupied by the Indian tribes in the Quapaw Indian Agency, and the townsite of the Miami Townsite Company. . . . The Central District shall consist of all the Choctaw country. . . . The Southern District shall consist of all the Chickasaw country."

The act provided for two additional judges for the court, one of whom should be judge of the northern district, and the other judge of the southern district, and that the judge then in office should be judge of the central district. The judges were clothed with all the authority, both in term time and in vacation, as to all causes, both criminal and civil, that might be brought in said district, and the same superintending control over commissioners' courts therein, the same authority in the judicial districts to issue writs of habeas corpus, etc., as by law vested in the judge of the United States court in the Indian territory or in the circuit or district courts of the United States. The judge of each district was authorized and empowered to hold court in any other district for the trial of any cause which the judge of such other district was disqualified from trying, and whenever on account of sickness or for any other reason the judge of any district was unable to perform the duties of his office, it was provided that either of the *other [457]
judges might act in his stead in term time or vacation. All laws theretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian territory as defined by law as to offenses committed within the territory, were repealed and their jurisdiction conferred after September 1, 1896, on the "United States courts in the Indian territory."

By section eleven of this act it was provided:

"Sec. 11. That the judges of said court shall constitute a court of appeals, to be presided over by the judge oldest in commission as chief justice of said court: and said court shall have such jurisdiction and powers in said Indian territory and such general superintending control over the courts thereof as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said state, as provided by chapter forty of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable, shall be, and they are hereby, extended over and put in force in the Indian territory: and appeals and writs of error from said court in said districts to said appellate court, in criminal cases, shall be prosecuted under the provisions of chapter forty-six of said Mansfield's Digest, by this act put in force in the Indian territory. But no one of said judges shall sit in said appellate court in the determination of any cause in which an appeal is prosecuted from the decision of any court over which he presided. In case of said presiding judge being absent, the judge next oldest in commission shall preside over said appellate court, and in such case two of said judges shall constitute a quorum. In all cases where the court is equally divided in opinion, the judgment of the court below shall stand affirmed.

"Writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States. Said *appellate [458]
court shall appoint its own clerk, who shall hold his office at the pleasure of said court, and who shall receive a salary of one thou-

sand two hundred dollars per annum. The marshal of the district wherein such appellate court shall be held shall be marshal of such court. Said appellate court shall be held at South McAlester, in the Choctaw Nation, and it shall hold two terms in each year, at such times and for such periods as may be fixed by the court."

By the Indian appropriation act of June 7, 1897 (30 Stat. at L. 84, chap. 3), provision was made for the appointment of an additional judge for the United States court in the Indian territory, who was to hold court at such places in the several judicial districts therein, and at such times, as the appellate court of the territory might designate. This judge was to be a member of the appellate court and have all the authority, exercise all the powers, and perform the like duties as the other judges of the court, and it was "*Provided*, that no one of said judges shall sit in the hearing of any case in said appellate court which was decided by him."

By this act of June 7, 1897, it was also provided:

"That the commission appointed to negotiate with the Five Civilized Tribes in the Indian territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities: *Provided further*, That on and after January first, eighteen hundred and ninety-eight, the United States courts in said territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said territory, and the United States Commissioners in said territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said territory; and the laws of the United States and the state of Arkansas in force in the territory shall
[459] apply to all persons therein, irrespective *of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.

"That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also*, That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified * immediately upon their [460]
passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

From the annual report of the commission of October 3, 1897, it appears that there had been presented, in accordance with the provisions of the act of 1896, "some seven thousand five hundred claims, representing nearly, if not quite, seventy-five thousand individuals, each claim requiring a separate adjudication upon the evidence upon which it rested;" and that "about one thousand appeals have been taken from the decisions of the commission." And the commission said: "The condition to which these Five Tribes have been brought by their wide departure in the administration of the governments which the United States committed to their own hands, and in the uses to which they have put the vast tribal wealth with which they were intrusted for the common enjoyment of all their people, has been fully set forth in former reports of the commission as well as in the reports of congressional committees commissioned to make inquiry on the ground. It would be but repetition to attempt again a recital. Longer service among them and greater familiarity with their condition have left nothing to modify either of fact or conclusion in former reports, but on the contrary have strengthened convictions that there can be no cure of the evils engendered by the perversion of these great trusts but their resumption by the government which created them."

June 28, 1898, an act was approved, entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes." 30 Stat. at L. 495, chap. 517. The second section read:

"Sec. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by serv-
[461] ice upon the chief *or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

And the third and eleventh sections in part:

"Sec. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the Five Tribes, or the United States court, and the judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

. . . .

"Sec. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the commission heretofore appointed under acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. . . . When such allotment of the lands of any tribe has been by them completed, said commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any
[462] such act of *Congress: *Provided further*, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

Section 21 was as follows:

"That in making rolls of citizenship of the several tribes, as required by law, the commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the court of claims rendered the third day of February, eighteen hundred and ninety-six.†

*"Said commission is authorized and di- [463]
rected to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

"Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen

†Article IX of the treaty of July 19, 1866, with the Cherokee Nation (14 Stat. at L. 799, 801), is as follows: "The Cherokee Nation having voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime whereof the party shall have been duly convicted in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement

hundred and thirty, and to that end they may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

"The roll of Creek freedmen made by J. W. Dunn, under authority of the United States,
[464] prior to March fourteenth, *eighteen hundred and sixty-seven, is hereby confirmed, and said commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

"It shall make a correct roll of all the Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

"It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty; and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

"The several tribes may, by agreement, determine the rights of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however*, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

"Said commission shall make such rolls descriptive of the persons thereon, so that
[465] they may be thereby identified, and *it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission for enrollment, at such times and places as may be fixed by said commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

"The members of said commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

"Sec. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian territory."

"Sec. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore *authorized by any [466]
law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not

of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated."

Referring to that article, the court of claims, February 18, 1896, transmitted a communication to the Commissioner of Indian Affairs, stating: "The court is of the opinion that the clauses in that article in these words, 'and are now residents therein, or who may return within six months, and their descendants,' were intended for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently, that they refer to both the freedmen and the free colored persons previously named in the article. That is to say, freedmen, and the descendants of freedmen, who did not return within six months, are excluded from the benefits of the treaty and of the decree. The court is also of the opinion that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867." 31 Ct. Cl. 148.

be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight."

Section twenty-nine ratified the agreement made by the commission with commissions representing the Choctaw and Chickasaw tribes, April 23, 1897, as amended by the act, and for its going into effect if ratified before December 1, 1898, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose, "*provided*, That no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election;" "and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement."

Then followed the agreement referred to, containing provisions as to allotments, railroads, town sites, mines, jurisdiction of courts and tribal legislation, and stating: "It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a state in the Union. But this provision shall not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes." The agree-
[467] ment was *ratified by the two nations in August, 1898. Rep. Com. Ind. Affairs, 1898, p. 77.

Section thirty made similar provision in respect of an agreement with the Creek Nation, which is set forth.

The Indian appropriation act of July 1, 1898 (30 Stat. at L. 571, 591, chap. 545), continued the authority theretofore conferred on the commission by law, and contained this provision:

"Appeals shall be allowed from the United States courts in the Indian territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

Thereupon numerous appeals were prosecuted to this court, of which one hundred and sixty-six were submitted on printed briefs, with oral argument in many of them. Four of these appeals are set out in the title, numbered 423, 453, 461, 496, and the remaining one hundred and sixty-two are enumerated in the margin. †

*The proceedings in these four appeals are [468] sufficiently stated as follows:

No. 423.—*Stephens et al.* v. *The Cherokee Nation.*

William Stephens; Mattie J. Ayres, his daughter; Stephen G. Ayres, Jacob S. Ayres, and Mattie Ayres, his grandchildren, *applied [469] to the Dawes Commission for admission to citizenship in the Cherokee Nation, August 9, 1896; the nation answered denying the jurisdiction of the commission, and on the merits; and the application was rejected, whereupon applicants appealed to the United States court in the Indian territory, northern district, where the cause was referred to a special master, who reported on the evidence that the applicants were Cherokee Indians by blood. The court, Springer, J., accepted

†No. 436, Cobb et al. v. Cherokee Nation; No. 438, Coldwell et al. v. Choctaw Nation; No. 445, Castoe et al. v. Cherokee Nation; No. 446, Anderson et al. v. Cherokee Nation: No. 447, Clark et al. v. Choctaw Nation; No. 449, Choctaw Nation v. Mickle et al.; No. 450, Same v. Skaggs; No. 451, Same v. Godard et al.; No. 452, Same v. Grady; No. 454, Morgan et al. v. Creek Nation; No. 456, Bridges et al. v. Creek Nation; No. 457, Cherokee Nation v. Parker et al.; No. 458, Same v. Gilliam et. al.; No. 459, Bell et al. v. Cherokee Nation; No. 460, Truitt et al. v. Cherokee Nation; No. 464, Jordan et al. v. Cherokee Nation; No. 465, Ward et al. v. Cherokee Nation; No. 466, Wassom et al. v. Muskogee or Creek Nation; No. 469, Chickasaw Nation v. Roff et al.; No. 470, Same v. Troop; No. 471, Same v. Love; No. 472, Same v. Hill et al.; No. 473, Same v. Thompson et al.; No. 474, Same v. Love; No. 475, Same v. Poe et al.; No. 476, Same v. McDuffie et al.; No. 477, Same v. McKinney et al.; No. 478, Same v. Bounds et al.; No. 479, Same v. King et al.; No. 480, Same v. Washington et al.; No. 481, Same v. Fitzhugh et al.; No. 482, Same v. Jones et al.; No. 483, Same v. Sparks et al.; No. 484, Same v. Hill et al.; No. 485, Same v. Arnold et al.; No. 486, Same v. Brown et al.; No. 487, Same v. Joines et al.; No. 488, Same v. Halford et al.; No. 489, Same v. Poyner et al.; No. 490, Same v. Albright et al.; No. 491, Same v. Doak et al.; No. 492, Same v. Passmore; No. 493, Same v. Laflin et al.; No. 494, Same v. Law et al.; No. 495, Same v. Saey; No. 497, Same v. Woody et al.; No. 498, Same v. Cornish et al.; No. 499, Same v. McSwain; No. 500, Same v. Standifer; No. 501, Same v. Bradley et al.; No. 502, Same v. Alexander et al.; No. 503, Same v. Sparks et al.; No. 504, Same v. Story et al.; No. 505, Same v. Archard et al.; No. 506, Same v. Keys; No. 507, Same v. McCoy; No. 508, Same

the findings of the master that William Stephens was one-fourth Indian and three-fourths white; that he was born in the state of Ohio; that his father was a white man and a citizen of the United States; that his mother's name was Sarah and that she was a daughter of William Ellington Shoe-boots, and that her father was known as Captain Shoe-Boots in the old Cherokee Nation; that his mother was born in the state of Kentucky, and that she moved afterwards to the state of Ohio, where she was married to Robert
[470] Stephens, *the father of William; that William Stephens came to the Cherokee Nation, Indian territory, in 1873, and has resided in the Cherokee Nation ever since; that soon after he came to the Cherokee Nation he made application for his mother and himself to be readmitted as citizens of that nation; that the Commission who heard the case was convinced of the genuineness of his claim to Cherokee blood, and so reported to the chief, but rejected his application on a technical ground; that the chief, in a message to the council, stated that he was convinced of the honesty and genuineness of the claim, and wished the council to pass an act recognizing Stephens as a full citizen; but this was never done. The court, referring to the master's report, said:

"It is further stated that he has improved considerable property in the nation, and has continuously lived there as a Cherokee citizen, and at one time was permitted to vote in a Cherokee election. It appears from the evidence in the case that this applicant comes within the following provision of the Cherokee Constitution: 'Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: *Provided, nevertheless*, That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who may at any time desire to return to the nation on memorializing the national council for such readmission.' There was a provision precisely similar to this in the Constitution of the old Cherokee Nation as it existed prior to the removal of the tribe west of the Mississippi river. The provision just quoted is from the Constitution of the Cherokee Nation as now constituted.

"The mother of the principal claimant, as heretofore stated, was born in the state of Kentucky, and from that state she moved to the state of Ohio, where she married the father of the principal claimant in this case. Her status was then fixed as that of one who had taken up a residence in the states. She had ceased to be a citizen of the Cherokee Nation, and she cannot be readmitted to citizenship in the nation except by *complying [471]
with the Constitution and laws of the nation as declared by the Supreme Court in the case of The Eastern Band of Cherokee Indians against The Cherokee Nation and The United States.

"The master states the claimant was rejected by the commission of the Cherokee Nation upon a technical ground. The ground upon which the decision was based was that the names of the claimants did not appear upon any of the authenticated rolls of the

v. Vaughan et al.; No. 509, Same v. Dorchester et al.; No. 510, Same v. Duncan; No. 511, Same v. Phillips et al.; No. 512, Same v. Lancaster; No. 513, Same v. Goldsby et al.; No. 514, Same v. East et al.; No. 515, Same v. Bradshaw et al.; No. 516, Same v. Graham et al.; No. 517, Same v. Burch et al.; No. 518, Same v. Palmer et al.; No. 519, Same v. Watkins et al.; No. 520, Same v. Holder et al.; No. 521, Same v. Jones et al.; No. 522, Same v. Worthy et al.; No. 523, Same v. Sartin et al.; No. 524, Same v. Woolsey et al.; No. 525, Same v. Arnold et al.; No. 526, Same v. Paul et al.; No. 527, Same v. Peery et al.; No. 528, Same v. Stinnet; No. 529, Same v. Stinnet et al.; No. 530, Same v. Duncan; No. 531, Same v. Lea et al.; No. 532, Same v. Hamilton; No. 533, Same v. Pitman; No. 534, Same v. Carson et al.; No. 535, Same v. Shanks et al.; No. 536, Same v. Paul; No. 537, Clark et al. v. Creek or Muskogee Nation; No. 538, Tulk et al. v. Same; No. 539, Hubbard et al. v. Cherokee Nation; No. 540, McAnnally et al. v. Same; No. 541, Brashear et al. v. Same; No. 542, Condry et al. v. Same; No. 543, Dial et al. v. Same; No. 544, Munson et al. v. Same; No. 545, Hubbard et al. v. Same; No. 546, Trotter et al. v. Same; No. 547, Hill et al. v. Same; No. 548, Russell et al. v. Same; No. 549, Baird et al. v. Same; No. 550, Binns et al. v. Same; No. 551, Smith et al. v. Same; No. 552, Henley et al. v. Same; No. 553, Same v. Same; No. 554, McKee et al. v. Same; No. 555, Singleton et al. v. Same; No. 556, Brown et al. v. Same; No. 557, Flippin et al. v. Same; No. 558, Gambill et al. v. Same; No. 559, Brewer et al. v. Same; No. 560, Abercrombie et al. v. Same; No. 561, Watts et al. v. Same; No. 562, Hackett et al. v. Same; No. 563, Pace et al. v. Same; No. 564, Teague et al. v. Same; No. 565, Earp et al. v. Same; No. 566, Mayberry et al. v. Same; No. 567, Bailes v. Same; No. 568, Lloyd v. Same; No. 569, Rutherford et al. v. Same; No. 570, Braught et al. v. Same; No. 571, Black et al. v. Same; No. 572, Archer et al. v. Same; No. 573, Hopper et al. v. Same; No. 574, Bayes et al. v. Same; No. 575, Rowell et al. v. Same; No. 576, Armstrong et al. v. Same; No. 577, Goin et al. v. Same; No. 578, Bennight et al. v. Choctaw Nation; No. 579, Wade et al. v. Cherokee Nation; No. 582, Choctaw Nation v. Jones et al.; No. 583, Same v. Goodall et al.; No. 584, Same v. Bottoms et al.; No. 585, Same v. Brooks et al.; No. 586, Same v. Blake et al.; No. 587, Same v. Randolph et al.; No. 588, Same v. Goins et al.; No. 589, Same v. Dutton et al.; No. 590, Same v. Thomas; No. 591, Same v. Jones et al.; No. 592, Meredith et al. v. Cherokee Nation; No. 593, Poindexter et al. v. Same; No. 598, Steen et al. v. Same; No. 599, Couch et al. v. Same; No. 600, Pressley et al. v. Same; No. 601, Elliott et al. v. Same; No. 608, Walker et al. v. Same; No. 609, Harrison et al. v. Same; No. 612, Watts et al. v. Same; No. 613, Hazlewood et al. v. Same; No. 614, Frakes et al. v. Same; No. 615, Harper et al. v. Same; No. 616, Armstrong et al. v. Same; No. 617, Rogers et al. v. Same; No. 618, Isbell et al. v. Same; No. 619, Wiltenberger et al. v. Same; No. 637, Baker v. Creek Nation; No. 643, Caie v. Choctaw Nation; No. 644, Cundiff et al. v. Same; No. 645, Slayton et al. v. Same; No. 646, Willis et al. v. Same; No. 647, Coppedge v. Same; No. 648, Nabors et al. v. Same; No. 651, Phillips et al. v. Same.

present Cherokee Nation or of the old Cherokee Nation. The commission which passed upon his application was created under the act of the council of December 8, 1886.

"Robert Stephens, the father of the principal claimant in this case, was a citizen of the United States and a resident of the state of Ohio, and the mother of the claimant William Stephens had abandoned the Cherokee Nation and ceased to be a citizen thereof. Therefore the principal claimant at the time of his birth was a citizen of the United States, taking the status of his father. I doubt whether he could become a citizen of the Cherokee Nation without the affirmative action of the Cherokee council. The evidence fails to disclose that he has ever applied to any of the commissions that had jurisdiction to admit him as a citizen of the Cherokee Nation. The commission to which he did apply for enrollment as a citizen of the Cherokee Nation having held that his name did not appear upon any of the Cherokee rolls of citizenship, his application was rejected. He never having been admitted to citizenship as required by the Constitution and laws of the Cherokeee Nation, the judgment of the United States Commission rejecting this case is affirmed, and the application of the claimants to be enrolled as citizens of the Cherokee Nation is denied."

Judgment affirming the decision of the Dawes Commission refusing applicants' enrollment and admission as citizens of the Cherokee Nation was entered December 16, 1897, whereupon a motion for rehearing was filed, which was finally overruled June 23, 1898, and judgment again entered that applicants "be not admitted and enrolled as citizens of the Cherokee Nation, Indian territory." From these decrees applicants prayed
[472] *an appeal to this court August 29, 1898, which was allowed and perfected September 2, 1898, and the record filed here October 3, 1898.

No. 453.—*The Choctaw Nation* v. *F. R. Robinson.*

September 7, 1896, F. R. Robinson applied to the Dawes Commission to be enrolled as an intermarried citizen. His petition set forth that he was a white man; that he married a woman of Choctaw and Chickasaw blood, September 21, 1873, by which marriage he had five children; that she died, and he married a white woman August 10, 1884, with whom he was still living. The Choctaw Nation answered, objecting that the Dawes Commission had no jurisdiction because the act of Congress creating it was unconstitutional and void; that Robinson had not applied for citizenship to the tribunal of the Choctaw Nation constituted to try questions of citizenship; and that he ought not to be enrolled "because he has not shown by his evidence that he has not forfeited his rights as such citizen by abandonment or remarriage." The Dawes Commission granted the application, and thereupon the Choctaw Nation appealed to the United States court in the Indian territory, central district. The cause was referred to a master, who made a report, and thereafter, June 29, 1897, the court, Clayton, J., found that Robinson was "a member and citizen of the Choctaw Nation by intermarriage, having heretofore been legally and in compliance with the laws of the Choctaw Nation married to a Choctaw woman by blood, and that said F. R. Robinson was by the duly constituted authorities of the Choctaw Nation placed upon the last roll of the members and citizens of the Choctaw Nation, prepared by the said Choctaw authorities, and that his name is now upon the last completed rolls of the members and citizens of the said Choctaw Nation," and thereupon decreed that Robinson was "a member and citizen, by intermarriage wth the Choctaw Nation, and entitled to all the rights, privileges, immunities, and benefits in said nation as such intermarried citizen and said member;" and directed a certified copy of the judgment to be transmitted to the commission. From this decree the
*Choctaw Nation prayed an appeal Septem- [473]
ber 21, 1898, which was on that day allowed and perfected.

No. 461.—*Jennie Johnson et al.* v. *The Creek Nation.*

This was a petition of Jennie Johnson and others to the Dawes Commission for admission to citizenship and membership in the Creek Nation. It seems to have been presented August 10, 1896, on behalf of one hundred and twelve applicants, to have been granted as to sixty-two, and to have been denied as to fifty-seven by whom an appeal was taken to the United States court in the Indian territory, northern district. The cause was referred to a special master, and on June 16, 1898, the court, Springer, J., rendered an opinion, in which, after considering various laws of the Muscogee or Creek Nation bearing on the subject, certain decisions of tribal courts, the action of a certain "committee of eighteen on census rolls of 1895," and of the council thereon adopting the report of that committee, in respect of applicants, the court concluded that appellants were not entitled to be enrolled as citizens of the Creek Nation, and entered judgment accordingly, whereupon an appeal was prayed from said decree and allowed and perfected September 27, 1898.

No. 496.—*The Chickasaw Nation* v. *Richard C. Wiggs et al.*

Richard C. Wiggs filed an application before the Dawes Commission to be admitted to citizenship in the Chickasaw Nation, asserting, among other things, that he was a white man and prior to October 13, 1875, a citizen of the United States, on which day he lawfully married Georgia M. Allen, a native Chickasaw Indian and member of the Chickasaw Tribe; and also an application on behalf of his wife, Josie Wiggs, at the time of their marriage, which was in accordance with the Chickasaw laws under such circumstances, a white woman and citizen of the United States, and their daughter Edna Wiggs, August 15, 1896. The Chickasaw Nation, September 1, 1896, filed with the commission its answer to these applications, which, after denying the jurisdiction of the commission, trav-

ersed the allegations of the applications. [474]*November 15, 1896, the Dawes Commission admitted Richard C. Wiggs to citizenship in the Chickasaw Nation, but denied the application as to Mrs. Wiggs and their daughter. Thereafter an appeal was taken on behalf of the wife and daughter to the United States court in the Indian territory, southern district, and a cross appeal by the Chickasaw Nation from the decision of the commission admitting Wiggs to citizenship. The court referred the cause to a master in chancery, who made a report in favor of Wiggs, but against his wife and daughter. The court, Townsend, J., found "that all of the applicants are entitled to be enrolled as Chickasaw Indians, it appearing to the court that the said Richard C. Wiggs, being a white man and citizen of the United States, was married in the year 1875 to Georgia M. Allen, who was a native Chickasaw Indian by blood. Said marriage was solemnized according to the laws of the Chickasaw Nation; that in the year 1876 the said wife of the said Richard C. Wiggs died; that from and after said marriage the said Richard C. Wiggs continued to reside in the Chickasaw Nation and to claim the rights of citizenship in said nation, and as such he served in the Chickasaw legislature, and was also sheriff of Pickens county, in said nation; that in the year 1886 the said Richard C. Wiggs was lawfully married, according to the laws of the Chickasaw Nation, to Miss Josie Lawson, and that ever since said marriage the said Wiggs and his present wife have resided in the Chickasaw Nation and claimed the rights of citizenship therein, and that there has been born unto them a daughter, Mary Edna Wiggs"; and thereupon entered a decree. December 22, 1897, admitting Richard C. Wiggs, his wife, and their daughter, "to citizenship in the Chickasaw Nation and to enrollment as members of the tribe of Chickasaw Indians, with all the rights and privileges appertaining to such relation; and it is further ordered that this decree be certified to the Dawes Commission for their observance."

From this decree an appeal was allowed and perfected July 11, 1898.

Messrs. **Heber J. May, Calvin L. Herbert, S. M. Porter, Charles A. Keigwin,** *A. H. Garland, R. C. Garland, M. M. Edmiston, Henry M. Furman, William I. Cruce, Andrew C. Cruce, James C. Thompson, William M. Cravens, C. C. Potter, Joseph M. Hill, James Brizzolara, S. H. Barr, Yancey Lewis, William Ritchie, W. W. Dudley, L. T. Mieherer, Wilkinson & Kennedy, Eugene Easton, J. S. Arnote, Thomas Norman, Robert H. West, James L. Norris, W. A. Ledbetter, Dorset Carter, B. D. Davidson, J. W. Johnson, S. T. Bledsoe, Silas Hare, Jacob C. Hodges, P. D. Brewer, M. M. Lindly, J. A. Hale, J. G. Ralls, J. F. Sharp,* and *Walter A. Logan*, for various claimants, including those whose cases were argued and those which were submitted on briefs as stated in the opinion.

Messrs. **William T. Hutchings, Wilkinson Call,** *A. W. Cockrell* and *D. W. C. Duncan* for Cherokee Nation.

Mr. **Jeremiah M. Wilson** for the Choctaw Nation.

Messrs. **Holmes Conrad** and *Halbert E. Paine* for the Chickasaw Nation.

Mr. **Ben T. Duval** filed a brief for the Muskogee Nation.

*Mr. Chief Justice **Fuller** delivered the [476] opinion of the court:

These appeals are from decrees of the United States court in the Indian territory, sitting in first instance, rendered in cases pending therein involving the right of various individuals to citizenship in some one of the four tribes named; most of them came to that court by appeal from the action of the so-called Dawes Commission, though some were from decisions of tribal authorities; many questions are common to them all; and it will be assumed that in all of them the decrees were rendered and the court had finally adjourned before the passage of the act of July 1, 1898, providing for appeals to this court.

The act of June 10, 1896, provided "that if the tribe or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however,* That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

It must be admitted that the words "United States district court" were not accurately used, as the United States court in the Indian territory was not a district or circuit court of *the United States (*Re Mills*, 135 U. [477] S. 263, 268 [34: 107, 110]), and no such court had, at the date of the act, jurisdiction therein. But as, manifestly, the appeal was to be taken to a United States court having jurisdiction in the Indian territory, and in view of the other terms of the act bearing on the immediate subject-matter, to say nothing of subsequent legislation, it is clear that the United States court in the Indian territory was the court referred to. This conclusion, however, may fairly be said to involve the rejection of the word "district" as a descriptive term, and reading the provision as granting an appeal to the United States court in the Indian territory, the question arises whether the judgments made final by the statute are the judgments of that court in the several districts delineated by the act of March 1, 1895, or of the appellate court therein provided for, which may be referred to later on, since it is objected in the outset that no appeal from the decisions of the Dawes Commision or of the tribal authorities could be granted to any United States court; and, furthermore, that, at all events, it was not competent for Congress to provide for an appeal from the decrees of the United States court in the Indian territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute.

As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only quasi judicial powers, by the transfer of their proceedings and decisions, denominated appeals, for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities.

The other objection, though appearing at first blush to be more serious, is also untenable.

The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the
[478] act was to operate *retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void.

And while it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder* v. *Bull,* 3 Dall. 386 [1: 648]; *Sampeyreac* v. *United States,* 7 Pet. 222 [8: 665]; *Freeborn* v. *Smith,* 2 Wall. 160 [17: 922]; *Garrison* v. *New York,* 21 Wall. 196 [22: 612]; *Freeland* v. *Williams,* 131 U. S. 405 [33: 193]; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334 [35: 446].

The United States court in the Indian territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and, assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction.

This brings us to consider the nature and extent of the *appeal provided for. We re- **[479]**
peat the language of the act of July 1, 1898, as follows:

"Appeals shall be allowed from the United States courts in the Indian territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian territory under the rules and regulations governing appeals to said court in other cases: *Provided,* That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

This provision is not altogether clear, and we therefore inquire, What is its true construction? Was it the intention of Congress to impose on this court the duty of re-examining the facts in the instance of all applicants for citizenship who might appeal; of construing and applying the treaties with, and the constitutions and laws, the usages and customs of, the respective tribes; of reviewing their action through their legislative bodies, and the decisions of their tribal courts and commissions; and of finally adjudicating the right of each applicant under the pressure of the advancement of each case on the docket to be disposed of as soon as possible? Or, on the other hand, was it the intention of Congress to submit to this court only the question of the constitutionality or validity of the legislation in respect of the subject-matter? We have no hesitation in saying that in our opinion the appeal thus granted was intended to extend only to the constitutionality or validity of the legislation affecting citizenship or the allotment of lands in the Indian territory.

*Two classes of cases are mentioned: (1) **[480]**
Citizenship cases. The parties to these cases are the particular Indian tribe and the applicant for citizenship. (2) Cases between either of the Five Civilized Tribes and the United States. Does the limitation of the inquiry to the constitutionality and validity of the legislation apply to both classes? We think it does.

It should be remembered that the appeal to the United States court for the Indian territory under the act of 1896 was in respect of decisions as to citizenship only, and that in those cases the jurisdiction of the Dawes Commission and of the court was attacked on the ground of the unconstitutionality of the legislation. The determination of that

question was necessarily in the mind of Congress in providing for the appeal to this court, and it cannot reasonably be supposed that it was intended that the question should be reopened in cases between the United States and the tribes. And yet this would be the result of the use of the words "affecting citizenship" in the qualification if that qualification were confined to the last-named cases. The words cannot be construed as redundant and rejected as surplusage, for they can be given full effect; and it cannot be assumed that they tend to defeat, but rather that they are in effectuation of, the real object of the enactment. It is true that the provision is somewhat obscure, although if the comma after the words "all citizenship cases" were omitted, or if a comma were inserted after the words "the United States," that obscurity would practically disappear, and the rule is well settled that, for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *Hammock* v. *Farmers' Loan and Trust Company*, 105 U. S. 77, 84 [26: 1111, 1114]; *United States* v. *Lacher*, 134 U. S. 624, 628 [33: 1080, 1083]; *United States* v. *Oregon & C. Railroad Company*, 164 U. S. 541 [41: 545].

On any possible construction, in cases between the United States and an Indian tribe, no appeal is allowed, unless the constitutionality or validity of the legislation is involved; and it would be most unreasonable to attribute to Congress an intention that the right of appeal should be more extensive
[481] in *cases between an Indian tribe and an individual applicant for citizenship therein.

Reference to prior legislation as to appeals to this court from the United States court in the Indian territory confirms the view we entertain.

By section five of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), as amended, appeals or writs of error might be taken from the district and circuit courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question.

By section 6 the circuit courts of appeals established by the act were invested with appellate jurisdiction in all other cases.

The thirteenth section reads: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act."

The act of March 1, 1895, provided for the appointment of additional judges of the United States court in the Indian territory and created a court of appeals with such superintending control over the courts in the Indian territory as the supreme court of Arkansas possessed over the courts of that state by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit court of the United States," which thus in terms deprived that court of jurisdiction of appeals from the Indian territory trial court under section 13 of the act of 1891. Prior to the act of 1895 the United States court in the Indian *terri- [482]
tory had no jurisdiction over capital cases, but by that act its jurisdiction was extended to embrace them. And we held in *Brown* v. *United States*, 171 U. S. 631 [*ante*, 312], that this court had no jurisdiction over capital cases in that court, the appellate jurisdiction in such cases being vested in the appellate court in the Indian territory. Whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable need not be considered, as the judgments of the United States court in the Indian territory in these citizenship cases were made final in that court by the act of 1896, and this would cut off an appeal to this court, if any then existed, whether the finality spoken of applied to the judgments of the trial court or of the appellate court. And when by the act of July 1, 1898, it was provided that "appeals shall be allowed from the United States courts in the Indian territory direct to the Supreme Court of the United States, . . . under the rules and regulations governing appeals to said court in other cases," the legislation, taken together, justifies the conclusion that the distribution of jurisdiction made by the act of March 3, 1891, was intended to be observed, namely, that cases falling within the classes prescribed in section five should be brought directly to this court, and all other cases to the appellate court, whose decision, as the legislation stands, would in cases of the kind under consideration be final. We do not think, however, that the analogy goes so far, in view of the terms of the act of 1898, that in cases brought here the whole case would be open to adjudication. The matter to be considered on the appeal, like the appeal itself, was evidently intended to be restricted to the constitutionality and validity of the legislation. The only ground on which this court held itself to be authorized to consider the whole merits of the case upon an appeal from the circuit court of the United States in a case in which the constitutionality of a law of the United States was involved, under section 5 of the act of March 3, 1891, chap. 517, was because of the express limitation in another part of that section of appeals upon the question of jurisdiction; and there is no kindred limitation in the act now before us. *Horner* v. *United States*, 143 U. S. 570, 577 [36: 266, 269]. The judgments of the *court [483]
in the Indian territory were made final, and appeals to this court were confined, in our opinion, to the question of constitutionality or validity only.

Was the legislation of 1896 and 1897, so

far as it authorized the Dawes Commission to determine citizenship in these tribes, constitutional? If so, the courts below had jurisdiction on appeal.

It is true that the Indian tribes were for many years allowed by the United States to make all laws and regulations for the government and protection of their persons and property, not inconsistent with the Constitution and laws of the United States; and numerous treaties were made by the United States with those tribes as distinct political societies. The policy of the government, however, in dealing with the Indian nations was definitively expressed in a proviso inserted in the Indian appropriation act of March 3, 1871 (16 Stat. at L. 544, 566, chap. 120), to the effect:

"That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe," which was carried forward into section 2079 of the Revised Statutes, which reads:

"Sec. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is "well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be
[484] met by the political department of the *government." *Thomas* v. *Gay*, 169 U. S. 264, 271 [42: 740, 743], and cases cited.

As to the general power of Congress we need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S. 641, 653 [34: 295, 301], from whose opinion we quote as follows:

"The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 [8: 25, 31], 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.' It is true, as declared in *Worcester* v. *Georgia*, 6 Pet. 515, 557, 569 [8: 483, 499, 504], that the treaties and laws of the United States contemplate the Indian territory as completely separated from the states and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583 [8: 509]), that 'in the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community.' But that falls far short of saying that they are a sovereign state, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to *the Cherokee Nation should at no [485]
future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory, and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them'; and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers*, 4 How. 567, 572 [11: 1105, 1107], the court, referring to the locality in which a particular crime had been committed, said: 'It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the consent of the United States, and under their authority. . . . We think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority.' In *United States* v. *Kagama*, 118 U. S. 375, 379 [30: 228, 230], the court, after observing that the Indians were within the geographical limits of the United States, said: 'The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exist within the broad do-

main of sovereignty but these two. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations,
[486] and *thus far not brought under the laws of the Union or of the state within whose limits they resided. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.' The latest utterance upon this general subject is in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27 [30: 306, 315], where the court, after stating that the United States is a sovereign nation limited only by its own Constitution, said: 'On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power.'"

Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.

By the act of June 10, 1896, the Dawes Commission was authorized "to hear and determine the application of all persons who may apply to them for citizenship in said nations, and, after such hearing they shall determine the right of such applicant to be so admitted and enrolled," but it was also provided:

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and
[487] all *treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof."

The act of June 7, 1897, declared that the commission should "continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission
*will investigate and determine the right of [488]
such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such commission shall [have] the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

"That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes."

We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recog-

nize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

The judgments in these cases were ren- [489] dered before the passage *of the act of June 28, 1898, commonly known as the Curtis act, and necessarily the effect of that act was not considered. As, however, the provision for an appeal to this court was made after the passage of the act, some observations upon it are required, and, indeed, the inference is not unreasonable that a principal object intended to be secured by an appeal was the testing of the constitutionality of this act, and that may have had controlling weight in inducing the granting of the right to such appeal.

The act is comprehensive and sweeping in its character, and notwithstanding the abstract of it in the statement prefixed to this opinion, we again call attention to its provisions. The act gave jurisdiction to the United States courts in the Indian territory in their respective districts to try cases against those who claimed to hold lands and tenements as members of a tribe and whose membership was denied by the tribe, and authorized their removal from the same if the claim was disallowed; and provided for the allotment of lands by the Dawes Commission among the citizens of any one of the tribes as shown by the roll of citizenship when fully completed as provided by law, and according to a survey also fully completed; and "that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands."

The act further directed, as to the Cherokees, that the commission should "take the roll of Cherokee citizens of eighteen hundred and eighty, not including freedmen, as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by [490] reason of their Cherokee blood, *have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have legal right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entited to citizenship under Cherokee laws." And that the commission should make a roll of Cherokee freedmen, in compliance with a certain decree of the court of claims; and a roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty; and a roll of Chickasaw freedmen entitled to any rights or benefits under the treaty of 1866, and their descendants; and a roll of all Creek freedmen, the roll made by J. W. Dunn, under the authority of the United States, prior to March 14, 1867, being confirmed, and the commission being directed to enroll all persons now living whose names are found on said roll, and their descendants, with "such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

The commission was authorized and directed to make correct rolls of the citizens by blood of all the tribes other than the Cherokees, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and laws of said tribes."

It was also provided that "no person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship."

The commission was authorized to make the rolls descriptive of the persons thereon, so that they might be thereby identified, and to take a census of each of said tribes, "or *to [491] adopt any other means by them deemed necessary to enable them to make such rolls;" and it was declared that "the rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

The act provided further for the resubmission of the two agreements, with certain specified modifications, that with the Choctaws and Chickasaws, and that with the Creeks, for ratification to a popular vote in the respective nations, and that, if ratified, the provisions of these agreements so far as differing from the act should supersede it. The Choctaw and Chickasaw agreement was accordingly so submitted for ratification August 24, 1898, and was ratified by a large majority, but whether or not the agreement with the Creeks was ratified does not appear.

The twenty-sixth section provided that,

after the passage of the act, "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian territory;" and the twenty-eighth section, that after July 1, 1898, all tribal courts in the Indian territory should be abolished.

The agreement with the Choctaw and Chickasaw tribes contained a provision continuing the tribal government, as modified, for the period of eight years from March 4, 1898; but provided that it should "not be construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes."

For reasons already given we regard this act in general as not obnoxious to constitutional objection, but in so holding we do not intend to intimate any opinion as to the effect that changes made thereby, or by the agreements referred to, may have, if any, on the status of the several applicants, who are parties to these appeals.

The elaborate opinions of the United States court in the Indian territory by Springer, J., Clayton, J., and Townsend, J., contained in these records, some of which are
[492] to be found *in the report of the Commissioner of Indian Affairs for 1898, page 479, consider the subject in all its aspects, and set forth the various treaties, tribal constitutions and laws, and the action of the many tribal courts, commissions, and councils which assumed to deal with it, but we have not been called on to go into these matters, as our conclusion is that we are confined to the question of constitutionality merely.

As we hold the entire legislation constitutional, the result is that all the *judgments must be affirmed.*

Mr. Justice **White** and Mr. Justice **McKenna** dissented as to the extent of the jurisdiction of this court only.

OFFICE SPECIALTY MANUFACTURING COMPANY, *Appt.*,

v.

FENTON METALLIC MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 492–499.)

Judicial notice of use of a device—Hoffman patent void—not infringed.

1. A semicircular hand hole or recess, for grasping the books, in upright partitions for holding books, is so old a device that the court can take judicial notice of its use, long prior to the Hoffman patent of April 7, 1891, for improvement in storage cases for books.
2. The Hoffman patent is only an aggregation of old, well-known devices, each of which performs its own function in the old way, and such patent is void.
3. Limiting the Hoffman patent to the claims as described, it is not infringed by any of defendant's devices.

[No. 253.]

Argued April 20, 1899. Decided May 15, 1899.

APPEAL from a decree of the Court of Appeals for the District of Columbia affirming the decree of the Supreme Court of that District in favor of the Fenton Metallic Manufacturing Company, plaintiff, and sustaining the validity of a patent issued to Horace J. Hoffman for improvements in storage cases for books and allowing damages in a suit in equity brought by said company against the Office Specialty Manufacturing Co. *Reversed,* and case remanded, with directions to dismiss the suit.

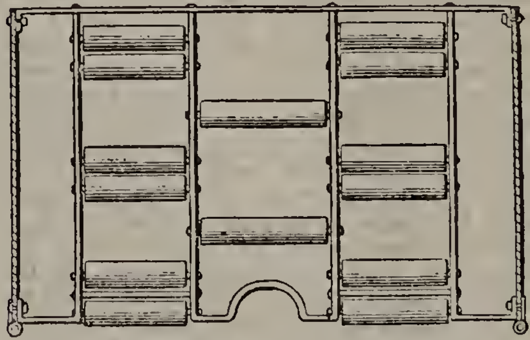
See same case below, 12 App. D. C. 201. See also *Fenton Metallic Mfg. Co.* v. *Chase,* 73 Fed. Rep. 831, 84 Fed. Rep. 893.

Statement by Mr. Justice **Brown:**

This was a bill in equity filed in the supreme court of the District of Columbia by the Fenton Metallic Manufacturing Company against the appellant to recover for the infringement of letters patent number 450,124, issued April 7, 1891, to Horace J. Hoffman for improvements in storage cases for books.

In the specification the patentee declares that "the object of my invention is to facilitate the handling and prevent the abrasion and injury of heavy books, etc. It consists essentially, *of the peculiar arrangement of [493]
the guiding and supporting rollers, and of the peculiarities in the construction of the case and shelves hereinafter specifically set forth."

The following drawing of one of the shelves exhibits the peculiar features of the invention. The drawing explains itself so perfectly that no excerpt from the specification is necessary to an understanding of the claims.



The two claims alleged to have been infringed are as follows:

"1. In a storage case for books, etc., the combination of a supporting rack or shelf composed of metallic strips and having a reentrant bend or recess in its front edge and rollers journaled in said rack and projecting above and in front of the same on each side of said bend or recess, substantially as described.

"2. In a book shelf, the combination of a supporting frame, a series of horizontal rollers, the front roller in two separated sections, the intermediate part of the frame being carried back to permit the admission of the hand between said roller sections, substantially as described."

The defendant, the Office Specialty Manufacturing Company, was the assignee,

through mesne assignments of Jewell and Yawman, whose application for a patent, filed November 6, 1888, was put in interference in the Patent Office with the application of Hoffman, filed February 12, 1887, and the interference proceedings on behalf of
[494]Jewell and Yawman, were *conducted by the parties who subsequently formed the Office Specialty Manufacturing Company. The Examiner of Interferences, the Board of Examiners-in-Chief, and the Commissioner of Patents successively decided in favor of Hoffman, to whose assignees the letters patent were subsequently issued. During the pendency of the interference, the Hoffman application was divided, as permitted by the rules of the Patent Office, to secure a patent for certain features not involved in the interference.

Upon a hearing on pleadings and proofs a decree was entered adjudging the patent to be valid, and the first and second claims thereof to have been infringed by the defendant; and the case was sent to the auditor to determine and report the profits and damages resulting from the infringement.

After certain proceedings, taken with respect to several infringing devices, not necessary to be here set forth, a final decree was entered in favor of the plaintiff, which, so far as respects the validity of the patent, was affirmed by the court of appeals, with an allowance for damages, which had been rejected by the supreme court. 12 App. D. C. 201. Whereupon the defendant appealed to this court.

Messrs. **Melville Church** and *Joseph B. Church* for appellant.

Mr. **Charles Elwood Foster** for appellee.

[494] *Mr. Justice **Brown** delivered the opinion of the court:

We consider the question of the validity of this patent as the decisive one in this case. The patent was adjudged to be valid by the supreme court of the District of Columbia, as well as by the court of appeals. It had been held to be invalid by Judge Lacombe, sitting in the circuit court for the southern district of New York, upon a motion for a preliminary injunction (*Fenton Metallic Manufacturing Co.* v. *Chase*, 73 Fed. Rep. 831), and by Judge Wheeler, upon a final hearing of the same case (84 Fed. Rep. 893).

[495] *The elements of Hoffman's combination as described in the first claim alleged to be infringed, are (1) a supporting rack or shelf composed of metallic strips; (2) a re-entrant bend or recess in its front edge for the insertion of the hand; and (3) rollers journaled in the rack and projecting above and in front of the same on each side of the recess. In the second claim the combination is described as (1) a supporting frame (apparently including one of wood as well as of metal; (2) a series of horizontal rollers, the front rollers being in two separated sections; (3) the intermediate part of the frame being carried back to permit the admission of the hand between said roller sections. It may be remarked in passing that none of the decisions in the Patent Office in the interference proceedings dealt with the question of prior devices.

The introduction of rollers in book shelves is undoubtedly a convenient and valuable device for preventing the abrasion of large and heavy books which are obliged to be laid flat upon the shelves, especially when they are subjected to frequent handling; but the employment of roller shelves at the time Hoffman made his application for a patent (February 12, 1887) was by no means a novelty. Indeed, plaintiff's own expert testifies that "it was common to use what were called roller shelves, the same consisting of frames or supports and longitudinal parallel rollers, which extended the entire length of the shelf and served to reduce friction in putting books upon and withdrawing them from the shelf. One form of such shelves is shown in complainant's exhibit, Office Specialty Manufacturing Company's catalogue, Figure 16." This exhibit shows a shelf frame made of bent metal, firmly riveted together, containing three continuous rollers, each of the full length of the shelf, made of steel in tubular form. Continuing, the witness said:

"The use of such shelves was, and is, however, limited because of certain defects; for instance, one of the principal defects is the liability of the person placing the book upon the shelf to have the fingers pinched between the book and the front roller in placing the book on the shelf. With light, small books this, of course, was not a matter of special importance, *and the shelves can be used with [496]
such books, but the class of books for which such shelves are especially adapted is heavy books, such as are used in keeping government records, weighing, in many instances, from ten to twenty-six or even thirty pounds, and quite large, and with such books the liability to injure the fingers in putting them on and taking them from the shelf is very great."

So long before Hoffman's application as the year 1870, Samuel H. Harris had obtained a patent, No. 107,042, for a shelf of three parallel wooden rollers covered with sheet metal, the specification of which seems to assume that wooden rollers had theretofore been used in iron cases for books.

A patent issued in 1876 to John L. Boone, No. 182,157, describes his invention as consisting "in attaching rollers to the front edges of book shelves so that when a book is withdrawn from or placed upon the shelf it will move over the roller instead of over the edge of the shelf." This is to obviate the danger of the book being abraded by the sharp corners of the shelf over which it is dragged, especially if the shelf is higher than the level of the person's head who handles it.

A patent issued in 1885 to Walter H. Conant shows a similar arrangement of front rollers to protect the books.

In a patent to Marion T. Wolfe of October 7, 1879, No. 220,265, there is shown a book case in which three series of short rollers, each inserted in what the patentee calls

a "box," are employed as a support for the books. These boxes run at right angles to the front of the case, and they are so constructed that the hand may be introduced between any two series of rollers in order to more readily grasp the back of the book, without liability of the fingers being caught by the edge of the shelf.

A device somewhat similar to that patented to Harris is shown in a patent issued in 1886 to A. Lemuel Adams, wherein a shelf is provided with a series of parallel short rollers, the front rollers being supported upon spring arms, which are carried forward so as to permit of the introduction of the hand between them, and thus facilitate the withdrawal of the book, without liability of con-
[497] tact of the fingers with any portion of *the shelf. When a book is to be placed in position, it is first rested upon the spring rollers, which by their elasticity assist in forcing the book upon the fixed rollers, when it is easily passed by such rollers to its proper place. The extension of the elastic rollers in front of the shelf would seem to prevent the use of doors in front of the shelves, and it is clear they do not support the books when in place.

There was also oral testimony showing that there were in use in the courthouse in Richmond, Indiana, in the year 1873, and thereafter, unpatented roller shelves for books, consisting of a wooden shelf, having the ordinary hand hole at the front, upon each side of which there were short rollers similar to Hoffman's, though some distance from the front edge, which enabled the back of the book to be readily grasped and easily withdrawn upon the rollers. The evidence showed that hundreds of these rollers were used, and one of them, taken from the courthouse in Richmond, was introduced as an exhibit.

Comparing these several devices with the patent in suit, it is manifest that every element of the combination, described in the first and second claims, is found in one or the other of such devices. Roller shelves are found in all the patents above described as well as in the Richmond shelf, and if there were any invention in substituting metal for a wooden frame, it appears to have been anticipated in the shelf used by the Specialty Company, known as figure 16, the existence of which before the Hoffman application for a patent is admitted by plaintiff's expert as well as by the manager of the plaintiff corporation. It was no novelty to place rollers at the front edges of the shelves, so as to project above and in front of the shelves, as this is shown in the Boone, Conant, and Adams patent, and in the defendant's metallic shelf, used prior to the Hoffman application. The employment of semicircular hand holes or recesses, for more readily grasping the books, is such a familiar device in upright partitions for holding books that scarcely any banking or record office is without them, and the court may properly take judicial notice of their use long prior to this patent. *Brown* v. *Piper*, 91 U. S. 37 [23:
[498] 200]; *Terhune* v. **Phillips*, 99 U. S. 292 [25: 293]; *King* v. *Gallun*, 109 U.S. 99 [29: 870]; *Phillips* v. *Detroit*, 111 U. S. 604, 606 [28: 532, 533]. If there were any invention in applying them to roller shelves, Hoffman is not entitled to the credit of it, since they are shown in the so-called Richmond shelf. The construction of the Wolfe and Adams patents is also such as to permit the introduction of the hand for grasping the book without coming in contact with the edge of the shelves.

Putting the Hoffman patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes* v. *Van Wormer*, 20 Wall. 353, 368 [22: 241, 248]; *Reckendorfer* v. *Faber*, 92 U. S. 347, 356 [23: 719, 723]; *Phillips* v. *City of Detroit*, 111 U. S. 604 [28: 532]; *Brinkerhoff* v. *Aloe*, 146 U. S. 515, 517 [36: 1068]; *Palmer* v. *Corning*, 156 U. S. 342, 345 [39: 445, 447]; *Richards* v. *Chase Elevator Co.* 158 U. S. 299 [39: 991]. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill.

If there be any invention at all in this patent, it is not to be found in the combination described in the claims, but by a reference to the drawing, and in the words "substantially as described." This would confine the plaintiff to a metallic frame divided longitudinally into three sections, each fitted with short rollers, two of which project above and forward of the front bar of the frame, which is bent inward in front of the middle section to form the "re-entrant bend or recess" for the insertion of the hand.

But in whatever light this device be considered, it is evident that, limiting the patent to the precise construction shown, none of the defendant's devices can be treated as infringements, since none of them show a shelf divided into three sections, and none of them, except possibly one, the manufacture *of **[499]**
which was stopped, indicate a bend in the front bar of the frame to form the recess for the insertion of the hand.

The decree of the court below must be reversed, and the case remanded to the court of appeals, with directions to order the bill to be dismissed.

ALBERT WADE, *Petitioner*,
v.
TRAVIS COUNTY, TEXAS.

(See S. C. Reporter's ed. 499-510.)

Determination of state statute—latest state decisions—bonds issued under favorable state decisions—validity of county bonds determined by the latest state decisions.

1. In determining what the laws of a state are, which will be regarded as rules of decision, this court will look, not only to its Constitution and statutes, but at the decisions of its highest court giving construction to them.
2. If there be any inconsistency in the opinions of such highest court, this court will generally follow the latest settled adjudications in preference to the earlier ones.
3. County bonds issued in good faith for a valuable consideration are valid in the hands of a bona fide holder, although the prior state decisions are against their validity, if the subsequent state decisions are in favor of their validity.

[No. 267.]

Argued April 26, 1899. Decided May 15, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Western District of Texas sustaining a demurrer and dismissing a suit brought by Albert Wade, plaintiff, against the county of Travis to recover the amount of certain coupons of bonds issued by said county to build an iron bridge over Colorado river. Judgments of the Circuit Court of Appeals and of the Circuit Court reversed, and case remanded to said Circuit Court for further proceedings.

See same case below, 72 Fed. Rep. 985, and 52 U. S. App. 395, 81 Fed. Rep. 742, 26 C. C. A. 589.

Statement by Mr. Justice **Brown:**

This was an action brought in the circuit court for the western district of Texas by the plaintiff Wade, who is a citizen of the state of Illinois, against the county of Travis, to recover upon certain interest coupons detached from forty-seven bonds issued by the defendant for the purpose of building an iron bridge across the Colorado river.

The petitioner set forth that in July, 1888, the defendant, being authorized so to do, entered into a contract with the King Iron Bridge Manufacturing Company of Cleveland, Ohio, for the construction of a bridge for public use over the Colorado river, the company agreeing to complete the same by November 15, 1888, in consideration of which
[500] the defendant *agreed to pay the sum of $47-000 in six per cent bonds, payable in twenty years after date.

That prior to the making of such contract, to wit, February 23, 1888, the defendant, acting though its commissioners' court, levied for the year 1888 and subsequent years, until otherwise ordered, an annual ad valorem tax of twenty cents for general purposes, and an annual ad valorem tax of fifteen cents for road and bridge purposes, on each one hundred dollars' worth of taxable property in such county; that on February 13, 1889, the commissioners' court of the county levied for the year 1889 an ad valorem tax of fifteen cents on each one hundred dollars' worth of property for road and bridge purposes and an ad valorem tax of five cents to create a sinking fund for bridge bonds, and to pay the interest on such bonds; that the defendant delivered to the bridge company upon its contract for erecting the bridge five bonds on December 6, 1888, ten bonds on December 22, 1888, ten bonds on February 12, 1889, and the remaining twenty-two of such bonds on July 3, 1889, such bonds being signed by the county judge, countersigned by the county clerk, and registered by the county treasurer; that the several levies in question had not been appropriated for any other purpose by the county, or, at least, a sufficient portion of them remained unappropriated to pay the interest and sinking fund upon such bonds, and that it was the intention of the commissioners' court to use these levies with a view of providing an annual fund sufficient to pay the interest, and to provide the sinking fund required by law. The petition further averred that plaintiff purchased the coupons for a good and valuable consideration in open market, and that he is the legal owner and holder of the same; that on January 16, 1896, he presented such coupons to the county treasurer and demanded payment thereof, which was refused.

The county demurred to the petition upon six different grounds, the first and material one of which was that the petition failed to allege that "at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the *interest, and at [501]
least two per cent sinking fund upon such bonds."

The circuit court was of opinion that, at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for the interest upon such bonds and for a sinking fund, and thereupon sustained the demurrer and dismissed the cause. 72 Fed. Rep. 985.

The plaintiff appealed to the circuit court of appeals, which affirmed the judgment of the circuit court. 52 U. S. App. 395. Upon plaintiff's petition a writ of certiorari was subsequently allowed by this court.

Messrs. **Joseph Paxton Blair** and **Frank W. Hackett** for petitioner.

Messrs. **Clarence H. Miller** and *Franz Fiset* for respondent.

*Mr. Justice **Brown** delivered the opinion [501]
of the court:

This case involves the validity of certain bonds issued by the county of Travis in payment to the King Iron Bridge Manufacturing Company for the construction of a bridge over the Colorado river; and, incidentally, the weight to be given to alleged conflicting decisions of the supreme court of Texas as to the validity of such bonds.

As bearing upon this question, the following sections of article XI. of the Constitution of Texas, upon the subject of "Municipal Corporations," are pertinent:

"Sec 2. The construction of jails, courthouses, and bridges, and the establishment of county poor houses and farms, and the lay-

ing out, construction, and repairing of county roads, shall be provided for by general laws."

"Sec. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two thirds of the taxpayers therein (to be ascertained [502] as may be *provided by law), to levy and collect such tax for construction of sea walls, breakwaters, or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

In apparent compliance with the sections above quoted, the legislature in 1887 enacted the following law (chap. 141, sec. 1):

"Sec. 1. That the county commissioners' court of the several counties of this state are hereby authorized and empowered to issue bonds of said county, with interest coupons attached, in such amounts as may be necessary, for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bearing interest at any rate not to exceed eight per cent per annum.

"Sec. 2. The commissioners' court shall levy an annual ad valorem tax, not to exceed fifteen cents on the one hundred dollars valuation, sufficient to pay the interest on and create a sinking fund for the redemption of said bonds. The sinking fund herein provided for shall not be less than four per cent on the full sum for which the bonds are issued."

It is admitted that no provision was made on July 3, 1888, "at the time of creating" the debt, for levying and collecting a sufficient tax to pay the interest thereon, and two per cent for a sinking fund, as required by the second clause of section seven, if said clause be applicable to a debt incurred for building bridges. It was alleged in the petition, however, that, in the February preceding, the commissioners' court ordered an ad valorem tax of twenty cents for general purposes, and an annual ad valorem tax of fifteen cents for road and bridge purposes; and it also appeared that in the following February (1889) it ordered an annual ad valorem tax of twenty-five cents for general purposes; fifteen cents for road and bridge purposes; courthouse and jail tax of five cents, [503] and an ad valorem *tax of five cents to create a sinking fund for bridge bonds to pay the interest on said bonds.

Plaintiff insisted in the court below that the language of the last clause of section seven, requiring a provision to be made for the levying and collection of a tax to pay the interest and to provide a sinking fund, must be read in connection with the preceding clause of the section, and, taking the two together, that the last clause must be held to apply only to counties bordering on the Gulf of Mexico. Both the circuit court and the court of appeals, however, held that the last clause contained a separate and independent provision, and was applicable to the contract made by the county for the building of this bridge, and that, the petition of the plaintiff failing to show compliance with it, the contract was void and the bonds issued without authority of law. Both courts relied upon the construction given by the supreme court of Texas in numerous cases to this section of the Constitution.

It is important in this connection to note that the opinion of the circuit court was pronounced on March 13, 1896, and that of the court of appeals on June 16, 1897. Since that time, it is asserted that the supreme court of Texas has taken a somewhat different view of the law, and an examination of these several decisions becomes important. In the earliest of them (*City of Terrell* v. *Dessaint*, 71 Tex. 770) (1888), which was an action on a promissory note given by the city in payment for material for waterworks supplies, it was squarely held that the last clause of section seven, above quoted, must be held to apply to all cities alike, and that the clause contained no word or words which restricted its application to the cities previously mentioned in the same section. "The language is general and unqualified," said the court, "and we find nothing in the context to indicate that the framers of the Constitution did not mean precisely what is said; that is, that no city shall create any debt without providing, by taxation, for the payment of the sinking fund and interest." It was also held that a debt of $1,500 for materials to extend its waterworks was within the clause in question, and that as the current expenses proper of the city exceeded its resources for *general purposes, and no ap- [504] propriation was made for the payment of this debt, there could be no recovery.

In *Bassett* v. *City of El Paso*, 88 Tex. 168 (1895), it was held that the language and purpose of the Constitution were satisfied by an order for the annual collection by taxation of a "sufficient sum to pay the interest thereon and create a sinking fund," etc., although it did not fix the rate or per cent of taxation for each year by which the sum was to be collected, but left the fixing of such rate for each successive year to the commissioners' court or the city council. It was contended that the ordinance, which provided for the issue of waterworks bonds, was void, because it did not levy a tax, but delegated to the assessing and collecting officers the power to make such levy from year to year. But it was said that "to so construe these provisions as to require, at the time the debt is created, the levy of a fixed tax to be collected through a long series of years, without reference to the unequal 'sums' that would in all probability be realized therefrom, instead of the collection annually of a certain 'sufficient sum' to pay the annual interest and create the sinking fund required by law, would be doing violence to the language used, and authorize, in cases where

values rapidly increase, the extortion from the taxpayers of large amounts of money in excess of the amount necessary to satisfy the interest and principal of the bonds, and this in turn would invite municipal corruption and extravagance."

In *McNeal* v. *City of Waco*, 89 Tex. 83 (1895), plaintiff sued the city on a contract for building cisterns for fire protection, to recover the contract price for one and damages for refusing to allow him to complete the others. The petition failed to show a provision for taxes to pay interest and a sinking fund, or an existing fund for the payment; nor did the contract show facts from which the court could say that it was an item of ordinary expenditure. It was held that a general demurrer to the petition should have been sustained, and it was also held that the word "debt" included every pecuniary obligation imposed by contract outside of the current expenditures for the year. To same effect is *Howard* v. *Smith*, 91 Tex. 8.

[505] *Such was the construction placed by the supreme court of Texas upon the constitutional provision at the time when the case under consideration was decided by the courts below. It was held by the circuit court that the county commissioners' court should have made provision at the time the contract was executed, July 3, 1888, by levy of a tax or otherwise, for a sinking fund, and the interest on the bonds issued for the erection of the bridge; that the levy made by the commissioners' court in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence nor even in the contemplation of the parties, so far as the allegations of the petition disclosed; that the general levy made in February, 1889, could not be held applicable to the bonds of the bridge company for two reasons: First, because it was made some six months after the execution of the contract; and, second, because the order of the commissioners' court, authorizing the levy, made no reference whatever to the bonds in controversy nor to the contract between the county and the bridge company. The circuit court of appeals came practically to the same conclusion.

Since these cases were decided, however, the supreme court of Texas has put a construction upon the Constitution, which fully supports the position of the plaintiff in this case. In *Mitchell County* v. *The City Nat. Bank of Paducah*, 91 Tex. 361, decided in January, 1898, the action was upon interest coupons attached to bonds issued by the county for the purpose of building a courthouse and jail, and upon others for constructing and purchasing bridges. An act had been passed in 1881 with reference to the creation of courthouse debts similar to the act subsequently passed in 1887 respecting bridge bonds, a copy of which is given above. The same defense was made—that at the time of the creation of the debts the county made no provision for levying and collecting a sufficient tax to pay the interest and sinking fund, although for the year 1881 the court levied a courthouse and jail tax of twenty-five cents on the one hundred dollars, repeated during subsequent years, and increased to fifty cents; and every year after the issue of the *bonds for bridge purposes [506]
the court levied fifteen cents on the one hundred dollars as a tax for road and bridge purposes. It was held, quoting *Bassett* v. *El Paso*, 88 Tex. 175, that it was unnecessary to ascertain the rate per cent required to be levied in order to raise the proper sum and to actually levy that rate of tax at the time; that if the laws of 1881 and 1887 had never been passed, the county would have had no authority under the Constitution to contract the debts represented by the bonds, nor to levy a tax for the payment of the interest and sinking fund on such debts. The power to do so could be derived from the legislature only. "We understand," said the court, "that the provision required by the Constitution means such fixed and definite arrangements for the levying and collecting of such tax as will become a legal right in favor of the bondholders of the bonds issued thereon, or in favor of any person to whom such debt might be payable. It is not sufficient that the municipal authorities should by the law be authorized to levy and collect a tax sufficient to produce a sinking fund greater than two per cent, but to comply with the Constitution the law must itself provide for a sinking fund not less than two per cent, or require of the municipal authorities to levy and collect a tax sufficient to produce the minimum prescribed by the Constitution." It was held that, the laws of 1881 and 1887 having been enacted for the purpose of putting into force the constitutional provisions, it was the duty of the courts to so construe the laws as to make them valid and give effect to them. The court came to the conclusion that these laws did make such provision for the levying and collecting of a tax as was required by the Constitution, and that, in case the court had refused to levy the tax after the bonds were issued and sold, the bondholders would have been entitled to a mandamus to compel the commissioners' court to levy such tax as purely a ministerial duty. The bonds, with certain immaterial exceptions, were held to be valid obligations of the county.

It is quite evident that if this case had been decided and called to the attention of the courts below, the validity of the bonds involved in this action would have been sustained, and *the main question involved in this [507]
case is whether we shall give effect to this decision of the supreme court of Texas, pronounced since the case under consideration was decided in the courts below, and giving, as is claimed at least, a somewhat different construction to the Constitution of the state.

We do not ourselves perceive any such inconsistency between the case of *Mitchell County* v. *The City Nat. Bank*, and the earlier cases, as justifies the county, in the case under consideration, in claiming that the supreme court of Texas had overruled the settled law of the state and set in motion a new departure. No such inconsistency is indicat-

ed in the opinion in the *Mitchell County Case;* so far as the prior cases are cited at all they are cited with approval, and there is certainly nothing to indicate that the court intended to overrule them. That court had not changed in its *personnel* since the prior judgments, except the first, were pronounced, and it is not probable that the judges would have changed their views without some reference to such change. Indeed, but one of the earlier cases was cited in the *Mitchell County Case* (*Bassett* v. *El Paso*, 88 Tex. 175), and that supports rather than conflicts with the opinion. As we read them, they merely decided that some provision for payment must be made. In the *Mitchell County Case* the question was for the first time presented whether the laws of 1881 and 1887 were constitutional, and whether action taken under these laws was an adequate compliance with the requirement that provision should be made "at the time of creating" the debt for a sufficient tax to pay the interest and to provide a two per cent sinking fund. It was held that they were. This overruled nothing, because the question had never before been decided, and the point was not made in the courts below in this case. We are simply called upon, then, to determine what is the law of Texas upon the subject, since, under Revised Statutes, section 721, the "laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States." While if this case had been brought before this court before the decision in the *Mitchell County Case*, we might have taken
[508] the view that was *taken by the courts below, treating the question as one hitherto unsettled in that state, we find ourselves relieved of any embarrassment by the decision in the *Mitchell County Case*, which manifestly applies to this case and requires a reversal of their judgment.

But assuming that the later case was intended to overrule the prior ones, and to lay down a different rule upon the subject, our conclusion would not be different. In determining what the laws of the several states are, which will be regarded as rules of decision, we are bound to look, not only at their Constitutions and statutes, but at the decisions of their highest courts giving construction to them. *Polk's Lessee* v. *Wendal*, 9 Cranch, 87 [3: 665]; *Luther* v. *Borden*, 7 How. 1, 40 [12: 581, 598]; *Nesmith* v. *Sheldon*, 7 How. 812 [12: 925]; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436 [17: 173]; *Leffingwell* v. *Warren*, 2 Black, 599 [17: 261]; *Christy* v. *Pridgeon*, 4 Wall. 196 [18: 322]; *Post* v. *Kendall County Supervisors*, 105 U. S. 667 [26: 1204]; *Bucher* v. *Cheshire Railroad Co.* 125 U. S. 555 [31: 795].

If there be any inconsistency in the opinions of these courts, the general rule is that we follow the latest settled adjudications in preference to the earlier ones. The case of *United States* v. *Morrison*, 4 Pet. 124 [7: 804], seems to be directly in point. The United States recovered judgment against Morrison, upon which a fi. fa. was issued, goods taken in execution and restored to the debtor under a forthcoming bond. This bond having been forfeited, an execution was awarded thereon by the judgment of the district court, rendered April, 1822, which it was asserted created a lien upon the lands, and overreached certain conveyances under which the defendants claimed, dated February and March, 1823. The circuit court was of opinion that the lien did not overreach these conveyances. But the court of appeals of Virginia having subsequently decided that the lien of a judgment continued pending proceedings on a writ of fi. fa., this court adopted this subsequent construction by such court, and reversed the decree of the circuit court.

In *Green* v. *Neal's Lessee*, 6 Pet. 291 [8: 402], a construction given by the supreme court of Tennessee to the statute of limitations of that state having been overruled, this court followed *the later case, although [509]
it had previously adopted the rule laid down in the overruled cases. See also *Leffingwell* v. *Warren*, 2 Black, 599 [17: 261]; *Fairfield* v. *Gallatin County*, 100 U. S. 47 [25: 544].

In *Morgan* v. *Curtenius*, 20 How. 1 [15: 823], the circuit court placed a construction upon an act of the legislature in accordance with a decision of the supreme court of Illinois with reference to the very same conveyance, and it was held that, that being the settled rule of property which that court was bound to follow, this court would affirm its judgment, though the supreme court of the state had subsequently overruled its own decision, and had given the act and the same conveyance a different construction. We do not consider this case as necessarily conflicting with those above cited.

An exception has been admitted to this rule, where, upon the faith of state decisions affirming the validity of contracts made or bonds issued under a certain statute, other contracts have been made or bonds issued under the same statute before the prior cases were overruled. Such contracts and bonds have been held to be valid, upon the principle that the holders upon purchasing such bonds and the parties to such contracts were entitled to rely upon the prior decisions as settling the law of the state. To have held otherwise would enable the state to set a trap for its creditors by inducing them to subscribe to bonds and then withdrawing their only security. *Gelpcke* v. *Dubuque*, 1 Wall. 175 [17: 520]; *Havemeyer* v. *Iowa County*, 3 Wall. 294 [18: 38]; *Mitchell* v. *Burlington*, 4 Wall. 270 [18: 350]; *Riggs* v. *Johnson County*, 6 Wall. 166 [18: 768]; *Lee County Supers.* v. *Rogers*, 7 Wall. 181 [19: 160]; *Chicago* v. *Sheldon*, 9 Wall. 50 [19: 594]; *Olcott* v. *Fond du Lac County Supervisors*, 16 Wall. 678 [21: 382]; *Douglass* v. *Pike County*, 101 U. S. 677 [25: 968]; *Burgess* v. *Seligman*, 107 U. S. 20 [27: 359].

Obviously this class of cases has no application here. The bonds were issued in good faith for a valuable consideration received by the county, and were purchased by the plaintiff with no notice of infirmity attaching to them. If certain decisions, pronounced after the bonds were issued, threw doubt upon their validity, those doubts have been removed by a later decision pronouncing

[510]unequivocally in favor of their *validity. In the theory of the law the construction given to the bonds of this description in the *Mitchell County Case* is and always has been the proper one, and, as such, we have no hesitation in following it. So far as judgments rendered in other cases which are final and unappealable are concerned, a different question arises.

The judgments of the Court of Appeals and of the Circuit Court must be reversed, and the case remanded to the Circuit Court for the Western District of Texas for further proceedings in conformity with this opinion.

THE OLINDE RODRIGUES.

(See S. C. Reporter's ed. 510-539.)

Vessel captured in attempting to run a blockade— what is an effective blockade— single blockading cruiser—right to put in further proofs—evidence of evil intent— probable cause for capturing vessel—destruction of papers—when restitution will be decreed conditionally—when intention to run blockade is presumed—terms of restitution of captured vessels.

1. A vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, cannot dispute the efficiency of the force to which she was subjected.
2. An effective blockade is one that is so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port.
3. The effectiveness of a blockade is not determined by the number of the blockading force. If a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, the blockade is practically effective.
4. Where the claimant has declined to put in further proofs as to the violation of the blockade under the order of the district court, he cannot, as a matter of right, demand that the cause shall be opened again for further proof.
5. The evidence of evil intent must be clear and convincing, before a merchant ship belonging to citizens of a friendly nation will be condemned for attempting to run a blockade.
6. Probable cause for making the capture of a vessel for attempting to run a blockade exists where there are sufficient circumstances to warrant suspicion, though they may turn out to be not sufficient to warrant condemnation.
7. The concealment and destruction of papers of a captured vessel authorize the presumption of an intention to suppress incriminating evidence but such presumption is not conclusive when the concealment was owing to forgetfulness, and the destruction to the belief that the papers were useless.
8. Even if the facts are not found to be sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally as each case requires; and an order of restitution does not prove lack of probable cause.
9. Where the captured vessel had been warned of the blockade and was on a course toward the blockaded port, and was steadily pursuing it, and when signaled persisted on her course, and did not change it until after a shot was fired, and two of her papers which would have strongly corroborated her criminal intent were destroyed,—the intention to break the blockade was to be presumed.
10. Restitution of the captured vessel awarded in this case without damages, and on payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel.

[No. 704.]

Argued April 11, 13, 1899. Decided May 15, 1899.

APPEAL from a decree of the District Court of the United States for the District of South Carolina in a prize case in which a libel was filed by the United States against the Steamship Olinde Rodrigues and cargo, for violation of blockade, holding that the blockade of San Juan, Porto Rico, was not an effective blockade and ordering the restitution of the ship to the claimants. The steamship was owned and claimed by La Compagnie Générale Transatlantique, a French corporation. Decree modified, and as modified, *affirmed.*

See same case below, 91 Fed. Rep. 274.

Statement by Mr. Chief Justice **Fuller:**

*This was a libel filed by the United [511] States against the steamship Olinde Rodrigues and cargo in the district court for South Carolina, in a prize cause, for violation of the blockade of San Juan, Porto Rico. The steamship was owned and claimed by La Compagnie Générale Transatlantique, a French corporation.

The Olinde Rodrigues left Havre, June 16, 1898, upon a regular voyage on a West Indian itinerary prescribed by the terms of her postal subvention from the French government. Her regular course, after touching at Paulliac, France, was St. Thomas, San Juan, Port au Platte or Puerto Plata, Cape Haytien, St. Marque, Port au Prince, Gonaives, and to return by the same ports, the voyage terminating at Havre. The proclamation of the President declaring San Juan in a state of blockade was issued June 27, 1898. The Olinde Rodrigues left Paulliac June 19, and arrived at St. Thomas July 3, 1898, and on July 4, in the morning, went into San Juan, Porto Rico. She was seen by the United States auxiliary cruiser Yosemite, then blockading the port of San Juan.

On the fifth of July, 1898, the Olinde Rodrigues came out of the port of San Juan, was signalled by the Yosemite, and on communicating with the latter asserted that she had no knowledge of the blockade of San Juan. Thereupon a boarding officer of the Yosemite entered in the log of the Olinde Rodrigues an official warning of the blockade, and she went on her way to Puerto Plata and other ports of San Domingo and Haiti. She left Puerto Plata on her return from these ports, July 16, 1898, and on the morning of July 17 was captured by the United States armored cruiser New Orleans, then blockading the port of San Juan, as attempting to

enter that port. A prize crew was put on [512]board and the vessel was *taken to Charleston, South Carolina, where she was libelled, as before stated, July 22, 1898. Depositions of officers, crew, and persons on board the steamship were taken by the prize commissioners *in preparatorio*, in answer to certain standing interrogatories, and the papers and documents found on board were put in evidence. Depositions of officers and men from the cruiser New Orleans were also taken *de bene esse*, but were not considered on the preliminary hearing except on a motion by the district attorney for leave to take further proofs.

The cause having been heard on the evidence *in preparatorio*, the district judge ruled, August 13, for reasons given, that the Olinde Rodrigues could not, under the evidence as it stood, be condemned for her entry into the blockaded port of San Juan on July 4, and her departure therefrom July 5, 1898; nor for attempting to enter the same port on July 17: but that the depositions *de bene esse* justified an order allowing further proofs, and stated also that an order might be entered, "discharging the vessel upon stipulation for her value, should the claimant so elect." 89 Fed. Rep. 109. An order was accordingly entered that the captors have ninety days to supply further proof "as to the entry of the 'Olinde Rodrigues' into the port of San Juan, Porto Rico, on July 4, 1898, and as to the courses and movements of said vessel on July 17, 1898;" and "that the claimants may thereafter have such time to offer testimony in reply as may seem proper to the court."

The cargo was released without bond, and on September 16 the court entered an order releasing the vessel on "claimants' giving bond by the Compagnie Générale Transatlantique, its owners, without sureties, in the sum of $125,000 conditioned for the payment of $125,000 upon the order of the court in the event that the vessel should be condemned." The bond was not given, and the vessel remained in custody.

Evidence was taken on behalf of the United States, and the cause came on for hearing on a motion by the claimants for the discharge and restitution of the steamship on the grounds: (1) That the blockade of San Juan at the time of the capture of the Olinde [513]Rodrigues was not an effective *blockade; (2) That the Olinde Rodrigues was not violating the blockade when seized.

The district court rendered an opinion December 13, 1898, holding that the blockade of San Juan was not an effective blockade, and entered a decree ordering the restitution of the ship to the claimants. 91 Fed. Rep. 274. From this decree the United States appealed to this court and assigned errors to the effect: (1) That the court erred in holding that there was no effective blockade of the port of San Juan on July 17, 1898; (2) that the court erred in not finding that the Olinde Rodrigues was captured while she was violating the blockade of San Juan, July 17, 1898, and in not decreeing her condemnation as lawful prize.

Messrs. **J. P. Kennedy Bryan, Henry M. Hoyt,** Assistant Attorney General, and *John W. Griggs,* Attorney General, for appellant.

Messrs. **Edward K. Jones** and *Eustis, Jones, & Govin* for appellee.

*Mr. Chief Justice **Fuller** delivered the [513]
opinion of the court:

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (April 16, 1856), was: "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. *The [514]
object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that Declaration." Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In *The Mercurius*, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war understood blockade in this [515] sense; and *Russia, who was the principal party in that confederacy, described a place to be in a state of blockade when it is dangerous to attempt to enter into it."

And in *The Frederick Molke*, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist results necessarily from these facts, as nothing farther is necessary to constitute blockade than that there should be a force stationed to prevent communication, and a due notice, or prohibition, given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In *The Franciska*, 2 Spinks, Eccl. & Adm. Rep. 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term definition can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent (1 Kent's Com. 146), is that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

[516] *"It is impossible," says Mr. Hall (§ 260), "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be non-existent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In *The Hoffnung*, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." *The Nancy*, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective *as to make it dangerous [517]
in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in *The Nancy*, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that, "under particular circumstances a single vessel may be adequate to maintain the blockade of one port and co-operate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in *The Franciska*, above cited, was to that effect, and the text books refer to other instances.

The learned district judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance

slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, 4th ed. 330, and note 2.

Nor do we regard Sir William Scott's judgment in *The Arthur* (1814) Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a
[518] claim made by one of His Majesty's *ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships, and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective.

What, then, were the facts as to the effectiveness of the blockade in the case before us?

In the proclamation of June 27, 1898, occurs this paragraph: "The United States of America has instituted and will maintain an effective blockade of all the ports on the south coast of Cuba, from Cape Frances to Cape Cruz, inclusive, and also of the port of San Juan, in the island of Porto Rico." (Proclamation No. 11, 30 Stat. at L. 34.) The blockade thus announced was not of the coast of Porto Rico, but of the port *of San [519]
Juan, a town of less than 25,000 inhabitants, on the northern coast of Porto Rico, with a single entrance. From June 27 to July 14, 1898, the Yosemite, a merchant ship converted into an auxiliary cruiser, blockaded the port. Her maximum speed was fifteen and one-half knots; and her armament ten 5-inch rapid firing guns, six 6-pounders, two 1-pounders, with greatest range of three and one-half miles. While the Yosemite was blockading the port she ran the armed transport Antonio Lopez aground six miles from San Juan; gave a number of neutral vessels official notice of the blockade; warned off many from the port; and on the 5th of July, 1898, wrote into the log of the Olinde Rodrigues, off San Juan, the official warning of the blockade of San Juan. On July 14 and thereafter the port was blockaded by the armored cruiser New Orleans, whose maximum speed was twenty-two knots, and her armament six 6-inch breech-loading rifles, four 4.7-inch breech-loading rifles, ten 6-pounders, four 1.5-inch guns, corresponding to 3-pounders; four 3-pounders in the tops; four 37-millimeter automatic guns, corresponding to 1-pounders. The range of her guns was five and one-half sea miles or six and a quarter statute miles. If stationary, she could command a circle of thirteen miles in diameter; if moving at maximum speed, she could cover in five minutes any point on a circle of seventeen miles diameter; and in ten minutes any point on a circle of nineteen miles diameter; her electric search lights could sweep the sea by night for ten miles distance; her motive power made her independent of winds and currents; in these respects and in her armament and increased range of guns she so far surpassed in effectiveness the old-time war ships that it would be inadmissible to hold that even if a century ago more than one ship was believed to be required for an effective blockade, therefore this cruiser was not sufficient to blockade this port.

Assuming that the Olinde Rodrigues attempted to enter San Juan July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; *her commander had no [520]
right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective.

After the argument on the motion to discharge the vessel, application was made by counsel for the claimant to the district judge, by letter, that the Navy Department be requested to furnish the court with all letters or despatches of the commanders of vessels blockading the port of San Juan in respect to the sufficiency of the force. And a motion was made in this court "for an order authorizing the introduction into the record of the despatches of Captain Sigsbee and

Commander Davis," dated June 27, 1898, and July 26, 1898, and published by the Navy Department in the "Appendix to the Report of the Chief of the Bureau of Navigation, 1898," pp. 224, 225, 642.

To this the United States objected on the grounds that isolated statements transmitting official information to superior officers, and consisting largely of opinion and hearsay, were not competent evidence; that the claimants had been afforded the opportunity to offer additional proof, and had not availed themselves thereof; that if the court desired to have these papers before it, then the government should be permitted to define their meaning by counter proofs; and certain explanatory affidavits were, at the same time, tendered for consideration, if the motion were granted.

We need not specifically rule on the motion, or as to the admissibility of either the despatches or affidavits, as we are satisfied that the despatches have no legitimate tendency to establish that the blockade was not effective so far as the exclusion of trade from this port of the belligerent, whether in neutral or enemy's trading ships, was concerned. This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter case than in the former is obvious. The difference is in kind, and in degree.

[521] *Our government was originally of opinion that commercial blockades in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established. Dana's Wheat. Int. Law, 8th ed. p. 671, note 232; 3 Whart. Int. Dig. § 361.

The letters of Captain Sigsbee, of the St. Paul, and of Commander Davis, of the Dixie, must be read in the light of this recognized distinction; and it is to be further remarked that after the letter of Captain Sigsbee of June 27 the New Orleans was sent by Admiral Sampson officially to blockade the port of San Juan, thereby enormously increasing its efficiency.

In his report of June 28, Appendix, Rep. Bur. Nav. 220, 222, Captain Sigsbee describes an attack on the St. Paul off the port of San Juan, June 22, by the Spanish cruiser Isabella II. and by the torpedo boat destroyer Terror, in which engagement the St. Paul severely injured the Terror, and drove the attacking force back into San Juan, and in his letter of June 27 he wrote: "It is advisable to constantly keep the Terror in mind as a possible active force; but, leaving her out of consideration, the services to be performed by the Yosemite, of blockading a well-fortified port containing a force of enemy's vessels whose aggregate force is greater than her own, is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken."

It is true that in closing his letter of June 27 Captain Sigsbee said: "I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some to occasionally cruise about the island. West of San Juan the coast,† although bold, has outlying dangers, making it easy at *present for blockade runners hav- [522]
ing local pilots to work in close to the port under the land during the night."

But we are considering the blockade of the port of San Juan and not of the coast, and while additional vessels to cruise about the island might be desirable in order that the blockade should be positively effective, we think it a sufficient compliance with the obligations of international law if the blockade made egress or ingress dangerous in fact, and that the suggestions of a zealous American naval commander, in anticipation of a conflict of armed forces before San Juan, that the blockade should be brought to the highest efficiency in a military as well as a commercial aspect, cannot be allowed to have the effect of showing that the blockade which did exist was as to this vessel ineffective in point of law.

And the letter of Commander Davis of the Dixie, of July 26, 1898, appears to us to have been written wholly from the standpoint of the efficiency of the blockade as a military blockade. He says: "Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night. There are in San Juan, Porto Rico, the Terror, torpedo gunboat; the Isabella II., cruiser; a torpedo boat, and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out." And further: "It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reinforced there with the least possible delay."

In our judgment these naval officers did not doubt the effectiveness of the commercial blockade, and had simply in mind the desirability of rendering the blockade, as a military blockade, impregnable, by the possession of a force sufficient to successfully repel any hostile attack of the enemy's fleet. The blockade was practically effective; had remained so; and was legal and binding, if not raised by an actual driving away of the blockading force by the enemy; until the happening of which result the neutral trader had no right to ask whether the blockade, as against the possible superiority of the enemy's fleet, was or was not effective in a military sense.

*But was this ship attempting to enter the [523]
port of San Juan, on the morning of July 17, when she was captured? It is contended

†The coast thus referred to is described in a work entitled "Navigation of the Gulf of Mexico and the Carribean Sea," issued by the Navy Department, vol. I. 342, thus: "The shore appears to be skirted by a reef, inclosing numerous small cays and islets, over which the sea breaks violently, and it should not be approached within a distance of four miles."

by counsel for the claimant that if the rulings of the district court should be disapproved of, an opportunity should still be given it to put in further proofs in respect of the violation of the blockade, notwithstanding it had declined to do so under the order of that court. That order gave ninety days to the captors for further proofs, and to the claimant, thereafter, such time for testimony in reply as might seem proper. After the captors had put in their proofs, the claimant, without introducing anything further, moved for the discharge and restitution of the steamship on the ground of the ineffective character of the blockade, and because the evidence did not justify a decree of condemnation; but undertook to reserve the right to adduce further proof, in the event that its motion should be denied. The district court commented with disfavor upon such an attempt, and we think the claimant could not as matter of right demand that the cause should be opened again. The settled practice of prize courts forbids the taking of further proofs under such circumstances; and in the view we take of the cause it would subserve no useful purpose to permit this to be done.

On the proofs before us the case is this: The Olinde Rodrigues was a merchant vessel of 1675 tons, belonging to the Compagnie Générale Transatlantique, engaged in the West India trade and receiving a subsidy from the French government for carrying its mails on an itinerary prescribed by the postal authorities. Her regular course was from Havre to St. Thomas, San Juan, Puerto Plata, and some other ports, returning by the same ports to Havre. She sailed from Havre, June 16, and arrived at St. Thomas July 3, and at San Juan the morning of July 4. The proclamation of the blockade of San Juan was issued June 27, while she was on the sea. The United States cruiser Yosemite was on duty in those waters, blockading the port of San Juan, and when her commander sighted the Olinde Rodrigues coming from the eastward toward the port he made chase, but before reaching her she had turned in and was under the protection
[524] *of the shore batteries. He lay outside until the next morning—the morning of July 5—when he intercepted the steamship as she was coming out, and sent an officer aboard, who made this entry in her log: "Warned off San Juan, July 5th, 1898, by U. S. S. Yosemite. Commander Emory. John Burns, Ensign, U. S. Navy." The master of the Olinde Rodrigues, whose testimony was taken *in preparatorio*, testified that when he entered San Juan, July 4, he had no knowledge that the port was blockaded, and that he first heard of it from the Yosemite on July 5, when he was leaving San Juan. After the notification he continued his voyage on the specified itinerary, arriving at Gonaives, the last port outward, on July 12. On his return voyage he stopped at the same ports, taking on freight, passengers, and mail for Havre. At Cape Haytien, on July 14, he received a telegram from the agent of his company at San Juan, telling him to hasten his arrival there by one day in order to take on fifty first-class passengers, and he replied that the ship would not touch at San Juan, but would be at St. Thomas on the 17th. The purser testified that on the receipt of the cable from the consignee at San Juan, he told the captain "that since we were advised of the blockade of Porto Rico by the war ship, it was absolutely necessary not to stop"; and that "before me, the agent in Cape Haytien, sent a cablegram, saying 'Daim [the vessel] will not stop at San Juan, the blockade being notified.'"

The ship's master further testified that on the outward voyage at each port he had warned the agency of the company and the postal department that he would not touch at Porto Rico, that he would not take passengers for that point, and that the letters would be returned to St. Thomas, and that having received his clearance papers at Puerto Plata at half-past five o'clock on the evening of July 15, he did not leave until six o'clock in the morning of July 16, as he did not wish to find himself at night along the coast of Porto Rico.

The ship was a large and valuable one, belonging to a great steamship company of world-wide reputation; she was on her return voyage laden with tobacco, sugar, coffee, and other products of that region; she had no cargo, passengers, or mail for *San Juan; [525]
she had arrived off that port in broad daylight, intentionally according to the captain; her regular itinerary on her return to France would have taken her from Port au Platte to San Juan, and from San Juan to St. Thomas, and thence to Havre, but as San Juan was blockaded and she had been warned off, and could not lawfully stop there, her route was from Port au Platte to St. Thomas, which led her directly by and not many miles from the port of San Juan.

The only possible motive which could be or is assigned for her to attempt to break the blockade is that the consignee at San Juan cabled the captain at Cape Haytien that he must stop at San Juan and take fifty first-class passengers. At this time the fleet of Admiral Cervera had been destroyed; Santiago had fallen; and the long reign of Spain in the Antilles was drawing to an end. Doubtless the transportation of fifty first-class passengers would prove remunerative, especially as some of them might be Spanish officials, and Spanish archives and records, and Spanish treasure, might accompany them if they escaped on the ship. It is forcibly argued that these are reasonable inferences, and afforded a sufficient motive for the commission of the offense. But as, where the guilty intent is established, the lack of motive cannot in itself overthrow it, so the presence of motive is not in itself sufficient to supply the lack of evidence of intent. Now, in this case, the captain not only testified that he answered the cable to the effect that he should not stop at San Juan, but the purser explicitly stated that the agent at Cape Haytien sent the telegram for the captain, specifically notifying the agent at San Juan that the ship would not stop there, the blockade having been notified. It is true that the cablegram was not produced, but

this was not to be expected in taking the depositions *in preparatorio*, and particularly as it was not the captain's own cablegram, but that of the agent at Cape Haytien. There is nothing in the evidence to the contrary, and under the liberality of the rules of evidence in the administration of the civil law, we must take this as we find it, and, as it stands, the argument that a temptation was held out is answered by the evidence that it was resisted.

[526] *Such being the situation and the evidence of the ship's officers being explicit that the vessel was on her way to St. Thomas and had no intention of running into San Juan, the decree in her favor must be affirmed on the merits, unless the record elsewhere furnishes evidence sufficient to overcome the conclusion reasonably deducible from the facts above stated.

Among the papers delivered to the prize master were certain bills of health, five of them by consuls of France, namely, July 9, from St. Marc, Haiti, giving the ship's destination as Havre, with intermediate ports; July 11, from Gonaives, Haiti, giving no destination; July 13, from Port au Prince; July 14, from Cape Haytien; July 15, from Puerto Plata,—all naming Havre as the destination: and three by consuls of Denmark, July 13, from Port au Prince, July 14, from Cape Haytien, and July 15 from Puerto Plata, all naming St. Thomas as the destination. When the captain testified August 2, in answer to the standing interrogatories, he said nothing about any Spanish bills of health. The deposition was reread to the captain, August 3, and on the next day, August 4, he wrote to the prize commissioners desiring to correct it, saying: "I fear I have badly interpreted several questions. I was asked if I had destroyed any papers on board or passports. I replied, no. The papers—documents—on board for our voyage had been delivered up proper and legal to the prize master. This is absolutely the truth, not including in the documents two Spanish bills of health, one from Port au Prince and one from Cape Haytien, which we found in opening our papers, although they had not been demanded. Not having any value for us, I said to the steward to destroy them on our arrival at Charleston, as we often do with papers that are useless to us. The regular expedition only counts from the last port, which was Puerto Plata, and I refused to take it from our agent for Porto Rico. I swear that at my examination I did not think of this, and it is only on my return from signing that the steward recalled it to me. I never sought to disguise the truth, since I wish to advise you of it as soon as possible."

On the 5th of August the purser answered
[527] the interrogatories, *and testified that papers were given him by the consignees of the steamer at Port au Prince in a box at the time of sailing, and he found in the box one manifest of freight in ballast, and it was the same thing at Cape Haytien. At Puerto Plata the agent of the company came on board on their arrival there, and "the captain told him that there was no Spanish clearance; there was no need of it; and it was not taken." The captain said to the agent "it was not necessary because we are not going to San Juan, being notified of the blockade." "When we arrive in a port we put up a placard of the date of departure and the time of sailing and the destination, and it was put up by my personal order from the captain that we sailed from St. Thomas directly, and it was fixed up in the night of the 15th of July. . . . We were to start on the morning of the 16th, at 6 o'clock in the morning, the captain saying he did not want to fall into the hands of the American cruisers during the night. The night before our arrival in Charleston, the doctor says to me, 'I have a bill of health, Spanish account, from Cape Haytien and Port au Prince,' and I told him I would speak to the captain and ask him what to do with these papers that I had found in assorting my papers—these papers in the pigeon holes. I told the captain that morning, and he told me that we had better destroy them, because we don't want them; that it is not our expedition, and that a true exposition is valuable only for the last port to the Spanish port."

On the 5th the captain was permitted to testify, in explanation, saying, among other things: "The reason that we did not give up the two bills of health is because they did not form a part of the clearance of our ship for our itinerary, and they were left in the pigeon holes where they were. It was at the time of our arrival at the quarantine at Charleston that the purser spoke to me of them, and I told him that they were good for nothing and to tear them up. The captain wishes to add that he did not remember the instance the other day about the destruction of papers that he has just told us about and that he never had any intention to disguise anything or to deceive."

*Counsel for the government insist that the [528]
intention of the Olinde to run the blockade is necessarily to be inferred from the possession of these bills of health and their alleged concealment and destruction. Doubtless the spoliation of papers, and, though to a less degree, their concealment, is theoretically a serious offense, and authorizes the presumption of an intention to suppress incriminating evidence though this is not an irrebuttable presumption.

In *The Pizarro*, 2 Wheat. 227, 241 [4: 226, 229], the rule is thus stated by Mr. Justice Story: "Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and to justify the suspicions, of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of far-

ther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply."

It should be remembered that the first deposition of the captain was given in answer to standing interrogatories, and not under an oral examination; that the statute (R. S. § 4622) forbade the witness "to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority from the court", that he was born and had always lived in France, and was apparently not conversant with our language; indeed, he protested, as "neither understanding nor speaking English," "against all interpretation or translation contrary to my thought;" that the deposition having been read to him the day after it was taken, he detected its want of fullness, and immediately wrote the prize commissioners on the subject with a view to
[529] correction; *and that it was after this, and not before, that the purser testified.

Transactions of this sort constitute in themselves no ground for condemnation, but are evidence, more or less convincing, of the existence of such ground; yet, taking the evidence in this case together, we are not prepared to hold that the explanation as to how these bills came to be received on board, neglected when the papers were surrendered, and finally torn up, was not sufficient to obviate any decisive inference of objectionable intention.

The government further insisted that the Olinde Rodrigues refused to obey the signal from the New Orleans to heave to and stop instantly, and turned only after she had fired, and that this conclusively established an intention to violate the blockade. The theory of the government is that the French ship purposely held on so as to get under the protection of the batteries of San Juan.

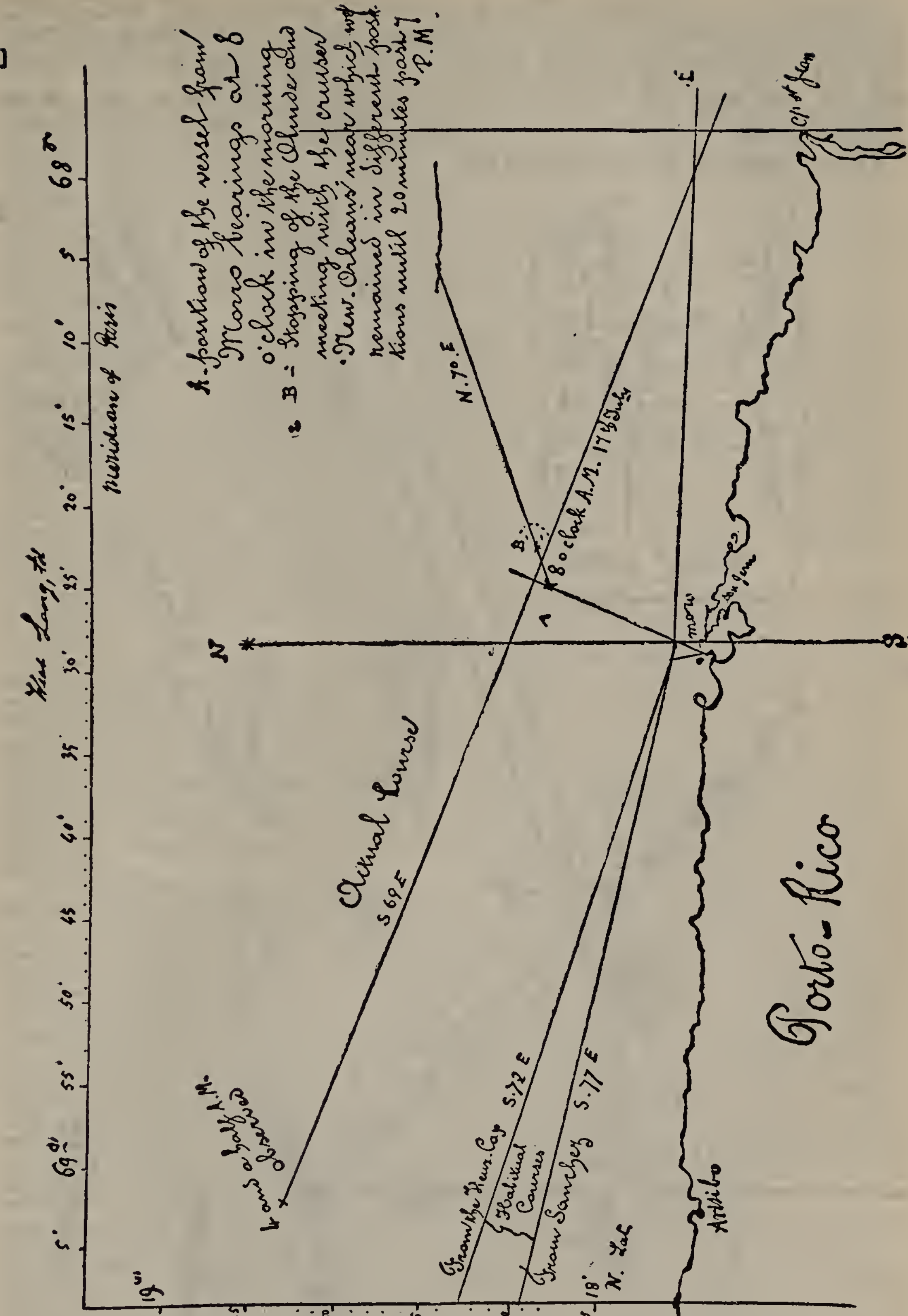
The log of the Olinde Rodrigues states: "6.30, noticed the heights of San Juan. At 7.20, took the bearings of the fortress at 45 degrees, eight miles and one-half crosswise. Noticed, at 7.50, a man-of-war. At 8.10, she signalled 'J. W.,' ["heave to and stop instantly"]. I went towards it and made arrangements in order to receive the whale boat which is sent to us."

In a communication to the Ambassador of France at Washington, written July 17, and purporting to give a full account of the matter, the captain said that he "was some time before seeing her signal, on account of the distance and of the sun. Suspecting what she wanted, I hoisted the 'perceived' and stopped."

He testified that he turned his vessel to the warship before the gun was fired. which was at 8.12, but on this point the evidence is strongly to the contrary. We are inclined to think that some allowance should be made for imperfect recollection in the rapid passage of events. The Olinde Rodrigues was comparatively a slow sailer (ten to twelve knots), and if the captain stopped on seeing the signal, and turned towards the war ship with reasonable promptness. a settled purpose to *defy the signal ought not to be im- [530]
puted, whether she started towards the New Orleans just before, just after, or just as the shot was fired.

The stress of the contention of the government is, however, that the Olinde Rodrigues was on a course directly into the port of San Juan at the time her progress was arrested. It is extremely difficult to be precise in such a matter, as her course to reach St. Thomas necessarily passed in face of San Juan. The captain attached to his explanatory affidavit a sketch, "showing the usual route and the actual route which he was taking at the time of the capture, with the position of the capturing ship and his own ship," as follows:

[531]



But it appears from the entries of the second officer on the log of the Olinde Rodrigues that the ship was from one to five o'clock in the morning of July 17 on the course (as corrected), S. 69 E., and that from six to eight o'clock the course was S. 73 E.

The captain testified that at the time of capture "I had just passed the port of San Juan, about 7 or 8 miles eastward of the port, and about 9 miles from shore, about 9 miles from Morro. They judged the distance in passing as they do from all points."

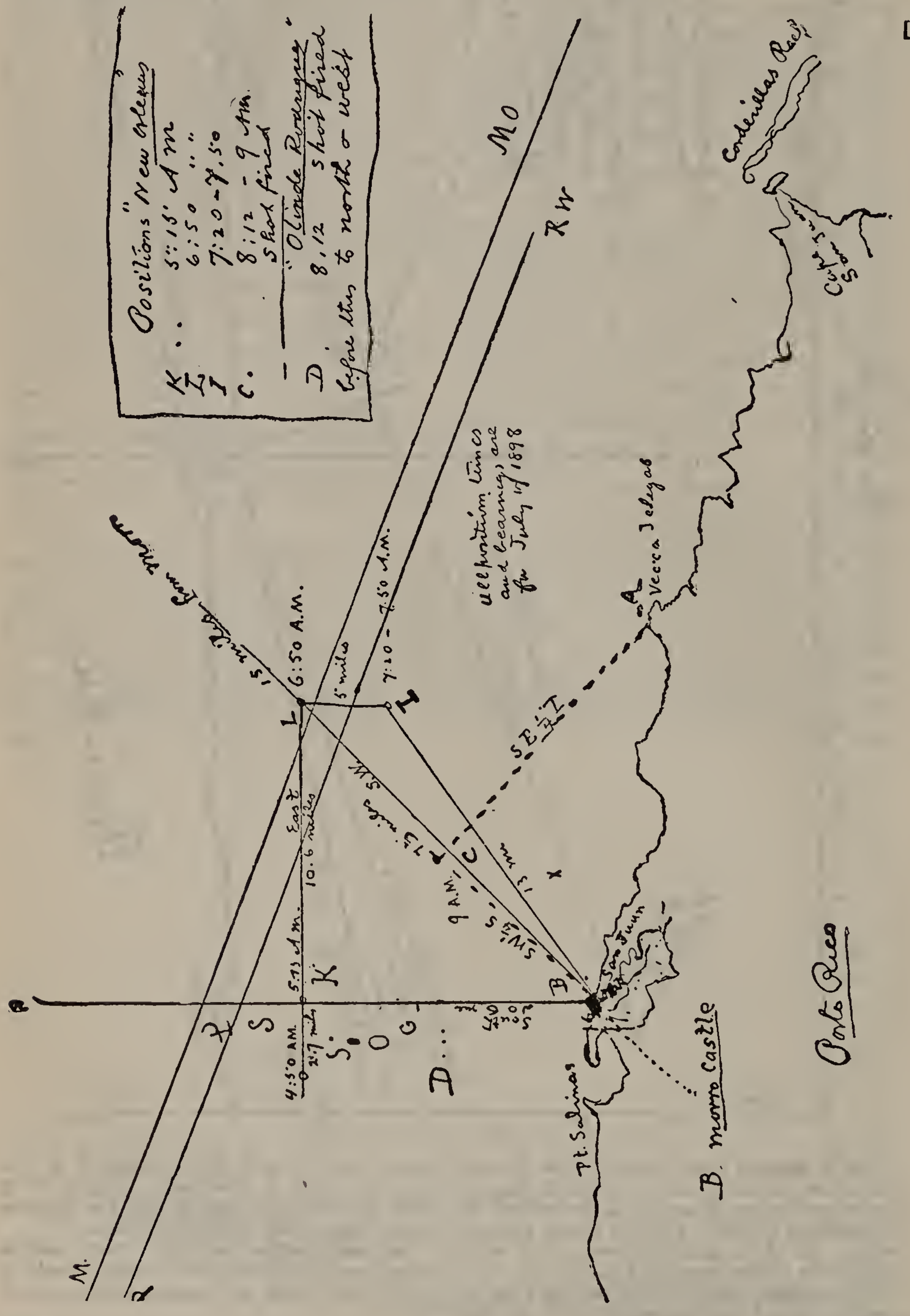
The second officer said that "they were 9 miles from San Juan after having passed the port of San Juan and gone 4 miles east of it."

This testimony strikingly confirms Captain Folger's candid expression of opinion that though the master of the Olinde Rodrigues may have been going in and out of that port for years, he did not measure the distances, but "would run so far down the coast and order them to steer to a certain point to head in."

The commander of the New Orleans admitted "that south 69 is the proper course beforehand for the Culebra Passage" (the passage through which to reach St. Thomas), but contested that the French vessel was making that course.

Lieutenant Rooney, the navigator of the New Orleans, laid down the positions upon a chart as follows:

[532]



[533] *The point C. is seven and two-thirds miles from Morro, bearing S. W., and five miles from point D., the intersection of a line drawn west with north and south line through Morro. D. is five and two-thirds miles from Morro. The range of Morro guns was six and one-half miles, and the range of the shore batteries, three miles east of Morro, also six and one-half miles. According to this plat, the Olinde Rodrigues was slightly within the range of the Morro guns, but not within the range of the shore batteries. The New Orleans when she fired was close to the range of the shore batteries and something over a mile outside of the extreme range of the Morro guns.

And it is urged that the conclusion is inevitable that the French ship intended to run into the port and to draw the pursuing cruiser within the range of the Spanish guns. If her being in the neighborhood were not satisfactorily explained; if she persistently ignored the signal of the cruiser; and if her course was a course into the port of San Juan and not a proper course to reach St. Thomas,—then the conclusion may be admitted; but it is not denied that she was in the neighborhood in the discharge of her duty, and we have already seen that she may be consistently regarded as not having defied the signal.

On the part of the captors, the witnesses concurred that the Olinde Rodrigues's course was laid for the port of San Juan, while on her behalf this was denied, except so far as her course for St. Thomas took her near the blockaded port. In addition to the witnesses from the New Orleans the telegraph operator on the Morro testified that the Olinde Rodrigues was coming directly toward the Morro, but changed her course when the shot was fired.

A principal reason given by the witnesses for concluding that the Olinde Rodrigues was making for San Juan was that her masts, as seen from the deck of the New Orleans, were open, thus indicating that she was sailing south or toward the port of San Juan. It was admitted that this would not necessarily be so unless the New Orleans was on the same line east and west with the other vessel, or,
[534] in other words, if the *New Orleans were to the north of the Olinde Rodrigues, the latter's masts might appear open without necessarily indicating that she was sailing south, or towards the land. Lieutenant Rooney did not see her until after she was captured. He is positive as to the approximate position of the New Orleans early in the morning before the Olinde Rodrigues was sighted, which had not occurred when he went below at 7.30, and he is positive as to the position of the New Orleans after the capture. He places the position of the New Orleans at 6.50, when the last bearing observation was taken, at fifteen miles north of the coast and of the Morro. At nine o'clock bearings were again taken, and she was about seven and two-thirds miles from the Morro. Lieutenant Rooney explained in his testimony the proper courses for a vessel sailing to St. Thomas, and stated that several courses might be properly steered, that one of them would be to pass about twelve miles north of the harbor of San Juan, and that there was nothing impracticable in a vessel reaching Culebra Point, with a view of going to St. Thomas, on a course of S. 69 E. from midnight to 5 o'clock, and a change at 5 o'clock to S. 73 E. He also testified that a vessel bound for San Juan on an ordinary commercial voyage would have been nearer the shore than where the Olinde Rodrigues was when she was captured, and that it was probable that if she intended to go to San Juan and avoid the New Orleans she would have hugged the shore and not been out at sea.

Some of the evidence, in short, had a tendency to show that the Olinde Rodrigues, when sailing on a proper course for St. Thomas, would be drawing to the south, and that the New Orleans was to the north of her, in which case, obviously, the nearer the vessels approached the more open would the masts of the Olinde Rodrigues appear. But the clear preponderance was that the captured ship was to the west of a north and south line drawn through Morro, and running nearly south just before or when the New Orleans fired.

It is impossible to deny that the testimony of Captain Folger, the commander of the New Orleans, and of his officers, was extremely strong and persuasive to establish that the *Olinde Rodrigues, when brought to, was in- [535]
tentionally heading for San Juan, and pursuing her course in such a manner as to draw the blockading cruiser in range of the enemies' batteries, and yet we must consider it in view of the evidence on behalf of the captured ship, and of the undisputed facts tending to render it improbable that any design of attempting to violate the blockade was entertained. The Olinde Rodrigues had neither passengers nor cargo for San Juan; in committing the offense, she would take the risk of capture or of being shut up in that port; she was a merchantman engaged in her regular business and carrying the mails; she was owned by a widely known and reputable company; her regular course, though interrupted by the blockade of that port, led directly by it, and not far from it; and the testimony of her captain and officers denied any intention to commit a breach.

The evidence of evil intent must be clear and convincing before a merchant ship belonging to citizens of a friendly nation will be condemned. And on a careful review of the entire evidence, we think we are not compelled to proceed to that extremity.

But, on the other hand, we are bound to say that, taking all the circumstances together and giving due weight to the evidence on behalf of the captors, probable cause for making the capture undoubtedly existed; and the case disclosed does not commend this vessel to the favorable consideration of the court.

Probable cause exists where there are circumstances sufficient to warrant suspicion though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not cannot be determined unless the customary proceedings

of prize are instituted and enforced. *The Adeline*, 9 Cranch, 244, 285 [3: 719, 733]; *The Thompson*, 3 Wall. 155 [18: 55]. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally as each case requires, and an order of restitution does not prove lack of probable cause. *The Adeline, supra; Jennings* v. *Carson*, 4 Cranch, 2, 28, 29 [2: 531,539].

In the statement of Sir William Scott and [536] Sir John Nicholl, *transmitted to Chief Justice Jay, then Minister to England, by Sir William Scott, September 10, 1794, "the general principles of proceeding in prize causes, in British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdictions," are set forth as laid down in an extract from a report made to the King in 1753 "by Sir George Lee, then judge of the prerogative court, Dr. Paul, His Majesty's Advocate General, Sir Dudley Rider, His Majesty's Attorney General, and Mr. Murray (afterwards Lord Mansfield), His Majesty's Solicitor General", and many instances are given where in the enforcement of the rules "the law of nations allows, according to the different degrees of misbehavior, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution." Wheaton, Captures, Appendix, 309, 311, 312; Pratt's Story's Notes, p. 35.

In *The Apollon*, 9 Wheat. 362, 372 [6: 111, 113], Mr. Justice Story said: "No principle is better settled in the law of prize than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and if the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captor their costs and expenses in proceeding to adjudication."

Section 4639 of the Revised Statutes contemplates that, under circumstances, all costs and expenses shall remain charged on the captured vessel though she be restored, and this court has repeatedly held that damages and costs will be denied where there was probable cause for seizure, and that sometimes costs will be awarded to the captors. *The Venus*, 5 Wheat. 127 [5: 50]; *The Thompson*. 3 Wall. 155 [18: 55]; *The Springbok*, 5 Wall. 1 [18: 480]; *The Dashing Wave*. 5 Wall. 170 [18: 622]; *The Sir William Peel*, 5 Wall. 517 [18: 696]; *The Peterhoff*, 5 Wall. 28, 61, 62 [18: 564, 572].

In *The Dashing Wave*, Chief Justice Chase said: "We think it was the plain duty of a neutral claiming to be engaged in trade with [537] Matamoras, under circumstances which *warranted close observation by the blockading squadron, to keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the boundary line as to repel, so far as position could repel, all imputation of intent to break the blockade. He had no right to take, voluntarily, a position in the immediate presence of the blockading fleet, from which merchandise might be so easily introduced into the blockaded region. We do not say that neglect of duty, in this respect, on the part of the brig, especially in the absence of positive evidence that the neglect was wilful, calls for condemnation; but we cannot doubt that under the circumstances described, capturing and sending in for adjudication was fully warranted."

In *The Springbok*, the ship was restored but costs and damages were not allowed because of the misconduct of the master.

In *The Peterhoff*, payment of costs and expenses by the ship was decreed as a condition of restitution. The Peterhoff was captured by the United States vessel of war Vanderbilt on suspicion of intent to run the blockade and of having contraband on board. Her captain refused to take his papers to the Vanderbilt, and, in addition, papers were destroyed and a package was thrown overboard. The Peterhoff was searched, and it is stated in the opinion: "The search led to the belief on the part of the officers of the Vanderbilt that there was contraband on board, destined to the enemy. This belief, it is now apparant, was warranted. It was therefore the duty of the captors to bring the Peterhoff in for adjudication, and clearly they are not liable for the costs and expenses of doing so." The court then commented on the destruction of papers, and the throwing overboard of the package, in regard to which it was unable to credit the representations of the captain, but, in view of the other facts in the case, did not extend the effect of the captain's conduct and the incriminating circumstances to condemnation.

The case before us falls plainly within these rulings. This vessel had gone into San Juan on July 4, although the captain had heard of the blockade at St. Thomas, but he says he had *not been officially notified of it: [538]
he telegraphed to the consul at San Juan to know, and was answered that they had received no official notice from Washington that the port was blockaded; he also heard while in San Juan that "it would be blockaded some future time, but that was not officially." The vessel was boarded and warned by the Yosemite on July 5, and the warning entered on her log. This imposed upon her the duty to avoid approaching San Juan, on her return, so nearly as to give just cause of suspicion, yet she so shaped her course as inevitably to invite it.

When the New Orleans succeeded the Yosemite her commander was informed of the facts by his predecessor, and knew that whatever the right of the Olinde Rodrigues to be in those waters, she could not lawfully place herself so near the interdicted port as to be able to break the blockade with impunity. But when he sighted her the ship was on a course to all appearance directly into that port and steadily pursuing it. And when he signaled, the Olinde Rodrigues apparently did not obey, but seemingly persisted on her course, and that course would in a few moments have placed her within the range

of the guns of Morro and of the shore batteries. In fact, when the shot was fired she was within the range of the Morro's guns. The evidence is overwhelming that she did not change her course until after the shot was fired, even though she may have stopped as soon as she saw the signal. The turning point into the Culebra or Virgin Passage was perhaps forty miles to the eastward, and while she could have passed the port of San Juan on the course she was on, it would have been within a very short distance. The disregard of her duty to shun the port and not approach it was so flagrant that the intention to break the blockade was to be presumed though we do not hold that that was a presumption *de jure.*

The ship's log was not produced until three hours after she was boarded, and it now appears that the papers furnished the boarding officer, "said to be all the ship's papers," did not include two Spanish bills of health in which San Juan was entered as the vessel's destination. These were destroyed after the ship reached Charleston, and were, therefore,
[539] in the ship's *possession when the other papers were delivered. Had they been shown, as they should have been, can it be denied that they would have furnished strong corroboration of criminal intent? Or that their destruction tended to make a case of "strong and vehement suspicion?"

The entire record considered, we are of opinion that restitution of the Olinde Rodrigues should be awarded without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and as modified affirmed.

Mr. Justice **McKenna** dissented on the ground that the evidence justified condemnation.

ADOLPH COHN, *Appt.*,
v.
ANGELINA DALEY and A. J. Mehan.

(See S. C. Reporter's ed. 539-545.)

Appeal from territorial judgment—when it will be assumed that the evidence supports the judgment.

1. It must be assumed that the evidence supports the judgment, on appeal from a territorial court, in which there is no statement of facts in the nature of a special verdict, under the act of Congress of April 7, 1874.
2. A statement of facts not filed within the time required by Ariz. Rev. Stat. §§ 843-845, cannot be considered as part of the record on appeal from the supreme court of that territory.

[No. 136.]

Argued and Submitted April 4, 5, 1899. Decided May 15, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of said territory in and for the county of Cochise to quiet title to certain mining claims in an action by Adolph Cohn against Angelina Daley *et al.* The other defendants having made default, judgment was rendered on the trial for the defendant Daley. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Marcus A. Smith** and *Barnes & Martin* for appellant.

Messrs. **James K. Redington** and *James Reilly* for appellee.

*Mr. Justice **McKenna** delivered the **[539]**
opinion of the court:

This is an action to quiet title to certain mining claims in the territory of Arizona.

*The appellant was plaintiff in the court **[540]**
below, and the appellee was one of the defendants impleaded with A. J. Mehan, Dewitt C. Turner, and Bell H. Chandler.

Appellant claims to derive title from one A. J. Mehan under an execution sale upon a judgment obtained by him against Mehan in one of the justices' courts of Cochise county, in said territory, and a deed executed in pursuance of such proceedings and purchase.

The appellee denied the ownership of appellant, and asserted a superior right upon the following allegations: That on the 11th of April, 1890, and for more than five years before, she and one James Daley were husband and wife, and lived together as such. At the time of the marriage he owned no money nor property of any kind, but that she had three thousand dollars "in United States coin and currency"; and prior to the 11th of April, 1890, she and Daley used all of said money "in prospecting for, locating, and procuring, preserving, and maintaining titles to mines and mining claims," and owned the claims in controversy on the said 11th of April. During the coverture she was uneducated and utterly ignorant of the language, laws, and customs of the United States and the territory, and Daley was fairly well versed therein; and, confiding and relying on "the advice of her said husband," advanced him her money "to procure, preserve, and maintain the title" to the mining claims, and he took advantage of her ignorance and the confidence reposed in him, "and took and kept the title to all of said mining claims, and interests in mining claims in his own name," without her knowledge or consent, and on the 11th of April, 1890, he abandoned her, and has not since returned to or communicated with her.

On the 2d of September, 1890, Daley conveyed the claims by deed duly acknowledged and recorded in the recorder's office of Cochise county, of said territory, to A. J. Mehan, who gave no value therefor, and who had full notice and knowledge of all her equities.

The appellant claims to own the claims by virtue of an attachment, judgment, execution sale thereunder, and a constable's *deed in the **[541]**
case of *Adolph Cohn* v. *A. J. Mehan.* Cohn was plaintiff in the action and the purchaser at the sale, and at that time and long prior thereto had full notice and knowledge of her equities, and notice and knowledge that Me-

han had given no value for his conveyance. On the 15th of September, 1890, Mehan conveyed an undivided half interest in the claims, by a deed duly acknowledged and recorded, to Dewitt C. Turner, and on the 22d of November, 1890, a like deed of one-third interest to the defendant Bell H. Chandler, neither of whom gave value for his conveyance, and both of whom had notice of her equities, and of Mehan's knowledge thereof, and that Mehan had given no value for his conveyance. On the 8th day of January, 1891, the defendant Turner conveyed an undivided one-sixth to the defendant F. C. Fisher, who had knowledge of her equities, and the notice and knowledge of the prior parties. On the 15th of October, 1890, she commenced an action for divorce from said Daley, and on the 14th day of May, 1891, a decree was rendered therein in her favor dissolving the marriage and awarding her the mining claims in controversy, and permitting her to resume her maiden name of "Angela Dias."

On the 18th of October, 1890, and before Cohn bought the claims, she commenced an action against Daley, Mehan, and Turner to quiet the title to the claims, and caused to be filed in the recorder's office of the county where the property was situated a notice of the pendency of the action, containing a statement of the nature of the action and of her ownership of and a description of the claims; and Adolph Cohn took title from Mehan after the filing and recording of such notice.

She prayed to be decreed owner of the claims, and that defendants he adjudged to have no interest in them, and that their deeds be canceled.

The other defendants made default, and the trial proceeded on the issues made between appellant and appellee, and judgment was rendered for her and duly entered. A motion for a new trial was made, but was overruled on the 26th day of November, 1892.

A bill of exceptions was submitted by the
[542] appellant on the *1st of December, 1892, and settled and allowed on the 15th of said month by the judge who presided at the trial, after objections made by appellee were heard and considered.

The bill of exceptions recites "that on the 27th of May, 1892, the above cause came on regular for trial, and during the progress thereof the following proceedings were had, as more fully appears in the statement of facts filed herein expressly referred to, and the exceptions to rulings of court as therein shown are made a part of this bill of exceptions."

Then follows an enumeration of the rulings and the motion for new trial and the ruling thereon.

A statement of facts or what is called such was submitted to the counsel of appellee on the 16th of December, 1892. It was entitled in the court and cause, and contained the following recital:

"Transcript of shorthand notes of testimony, &c., taken from the trial of the above-entitled cause, at the courtroom of said court, in the city of Tombstone, on Friday, the twenty-seventh day of May, A. D. 1892, at 9.30 o'clock A. M., before the court (Hon. Richard E. Sloan, presiding) sitting without a jury, in the presence of W. C. Staehle, Esq., attorney for, and W. H. Barnes, Esq., of counsel with, plaintiff, and James Reilly, Esq., attorney for defendant Angela Dias de Daley; Allen R. English, Esq., for counsel."

Following this recital is a verbatim transcript of the proceedings and of the evidence by question and answer, and of the rulings of the court. It concluded by the following recital:

The foregoing 102 pages and documents herein referred to and to be copied into the transcript of the clerk when directed is submitted to the opposite party, the defendant, by plaintiff as a full statement of facts in the trial of this cause, and is by the plaintiff agreed to as such.

Dec. 16th, 1892. W. H. Barnes,
Att'y for Plaintiff.

The record contains the following:

We agree that the foregoing—pages of typewriting entitled *in the above cause con- [543]
tain a transcript of the reporter's notes taken at the trial of said cause, which was filed therein with the clerk of the court November 25th, 1892, but said pages also contain matter not in such transcript when so filed, to wit:

"Clerk will here copy said notice in transcript," and many such commands, commencing on page 3 of transcript, all commanding or directing the clerk to insert in his transcript all the documentary evidence introduced by plaintiff (appellant) at the trial, but none, except in one instance, of the documentary evidence of defendant (appellee), though defendant introduced in evidence many documents, including the deposition of A. J. Mehan, as shown by said transcript, pages 37 to 40, inc., and the alleged "statement of facts" is not such nor even a fair statement of the evidence, and we do not agree thereto. James Reilly,
Attorney for Angela Diaz.
Allen R. English,
Of Counsel.

Counsel for plaintiff in the above-entitled cause of *Cohn* v. *Mehan et al.*, having heretofore, to wit. on the 16th day of December, 1892, submitted to me a statement of facts in said cause, and the same having been thereupon submitted to counsel for defendants, and being by them disagreed to as correct, and being likewise found by me to be incomplete because omitting documentary evidence, said counsel for plaintiff did thereafter, to wit, on the 6th day of March, 1893, submit the foregoing as an amended statement of facts in said cause, and the same was on said sixth day of March, 1893, by me approved and signed.
Richard E. Sloan, Judge.

A completed statement was not filed till May, 1893. The judgment was affirmed on appeal to the supreme court of the territory, and the case was then brought here.

If the so-called statement of facts was filed in time under the Arizona Revised Statutes, it was not "a statement of the facts in the nature of a special verdict made and
[544] certified by *the court below" under the act of April 7, 1874. 18 Stat. at L. 27, 28, chap. 80. We must assume, therefore, that the evidence supports the judgment. *Marshall* v. *Burtis*, 172 U. S. 630 [*ante*, 579].

Was the statement filed in time to become a part of the bill of exceptions? Certainly not, if it was not on file at the time of the settlement of the bill of exceptions or did not afterward become a part of the record. It was submitted on the 16th of December, but not agreed to. It was not approved and signed by the judge who tried the case until March, 1893, and not filed until May, 1893.

The Revised Statutes of Arizona provide as follows:

"843. (Sec. 195.) After the trial of any cause either party may make out a written statement of the facts given in evidence on the trial and submit the same to the opposite party or his attorney for inspection. If the parties or their attorneys agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he find it correct, approve and sign it, and the same shall be filed with the clerk during the term."

"844. (Sec. 196.) If the parties do not agree upon such statement of facts, or if the judge do not approve or sign it, the parties may submit their respective statements to the judge, who shall from his own knowledge, with the aid of such statements, during the term, make out and sign and file with the clerk a correct statement of the facts proved on the trial, and such statement shall constitute a part of the record."

"845. (Sec. 197.) The court may by an order entered upon the record during the term authorize the statement of facts to be made up and signed and filed in vacation, at any time not exceeding thirty days after the adjournment of the term."

The record shows that the November term of the court at which the case was tried was finally adjourned December 29, 1892. The statement was therefore not filed within the time required by the statute, and cannot to be considered as part of the record.

The rulings of the court, as exhibited in the bill of exceptions, are assigned as error. But for an understanding of the rulings the testimony in the case is necessary, and we
[545] are *precluded from looking at it, because it is not properly a part of the bill of exceptions, for the reasons we have given.

It follows that on the record there is nothing for our review, and *judgment is affirmed.*

TERRITORY OF NEW MEXICO, *Appt.*,
v.
UNITED STATES TRUST COMPANY OF NEW YORK *et al.*

(See S. C. Reporter's ed. 545-551.)

Exemption from taxation of railroad right of way—separate valuation.

1. The exemption from taxation of a railroad right of way, given by § 2 of the act of Congress of July 27, 1866, granting lands to the Atlantic & Pacific Railroad Company, does not extend to the right of way acquired under § 7, or, independently of that section, from private owners.
2. The designation of some railroad improvements by name, and giving some of them a separate valuation, does not invalidate their assessment as realty.

[No. 169.]

Leave granted to file petition for rehearing, and counsel allowed thirty days to file additional briefs, March 6, 1899. Rehearing granted and case taken on briefs heretofore filed, April 17, 1899. Decided May 15, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of New Mexico on petition for rehearing of the cause, which is reported in 172 U. S. 171, 186, *ante*, 407, 413, where judgment of the Supreme Court of the Territory was affirmed. That judgment is *reversed,* and the cause remanded for further proceedings.

Mr. **Frank W. Clancy** for appellant.

Messrs. **C. N. Sterry, E. D. Kenna,** and **Robert Dunlap** for appellees.

*Mr. Justice **McKenna** delivered the [545]
opinion of the court:

This case was submitted with No. 106, which was between the same parties, and on the authority of the opinion in that case the judgment of the supreme court of the territory was affirmed. 172 U. S. 171, 186 [*ante*, 407, 413].

The cases were argued together, and it was supposed involved identically the same questions dependent upon a statement of facts which were stipulated. No distinction
between the cases *was indicated in the oral [546]
argument, and a reference of a few lines in a brief of thirty-five pages was overlooked.

In the petition for rehearing our attention was called to the fact that there is a substantial difference between the matters involved in this cause and those arising in No. 106. The difference is this: In 106 the right of way was in Bernalillo county through land which was public domain, whilst in this case the right of way is in Valencia county across the public domain for 33 miles only, and for 60.7 miles over land which was held in private ownership at the time of the grant to the railroad by the act of 1866. In other words, the railroad company derived its right of way for 33 miles in Valencia county under section 2 of the act of July 27, 1866, and to 66.7 miles under the power conferred by section 7 of said act. This difference was not adverted to in No. 106, and we will now consider the effect of it. In the opinion in 106 we said:

"The right of way is granted to the extent of two hundred feet on each side of the railroad, including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase, 'the right of way?' A mere right of passage, says appellant. *Per contra,* appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was

granted, that all that was attached to it became part of it and partook of its exemption from taxation.

"To support its contention appellant urges the technical meaning of the phrase, 'right of way,' and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute we find that whatever is granted is exactly measured as a physical thing, not as an abstract right. It is to be two hundred feet wide and to be carefully broadened, so as to include grounds for the superstructures indispensable to the railroad."

After further consideration of what was granted, we also said: "The interest granted by the statute to the Atlantic & Pacific Railroad Company therefore is real estate of corporeal quality, and the principles
[547] of such apply. One of these, and *an elemental one, is that whatever is erected upon it becomes part of it." And we concluded that not only the right of way was exempt, but all its superstructures were exempt. But our conclusion was expressly based on the terms of the statute, and we took care to affirm the rule of construction which had been announced many times and in many ways, that the taxing power of the state is never presumed to be relinquished unless the intention be expressed in terms too clear to be mistaken. If a doubt arise as to the intention of the legislature, that doubt must be solved against exemption from taxation.

Applying this rule to the act of July, 1866, the exemption from taxation must be confined to the right of way granted by the United States by section 2 of the act, and to the superstructures which become a part of it, and not to the right of way which the railroad company may have acquired under section 7, or independently of that section. Section 1 creates the corporation and authorizes it to construct and maintain a continuous railroad and telegraph line from and to certain points, and invests the company with the powers, privileges, and immunities necessary to effect that purpose. Section 2 provides: "That *the right of way* through the public lands be, and the same is hereby granted, to the said Atlantic & Pacific Railroad Company . . . for the construction of a railroad and telegraph line as proposed. . . . Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the *public domain*, . . . and *the right of way* shall be exempt from taxation within the territories of the United States."

The right of way which is granted and the right of way which is exempt from taxation is precisely identified by the natural and first meaning of the words used and their relations. It would require an exercise of construction to extend the exemption, and even if there are reasons for it, there are certainly reasons against it, and in such conflict the rule requires that the latter shall prevail.

2. It is contended by the appellee that the assessment was invalid because the laws of the territory required the assessment *of the [548]
right of way and its superstructures to be made as an entirety.

The contention is technical. It is not complained that the valuation of the superstructures was excessive, but that they were assessed as personal property, and hence invalidly assessed, because by the laws of the territory the term "real estate" includes lands to which title has been acquired and improvements, and the term "improvements" includes all buildings, structures, fixtures, and fences erected upon or fixed to land, whether title has been acquired or not.

The record does not afford the means of judging of the contention as clearly as might be wished, but we think it is not tenable.

The intervening petition, which is the basis of the proceedings, proceeds upon the ground that omissions were made in assessments of property to the railroad company for a series of years beginning with the year 1892 and ending with 1896, and that additions were made of said property under the laws of the territory for said years. The valuation of the property and the taxes levied against it are stated, and a description of the property is attached.

It is alleged that the receiver of the company refuses payment because he claims that the property is exempt from taxation under the act of July, 1866; but it is also alleged "that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad where it may pass through the public domain, and does not extend to any improvements made upon the right of way, nor to the said right of way itself where it passes through land not included in the public domain."

It is prayed that "the said taxes, so levied as aforesaid," be declared a lien on the property in the hands of the receiver, and that he be ordered "to pay the said taxes." General relief is also prayed.

To the petition of intervention the receiver submitted pleas respectively to the claim of taxes for each of the years. The pleas were substantially alike, and alleged the assessment of the company's property for each of the years, with a description *or designa- [549]
tion of it, the value at which it was assessed, and the taxes levied against it and the amounts of taxes paid by the company.

In the first plea it is alleged that the company through its officers made a return to the county assessor of its property situated in the county, and a copy of the return is attached and made part of the plea. Discriminating the property upon which the taxes were paid and that in the return of the company assessed, the plea alleges:

"That the other property returned by the taxing officers of said railroad company for said year was and is the property upon which the taxes are paid as above stated, and as shown by Receiver's Exhibits 3 and 4.

"That the only pretended or claimed levy of taxes against any property of the Atlantic & Pacific Railroad Company for the said

year, remaining unpaid, is that shown to have been extended and levied upon the 'right of way, of the Atlantic & Pacific Railroad Company, which was and is assessed at the lump sum of $327,103, upon the assessment roll for said year, together with the further sums placed in said assessment roll in the column headed 'Value of cattle,' opposite the words contained in the column in said assessment roll headed 'Name of property owners,' save and except as hereinafter stated.

"The names and sums referred to are as follows:

Rio Puerco, 1st	$1,888 00
El Rito, 3rd	541 00
Laguna, 4th	677 00
Cubero, 6th	2,145 00
McCarty's, 7th	682 00
Grants, 8th	1,383 00
Blue Water, 9th	3,150 00
San Jose, 2nd	1,316 00

—"All of which is shown by the said assessment and levy of taxes upon said assessment roll, as will fully appear by reference to said Receiver's Exhibits No. 1 and No. 2, and the indorsements thereon.

[550] *"That prior to the first day of January, 1894, the Atlantic & Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia county, territory of New of way was assessed, and the taxes levied against the assessed value of its 'right of way,' and that levied against the figures set opposite the names of the stations as hereinabove set forth and described."

The right of way, therefore, was assessed in 1892, and whatever taxes were due on it or any part of it were left delinquent.

As to the other years the record is not much less definite. It appears that the right of way was assessed, and the taxes levied against it were not paid. In all the pleas there is a careful allegation of payment of the taxes which were conceded to be valid and as careful a one that the company refused "to pay the balance of the taxes because of the fact that the assessment as made by the assessor was an assessment of the right of way and station grounds of the Atlantic & Pacific Railroad, which were and are exempt under the act of Congress creating said railroad company." It is manifest that the right of way was assessed and the taxes were delinquent. In what manner were the additional assessments made? It is shown in the exhibit to the intervening petition. We select the assessment for 1892. The assessments for the other years are the same, the amounts only being different to a small extent.

"The following was omitted in the assessment of the year 1892, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

"The cross ties, rails, fish plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic & Pacific Railroad Company in the county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile $214,500

*"Also the cross ties, rails, fish plates, bolts, [551] spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic & Pacific Railroad Company in said county of Valencia, and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile $394,550

Station houses, depots, switches, water tanks and all other improvements at Rio Puerco station	$1,800
Station houses, depots, switches, water tanks and all other improvements at San Jose station. .	540
Station houses, depots, switches, water tanks and all other improvements at El Rito station. . .	600
Station houses, depots, switches, water tanks and all other improvements at La Guna station. .	2,100
Station houses, depots, switches, water tanks and all other improvements at Cubero station. . .	600
Station houses, depots, switches, water tanks and all other improvements at McCarty's station	1,300
Station houses, depots, switches, water tanks and all other improvements at Grant's station. . .	3,100
Station houses, depots, switches, water tanks and all other improvements at Blue Water station	1,300
	$11,340"

The assessments were not, as contended by appellee, of personal property. They were clearly of real estate, and because the improvements were designated by name and some of them given a separate valuation did not invalidate their assessment as real estate. It was mere description which did not change the essential or legal character of the superstructures.

It follows from these views that—

The judgment of the Supreme Court of the Territory must be reversed, and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY, *Petitioner*, [552]

v.

LOUISVILLE TRUST COMPANY.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY, *Petitioner*,

v.

LOUISVILLE BANKING COMPANY.

(See S. C. Reporter's ed. 552-577.)

Corporation of one state may be made a cor-

poration of another state—corporation a citizen of the state of its creation—jurisdiction of suit—suit to cancel a guaranty, etc., can only be brought in court of equity—power of railroad corporation to guarantee bonds of another corporation—when guaranty not ultra vires—rights of bona fide holders—when validity assumed—obligation to inspect records—jurisdiction depending upon citizenship.

1. A corporation of one state may be made a corporation of another state by the legislature of that state in regard to property and acts within its territorial jurisdiction.
2. A corporation created by a state remains a citizen of that state for the purposes of the jurisdiction of the Federal courts, although also created a corporation of another state.
3. Jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit.
4. A suit to cancel a guaranty of negotiable bonds which might otherwise pass into the hands of bona fide purchasers, and to restrain suits upon the guaranty, because of facts not appearing upon its face, can only be brought in a court of equity.
5. A railroad corporation, unless authorized by its act of incorporation or another statute, has no power to guarantee the bonds of another corporation.
6. The guaranty by one railroad company of the bonds of another is not *ultra vires* in the sense of being outside of its corporate powers when expressly authorized by a statute of the state of its creation; the prerequisite prescribed by the statute, that it should be made upon the petition of a majority of the stockholders, is only a regulation of the mode and agencies by which the corporation should exercise the power granted to it.
7. A guaranty of bonds by a corporation, which could be lawfully made only by a petition of the majority of its stockholders, which was not obtained, is enforceable by bona fide holders of the bonds, but invalid as to other holders.
8. One who takes from a railroad or business corporation, in good faith and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity if the corporation could, by any action of its officers or stockholders or of both, have authorized the execution and issue of the obligation.
9. Records of a railroad corporation are private records which a purchaser of bonds is not obliged to inspect to see whether a guaranty thereon was authorized by a majority of the stockholders.
10. The rights and liabilities of a state corporation, as a corporation of other states than that which created it, cannot be adjudicated in a suit in a Federal court in which the jurisdiction depends upon its citizenship in that state, and would be ousted by citizenship in the other states.

[Nos. 29, 30.]

Argued May 4, 5, 1898. Decided May 15, 1899.

ON WRITS OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of that court reversing the decree of the Circuit Court of the United States for the District of Kentucky, entered for the plaintiff against all the defendants in a suit in equity brought by the Louisville, New Albany, & Chicago Railway Company against the Louisville Trust Company *et al.*, for the cancelation of a contract and of a guaranty indorsed upon bonds issued by the Richmond, Nicholasville, Irvine, & Beattyville Railway Company and held by other defendants, and for an injunction against suits thereon. A supplemental bill was filed against the Louisville Banking Company and others holding the guaranteed bonds. The Circuit Court of Appeals further ordered the suit to be dismissed as to the Louisville Trust Company and the Louisville Banking Company except as to forty-five bonds held by the latter company; and as to these bonds ordered an injunction against suits on the guaranty, etc. Decree of Circuit Court of Appeals in the first case affirmed and case remanded to the United States Circuit Court, with directions to dismiss the suit as against the Louisville Trust Company; and in the second case decrees of both lower courts reversed and case remanded to the United States Circuit Court, with directions to enter a decree in conformity with the opinion of this court.

See same case below, 69 Fed. Rep. 431, and 57 Fed. Rep. 42, and 43 U. S. App. 550, 75 Fed. Rep. 433, 23 C. C. A. 378.

Statement by Mr. Justice **Gray:**

This was a bill in equity, filed April 9, 1890, in the circuit court of the United States for the district of Kentucky, by the Louisville, New Albany, & Chicago Railway Company (hereafter called the New Albany Company), described as "a corporation duly organized and existing under the laws of the state of Indiana," against the Ohio Valley Improvement & Contract Company (hereafter called the construction company), the Richmond, Nicholasville, Irvine, and Beattyville Railway Company (hereafter called the Beattyville Company), *and the Louisville **[553]** Trust Company, all corporations of the state of Kentucky, and other citizens of Kentucky, of New York and of Illinois, for the cancelation of a contract between the New Albany Company and the construction company, and of a guaranty indorsed by the New Albany Company, in accordance with that contract, upon bonds issued by the Beattyville Company and held by the other defendants, and for an injunction against suits thereon. The Louisville Banking Company, a corporation of Kentucky, and other bondholders were afterwards made defendants by a supplemental bill.

The bill alleged that the guaranty was fraudulently placed on the bonds of the Beattyville Company by a minority of the plaintiff's directors, who, as individuals, had secured the option to buy the bonds at a low price; and also averred that the guaranty was void, for want of the presence of a quo-

rum of the directors at the meeting which directed it to be executed, as well as for want of a previous petition in writing by a majority of the stockholders, pursuant to a statute of Indiana.

Pleas to the jurisdiction, asserting that the plaintiff was a corporation and a citizen of Kentucky, as well as demurrers to the bill for want of equity, were overruled by the court. 69 Fed. Rep. 431, 432, 57 Fed. Rep. 42.

The case was afterwards heard upon pleadings and proofs, and, so far as is material to be stated, appeared to be as follows:

The New Albany Company, by articles of incorporation, filed with the secretary of state of Indiana in January, 1873, reciting its purchase at a judicial sale at New Albany of the railroad and franchise, and all the property, real and personal, of another railroad company whose line of railroad ran from New Albany to Michigan City in the state of Indiana, and expressed to be made "for the purpose of carrying out the design of the said purchase, and forming a corporation of Indiana," became a corporation, under the statute of Indiana of March 3, 1865, which contained these provisions:

"The said corporation shall have capacity to hold, enjoy, and exercise, within other states, the aforesaid faculties, powers, rights, franchises, and immunities, and such others
[554] as *may be conferred upon it by any law of this state, or of any other state in which any portion of its railroad may be situate, or in which it may transact any part of its business; and to hold meetings of stockholders and of its board of directors, and to do all corporate acts and things, without this state, as validly and to the same extent as it may do the same within the state, on the line of such road." Indiana Stat. 1865, chap. 20, § 5, p. 68; Rev. Stat. § 3949.

"Any railroad company incorporated under the provisions of this act shall have the power and authority to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises, of any other railroad corporation or corporations which may cross or intersect the line of such railroad company, or any part of the same, or the use and enjoyment thereof, in whole or in part; and may also purchase or contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining states; and may assume such of the debts and liabilities of such corporations as may be deemed proper." "Any railroad company incorporated under the provisions of this act shall also have power to consolidate with other railroad corporations in the continuous line, either within or without this state, upon such terms as may be agreed upon by the corporations owning the same." Indiana Stat. 1865, chap. 20, § 7, p. 68; Rev. Stat. § 3951.

On April 8, 1880, the legislature of Kentucky passed a statute, entitled "An Act to Incorporate the New Albany & Chicago Railway Company," which took effect upon its passage, and the first two sections of which were as follows:

"Sec. 1. The Louisville, New Albany, & Chicago Railway Company, a corporation organized under the laws of the state of Indiana, is hereby constituted a corporation, with power to sue and be sued, contract and be contracted with, to have and use a common seal, with the power incident to corporations, and authority to operate a railroad.

"Sec. 2. The Louisville, New Albany, & Chicago Railway Company is hereby authorized to purchase or lease, for depot purposes in the city of Louisville or county of Jefferson, such *real estate as may be deemed by it [555]
to be necessary for passenger and freight depots and transfer, machine shops, and for all switches or turnouts necessary to reach the same; and is also authorized to connect with any railroad or bridge now operated or used, or which may be hereafter operated or used, in said county of Jefferson, and may build any such connecting lines, or lease or operate the same; and for all said purposes shall have the right to condemn all property required for the carrying out of the objects herein named; and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises."

The third section of that statute directed how proceedings for the condemnation of such real estate should be conducted in the courts of the state of Kentucky. Kentucky Stat. sess. 1879, chap. 858, p. 233.

On May 5, 1881, the New Albany Company (describing itself as "a corporation existing under the laws of the state of Indiana," and as owning and operating a line of railroad from New Albany to Michigan City in the same state), and the Chicago & Indianapolis Air Line Railway Company (describing itself as "a consolidated corporation organized and existing under the laws of the states of Indiana and Illinois," and as having in process of construction a line of railway extending from Indianapolis in Indiana to a connection with a railroad at or near Glenwood in Illinois so as to secure a connection with Chicago in that state), consolidated their stock and property, under the laws of Indiana and of Illinois, "so as to create and form a consolidated corporation, to be called and known as the Louisville, New Albany, & Chicago Railway Company," by articles of consolidation, the third of which provided, in accordance with the statutes of Indiana, that "the said consolidated corporation hereby created shall be vested with all the rights, privileges, immunities, and franchises which usually pertain to railroad corporations under the laws of the respective states of Illinois and Indiana, wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities, and franchises which before the execution *of these [556]
articles were lawfully possessed or exercised by either of the parties hereto;" and the ninth of which provided that "the principal place of business and the general office of the consolidated corporation shall be established in the city of Louisville, Kentucky."

On April 7, 1882, the legislature of Kentucky, by a statute entitled "An Act to

Amend an Act Entitled 'An Act to Incorporate the Louisville, New Albany, & Chicago Railway,' approved April 8, 1880," enacted that "the Louisville, New Albany, & Chicago Railway Company is hereby authorized and empowered to indorse or guarantee the principal and interest of the bonds of any railway company now constructed, or to be hereafter constructed, within the limits of the state of Kentucky; and may consolidate its rights, franchises, and privileges with any railway company authorized to construct a railroad from the city of Louisville to any point on the Virginia line; such indorsement, guaranty, or consolidation to be made upon such terms and conditions as may be agreed upon between said companies; or it may lease and operate any railway chartered under the laws of the state of Kentucky: Provided, it shall not lease or consolidate with any two lines of railway parallel to each other." Kentucky Stat. sess. 1881, chap. 870, p. 251.

The New Albany Company was not shown to have formally accepted the statutes of Kentucky of 1880 and 1882, or to have ever organized as a corporation under those statutes. But the defendants, as evidence that it had accepted a charter of incorporation from the state of Kentucky, relied on the following documents:

1st. Two deeds to it of lands in Jefferson county, made and recorded in 1881, in which it was described as "of the city of Louisville, Kentucky."

2d. Two mortgages executed by it to trustees in 1884 and 1886, including its railway in Indiana and in Jefferson county, in each of which it was described as "a corporation duly created and existing under the laws of Indiana and Kentucky."

3d. A lease to it from the Louisville Southern Railway *Company, in 1888 (more fully stated below), in which it was similarly described. [557]

4th. A petition (the date of which did not appear in the transcript) that an action brought against it in a court of the state of Indiana might be removed into the circuit court of the United States, upon the ground that it was a corporation of Kentucky.

5th. Proceedings in 1887, in a court of Jefferson county, for the condemnation of lands in that county upon a petition in which "the Louisville, New Albany, & Chicago Railway Company states that it is a corporation, and that it is duly empowered by its charter by an act of the general assembly of the commonwealth of Kentucky to purchase, lease, or condemn in said state such real estate as may be necessary for railway, switches, side tracks, depots, yards, and other railway purposes, and to construct and operate a railroad in said state."

On March 8, 1883, the legislature of Indiana passed a statute, entitled "An Act to Authorize Railroad Companies Organized under the Laws of the State of Indiana to Indorse and Guarantee the Bonds of Any Railroad Company Organized under the Laws of Any Adjoining State," the material provisions of which were as follows:

"Sec. 1. The board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"Sec. 2. The petition of the stockholders, specified in the preceding section of this act, shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

*" Sec. 3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act." Indiana Stat. 1883, chap. 127, p. 182; Rev. Stat. §§ 3951a–3951c. [558]

On December 10, 1888, the New Albany Company took a lease, in which it was described as "a corporation organized and existing under the laws of the state of Indiana and of the state of Kentucky," from the Louisville Southern Railroad Company, a corporation of Kentucky, of the railroad of the latter, running from Louisville to Burgin through sundry other places in Kentucky, and connecting at Versailles in that state with a railroad then being constructed by the Beattyville Company to Beattyville, and which would, if completed, extend the connections of the New Albany Company a considerable distance towards the Virginia line.

The Beattyville Company had, on October 11, 1888, made a contract with the Ohio Valley Improvement and Contract Company, by which that company agreed to construct and equip its line of railroad; and, in consideration thereof, the Beattyville Company agreed to execute and issue to the construction company its first-mortgage bonds for $25,000 a mile, dated July 1, 1889, and payable in thirty years, with interest at the annual rate of 6 per cent; and to transfer to that company the subscriptions received from municipalities, and to issue to that company all its capital stock, except what would have to be issued on account of such subscriptions.

On October 8, 1889, the board of directors of the New Albany Company, as appeared by its records, passed a resolution ordering the president and secretary to execute, under the seal of the company, a contract with the construction company, which contract described that company as a corporation of the state of Kentucky, and the New Albany Company as "a corporation organized and existing un-

der the laws of the states of Indiana and Kentucky," and contained these stipulations:

"Fourth. The said New Albany Company
[559] agrees to and *with the said construction company that it will, from time to time, as the said first-mortgage bonds are earned by and delivered to the said construction company pursuant to the terms of their said construction contract, guarantee the payment by the said Beattyville Company of the principal and interest of the said bonds in manner and form following, that is to say, by indorsing upon each of said bonds a contract of guaranty as follows:

"'For value received, the Louisville, New Albany, & Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof.

"'In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary.'"

"Sixth. In consideration of the premises, the said construction company agrees to transfer and deliver to the said New Albany Company three fourths of the entire capital stock of the said Beattyville Company, the said delivery to proceed *pari passu* with the guaranteeing of the said bonds by the said New Albany Company: $3,000 at par of the said stock being delivered for each $4,000 of bonds guaranteed."

This contract was dated October 9, 1889; was signed in the name of each company by its president and secretary and under its corporate seal; and a copy of it was spread upon the records of the board of directors of the New Albany Company.

The charges of fraud against the directors who took part in that meeting were disproved; and the evidence failed to establish that the meeting was not in every respect a lawful one.

But no petition of a majority of the stockholders for the execution of the guaranty was presented, as required by the statute of Indiana of 1883, above cited. Nor was there any evidence that the stockholders ever authorized or ratified the contract between the New Albany Company and the construction company, or the guaranty executed in accordance therewith.

Pursuant to that contract, and before
[560] March 12, 1890, the *stock of the Beattyville Company was delivered to the New Albany Company; a guaranty, in the terms specified in the fourth article of that contract, and bearing the signature of the New Albany Company by its president and secretary and its corporate seal, was placed on 1185 bonds for $1,000 each of the Beattyville Company; and the bonds thus guaranteed were put on the market by the construction company.

On March 12, 1890, the annual meeting of the stockholders of the New Albany Company was held, a new board of directors was elected, and the meeting was adjourned to March 22, 1890, when it was voted by a majority of the stockholders to reject and disapprove the contract with the construction company, and the guaranty placed on the bonds of the Beattyville Company, as having been made without legal authority or the approval of the stockholders, and to empower the board of directors to take all proceedings necessary or proper to cancel such contract and guaranty, and to relieve the company from any obligation or liability by reason thereof.

Many of the bonds so guaranteed and put on the market, including one hundred and twenty-five bonds purchased by the Louisville Trust Company, and ten bonds purchased by the Louisville Banking Company, were taken from the construction company by the purchasers in good faith, and without notice or knowledge that there had been no petition of a majority of the stockholders for the execution of the guaranty; and forty-five of the bonds were purchased from the construction company by the Louisville Banking Company after the meeting in March, 1890, and with notice that the majority of the stockholders had not petitioned for, but had disapproved, the guaranty.

The Beattyville Company and the construction company went on with the work of constructing the Beattyville railroad until the summer of 1890, when they both became insolvent, and their property passed into the hands of receivers.

The plaintiff, in its bill, tendered back the stock which it had received, and the stock was deposited in the office of the clerk of the court.

The circuit court entered a decree for the plaintiff against *all the defendants. 69 [561]
Fed. Rep. 431. The Louisville Trust Company and the Louisville Banking Company and other bondholders appealed to the circuit court of appeals, which reversed the decree of the circuit court, and ordered the bill to be dismissed as to the Louisville Trust Company and the Louisville Banking Company, except as to the forty-five bonds held by the latter company; and, as to these bonds, ordered an injunction against suits on the guaranty against the plaintiff as a corporation of Indiana and Illinois, and that there be stamped on each of these forty-five bonds, under its guaranty, these words: "This guaranty is binding only on the Louisville, New Albany, & Chicago Railway Company, a corporation of Kentucky. It is not binding on the Louisville, New Albany, & Chicago Railway Company, a corporation of Indiana and Illinois." 43 U. S. App. 550. The plaintiff applied for and obtained these writs of certiorari. 164 U. S. 707, mem.

Messrs. **E. C. Field, G. W. Kretzinger,** and *James S. Pirtle* for petitioner:

The appellee. created by the consolidation of Illinois and Indiana companies, could not, by general contract, bind itself, if such contract was not authorized by the state of one of its constituents.

Shields v. *Ohio*, 95 U. S. 319, 24 L. ed. 357; *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359, 25 L. ed. 185; *Clearwater* v. *Meredith*, 1 Wall. 25, 17 L. ed. 604.

The general and implied corporate powers of appellee, as a consolidated corporation,

were limited by the articles of consolidation, and the laws of its creation, to the ownership and operation of railroads wholly within the states of Indiana and Illinois.

Thomas v. *West Jersey R. Co.* 101 U. S. 82, 25 L. ed. 952; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Pearce* v. *Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *Ernest* v. *Nicholls,* 6 H. L. Cas. 418; *Balfour* v. *Ernest,* 5 C. B. N. S. 600; *Ridley* v. *Plymouth S. & D. Grinding & Baking Co.* 2 Exch. 711; *Bedford R. Co.* v. *Bowser,* 48 Pa. 29; *People, Peabody,* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Davis* v. *Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221.

The appellee had no general power to lend its credit or guarantee the debts of any other enterprise or company.

Colman v. *Eastern Counties R. Co.* 10 Beav. 1; *East Anglian R. Co.* v. *Eastern Counties R. Co.* 11 C. B. 775; *Pearce* v. *Madison & I. R. Co.* 21 How. 443, 16 L. ed. 184.

It requires special legislative power to authorize the purchase of the stock or to guarantee the debt of any other company or enterprise.

People, Peabody, v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Sumner* v. *Marcy,* 3 Woodb. & M. 105; *Mechanics & Workingmen's Mut. Sav. Bank & Bldg. Asso.* v. *Meriden Agency Co.* 24 Conn. 159; *Starin* v. *Genoa,* 23 N. Y. 439.

Those dealing with a special agent must take notice that his authority, as such special agent, is not general but limited, and no presumption will be substituted for actually absent special authority.

Pratt v. *Short,* 79 N. Y. 437, 35 Am. Rep. 531; *Valley R. Co.* v. *Lake Erie Iron Co.* 46 Ohio St. 44; *Hackensack Water Co.* v. *DeKay,* 36 N. J. Eq. 548; *Martin* v. *Great Falls Mfg. Co.* 9 N. H. 51; *LeMoine* v. *Bank of North America,* 3 Dill. 44; *Spence* v. *Mobile & M. R. Co.* 79 Ala. 585; *Ernest* v. *Nicholls,* 6 H. L. Cas. 418; *Chambers* v. *Manchester & M. R. Co.* 5 Best & S. 588.

Messrs. **Swagar Sherley, St. John Boyle,** and *Barnett, Miller, & Barnett* for respondents:

The directors of the "Monon," under the powers granted by the Kentucky act of 1882, had the right to make the guaranty.

Hoyt v. *Thompson,* 19 N. Y. 216; *Louisville, E. & St. L. R. Co.* v. *McVay,* 98 Ind. 393, 49 Am. Rep. 770; *Thompson* v. *Nachez Water & Sewer Co.* 68 Miss. 423; *Hodder* v. *Kentucky & G. E. R. Co.* 7 Fed. Rep. 796; *Nashua & L. R. Co.* v. *Boston & L. R. Co.* 27 Fed. Rep. 825, 136 U. S. 356, 34 L. ed. 363; *Wood* v. *Whelen,* 93 Ill. 153; *Hendee* v. *Pinkerton,* 14 Allen, 387; *Beveridge* v. *New York Elev. R. Co.* 112 N. Y. 1, 2 L. R. A. 648; *Flagg* v. *Manhattan R. Co.* 10 Fed. Rep. 431; *McCullough* v. *Moss,* 5 Denio, 575; *Moses* v. *Tompkins,* 84 Ala. 613; *Dana* v. *Bank of United States,* 5 Watts & S. 223; *Hutchinson* v. *Green,* 91 Mo. 367; *Gashwiler* v. *Willis,* 33 Cal. 11, 91 Am. Dec. 607; *Conro* v. *Port Henry Iron Co.* 12 Barb. 27; *Clark* v. *Barnard,* 108 U. S. 436, 27 L. ed. 780.

The guaranty indorsed on the Beattyville bonds is negotiable.

Killian v. *Ashley,* 24 Ark. 511, 91 Am. Dec. 519; *Cooper* v. *Dedrick,* 22 Barb. 516; *Partridge* v. *Davis,* 20 Vt. 499; *Webster* v. *Cobb,* 17 Ill. 466; *Jackson* v. *Foote,* 12 Fed. Rep. 37; *Studabaker* v. *Cody,* 54 Ind. 586; *Davis* v. *Wells, Fargo, & Co.* 104 U. S. 169, 26 L. ed. 690; *Toppan* v. *Cleveland C. & C. R. Co.* 1 Flipp. 74.

The power of the board of directors to make the guaranty was so exercised as to bind the appellee in favor of bona fide holders.

Battles v. *Laudenslager,* 84 Pa. 446; *Stoney* v. *American L. Ins. Co.* 11 Paige, 635; *Farmers' Nat. Bank* v. *Sutton Mfg. Co.* 6 U. S. App. 312, 52 Fed. Rep. 191, 3 C. C. A. 1, 17 L. R. A. 595; *Farmers' & M. Bank* v. *Butchers' & D. Bank,* 16 N. Y. 125; *Bissell* v. *Michigan S. & N. S. R. Cos.* 22 N. Y. 289; *Mechanics' Bkg. Asso.* v. *New York & S. White Lead Co.* 35 N. Y. 505; *Wright* v. *Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701; *Hackensack Water Co.* v. *DeKay,* 36 N. J. Eq. 548; *Credit Co.* v. *Howe Mach. Co.* 54 Conn. 357; *Gelpcke* v. *Dubuque,* 1 Wall. 203, 17 L. ed. 524; *Genesee County Sav. Bank* v. *Michigan Barge Co.* 52 Mich. 438; *Bird* v. *Daggett,* 97 Mass. 494.

The guaranty is valid as the act of the appellee's agent.

Humboldt Twp. v. *Long,* 92 U. S. 642, 23 L. ed. 752; *Eastern Counties R. Co.* v. *Hawkes,* 5 H. L. Cas. 331; *Kinyon* v. *Wohlford,* 17 Minn. 239, 10 Am. Rep. 165; *Clarke* v. *Johnson,* 54 Ill. 296; *Burson* v. *Huntington,* 21 Mich. 415, 4 Am. Rep. 497; *McDougald* v. *Lane,* 18 Ga. 444; *Norwich* v. *Norfolk R. Co.* 4 El. & Bl. 397; Story on Agency, Secs. 452, 562; *Fitzherbert* v. *Mather,* 1 T. R. 11; *Locke* v. *Stearns,* 1 Met. 563, 35 Am. Dec. 382; *Hackett* v. *Ottawa,* 99 U. S. 608, 25 L. ed. 363; *New York & N. H. R. Co.* v. *Schuyler,* 34 N. Y. 31; *North River Bank* v. *Aymar,* 3 Hill, 262.

*Mr. Justice **Gray,** after stating the case [561]
as above, delivered the opinion of the court:

The plaintiff, the Louisville, New Albany, & Chicago Railway Company, undoubtedly became a corporation of the state of Indiana in 1873 by its incorporation according to the general statute of 1865 of that state.

Whether it afterwards became a corporation of the state of Kentucky also was strongly contested at the bar, and depends upon the legal effect of the statute of Kentucky of 1880.

That statute (being the first statute of Kentucky affecting this corporation) is described indeed in its title, as well as in the title of the statute of 1882 amending it, as "An Act to Incorporate" this company, although in the title of the first *statute the [562]
word "Louisville" in its name is omitted. By the first words of the enacting part of the statute of 1880, it is "the Louisville, New Albany, & Chicago Railway Company, a corporation organized under the laws of the state of Indiana," and not any other corporation, or any association of natural persons, that is "hereby constituted a corporation," with the usual powers of corporations, and with "authority to operate a railroad." And

it is the corporation so described that, by the other provisions of that statute, may purchase, lease, or condemn real estate required for railroad purposes in the county of Jefferson, and may connect with any other railroad in that county, or build, lease, or operate any such connecting line, "and may bond the same, and secure the payment of any such bonds by a mortgage of its property, rights, and franchises;" and, by the amendatory statute of 1882, may guarantee the bonds of, or consolidate with, other corporations authorized to construct railroads in Kentucky.

This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction. *Ohio & Mississippi Railroad Company* v. *Wheeler*, 1 Black, 286, 297 [17: 130, 133]; *Baltimore & O. Railroad Co.* v. *Harris*, 12 Wall. 65, 82 [20: 354, 358]; *Chicago & N. W. Railway Co.* v. *Whitton*, 13 Wall. 270, 283 [20: 571, 576]; *Indianapolis & St. L. Railroad Co.* v. *Vance*, 96 U. S. 450, 457 [24: 752, 756]; *Memphis & Charleston Railroad Co.* v. *Alabama*, 107 U. S. 581 [27: 518]; *Clark* v. *Barnard*, 108 U. S. 436, 451, 452 [27: 780, 786]; *Stone* v. *Farmers' Loan & Trust Co.* 116 U. S. 307, 334 [29: 636, 645]; *Graham* v. *Boston, Hartford, & Erie Railroad Co.* 118 U. S. 161, 169 [30: 196, 201]; *Martin* v. *Baltimore & Ohio Railroad Co.* 151 U. S. 673, 677 [38: 311, 313]. But this court has repeatedly said that, in order to make a corporation, already in existence under the laws of one state, a corporation of another state, "the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this." *Pennsylvania Railroad Co.* v. *St. Louis, Al-*
[563] *ton, & Terre Haute *Railroad Co.* 118 U. S. 290, 296 [30: 83, 88]; *Goodlett* v. *Louisville & Nashville Railroad Co.* 122 U. S. 391, 405, 408 [30: 1230, 1232, 1233]; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545, 561 [40: 802, 808].

The acts done by the Louisville, New Albany, & Chicago Railway Company, under the statutes of Kentucky, while affording ample evidence that it had accepted the grants thereby made, can hardly affect the question whether the terms of those statutes were sufficient to make the company a corporation of Kentucky.

But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits.

As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either state, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. *Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286 [17:130]; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545 [40:802]; *St. Joseph & G. I. Railroad Co.* v. *Steele*, 167 U. S. 659,663 [42:315, 317]; *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 106 [42: 964, 967].

In *St. Louis & San Francisco Railway Co.* v. *James*, the company was organized and incorporated under the laws of the state of Missouri in 1873, and owned a railroad extending from Monett in that state to the boundary line between it and the state of Arkansas. The Constitution of the state of Arkansas provided that foreign corporations might be authorized to do business in this state under such limitations and restrictions as might be prescribed by law, but should not have power to appropriate or condemn private property. The legislature of Arkansas, by a statute of 1881, provided that any railroad company incorporated by or under the laws of any other state, and having a line of railroad to the boundary *of Ar- [564] kansas, might, for the purpose of continuing its line of railroad into this state, purchase the property, rights, and franchises of any railroad company organized under the laws of this state, and thereby acquire the right of eminent domain possessed by that company, and hold, construct, own, and operate the railroad so purchased as fully as that company might have done; and that "said foreign railroad company" should be subject to all the provisions of all statutes relating to railroad corporations, including the service of process, and should keep an office in the state. Pursuant to that statute, the St. Louis & San Francisco Railway Company, in 1882, purchased from railroad corporations of Arkansas their railroads, franchises, and property, including a railroad connecting at the boundary line with its own railroad, and extending to Fort Smith in Arkansas, and thenceforth owned and operated a continuous line of railroad from Monett in Missouri to Fort Smith in Arkansas. In 1889 the legislature of Arkansas passed another statute providing that every railroad corporation of any other state, which had purchased a railroad in this state, should, within sixty days from the passage of this act, file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and should "thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding." And the St. Louis & San Francisco Railway Company forthwith filed with the secretary of state of Arkansas a copy of its articles of incorporation under the laws of Missouri, as required by this statute.

In an action brought by a citizen of Missouri against that company in the circuit court of the United States for the western

district of Arkansas, to recover for its negligence on that part of its road within the state of Missouri, the company pleaded to the jurisdiction that it was a citizen of Missouri; and the question was certified to this court whether the company, by filing a copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, became a corporation and citizen of the state of Arkansas.

[565] *This court, speaking by Mr. Justice Shiras, upon a careful review of the earlier cases, answered that question in the negative.

The fundamental proposition deduced from the previous decisions was thus stated: "There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal courts in 'controversies between citizens of different states.'"

The court frankly recognized that "it is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state, and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state;" and that "such corporations may be treated by each of the states whose legislative grants they accept as domestic corporations." 161 U. S. 562 [40:808].

But the court went on to say: "The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation." And after referring to the provisions of the statutes of Arkansas of 1881 and 1889, the court added: "But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the Federal Constitution, so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that Constitution, as construed by the decisions of this court, it would be necessary to cre-

[566] ate *it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself." 161 U. S. 562, 565 [40: 808,809].

In that case, the Constitution of Arkansas denied to foreign corporations the right of eminent domain; and the Missouri corporation acquired that right, and owned and operated a railroad in Arkansas, in virtue of statutes authorizing it to purchase the property, rights, and franchises of Arkansas corporations, and requiring it to file a copy of its articles of incorporation or charter with the secretary of state of Arkansas, and enacting that it should "thereupon become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding." Yet it was held that it was not thereby made a corporation of Arkansas, in the sense of the provisions of the Constitution, and of the acts of Congress, conferring jurisdiction on the courts of the United States by reason of diverse citizenship.

The statutes of Arkansas in that case went quite as far, to say the least, towards constituting a corporation of another state a corporation of the state enacting those statutes, as the statutes of Kentucky did in the case at bar.

The consolidation of the Louisville, New Albany, & Chicago Railway Company, under the same name, with a railroad company of Illinois in 1881, clearly does not affect the question of jurisdiction. That consolidation appears, by cases cited at the bar, to have been in accordance with the law of Indiana, but not to have been authorized by the law of Illinois. *Louisville, New Albany, & Chicago Railway Co.* v. *Boney*, 117 Ind. 501 [3 L. R. A. 435]; *American Loan & Trust Co.* v. *Minnesota & Northwestern Railroad Co.* 157 Ill. 641. It may have been ratified by very recent legislation in Illinois. Illinois Stat. June 9, 1897; Laws of 1897, p. 281; *McAuley* v. *Columbus, Chicago, & Indiana Railway Co.* 83 Ill. 348, 352. But jurisdiction of a suit, once acquired by a court of the United States by reason of the requisite citizenship, is not lost by a change in the citizenship of either party pending the suit. *Morgan* v. *Morgan*, 2 Wheat. 290 [4: 242]; *Clarke* v. *Mathewson*, 12 Pet. 164 [9: 1041]; *Koenigsberger* v. *Richmond Silver Min. Co.* 158 U. S. 41, 49 [39: 889, 892].

*The demurrers to the bill for want of equi- [567]
ty were rightly overruled, and were not insisted on in this court. The object of the bill was that the guaranty upon a great number of negotiable bonds, which might otherwise pass into the hands of bona fide purchasers, might be canceled, and suits upon the guaranty restrained, because of facts not appearing upon its face. The relief sought could only be had in a court of equity. *Peirsoll* v. *Elliott*, 6 Pet. 95, 98 [8: 332, 333]; *Grand Chute* v. *Winegar*, 15 Wall. 373, 376 [21: 174, 175]; *Robb* v. *Vos*, 155 U. S. 13 [39: 52]; *Springport* v. *Teutonia Savings Bank*, 75 N. Y. 397; *Fuller* v. *Percival*, 126 Mass. 381.

We are then brought to the question of the validity of the guaranty by the Louisville, New Albany, & Chicago Railway Company of the bonds of the Beattyville Company, as between the parties before us, and under the circumstances shown by this record.

A railroad corporation, unless authorized by its act of incorporation or by other stat-

utes to do so, has no power to guarantee the bonds of another corporation: and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification or estoppel. *Central Transportation Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55], and 171 U. S. 138 [*ante,* 108]; *Jacksonville, M. P. Railway & Nav. Co.* v. *Hooper,* 160 U. S. 514, 524 [40: 515, 523]; *Union Pacific Railway Co.* v. *Chicago, Rock Island, & Pacific Railway Co.* 163 U. S. 564, 581 [41: 265, 271]; *California Nat. Bank* v. *Kennedy,* 167 U. S. 362, 367, 368 [42: 198, 200]: *Davis* v. *Old Colony Railroad Co.* 131 Mass. 258 [41 Am. Rep. 221]; *Humboldt Min. Co.* v. *Variety Iron Works Co.* 22 U. S. App. 334.

The real question in the case is whether this guaranty was valid under the laws of Indiana, the state by which the guarantor was originally created a corporation, and as a corporation of which it brought this suit.

Some reliance was placed upon the statute of Indiana of 1865, authorizing any railroad company incorporated under its provisions (as the New Albany Company was) to consolidate with any railroad corporation having a connecting line, either within or without the state, or to acquire, by purchase or
[568] *contract, its property, rights, and franchises, or the use and enjoyment thereof, in whole or in part, and to "assume such of the debts and liabilities of such corporations as may be deemed proper." It was argued that the powers thus given embraced the contract by which the New Albany Company agreed with the construction company, in consideration of receiving from it a controlling interest in the stock of the Beattyville Company, to guarantee the bonds of that company.

But the New Albany Company never consolidated itself with the Beattyville Company, or acquired by purchase or contract its property, rights, and franchises, or the use or enjoyment thereof, in whole or in part. It is doubtful, to say the least, whether a mere purchase of three fourths of its stock could authorize an assumption of its debts, under the statute of 1865, if that statute had remained in full force. In *Hill* v. *Nisbet,* 100 Ind. 341, cited at the bar, a purchase of the stock of one railroad company by another was upheld, not as equivalent to a purchase of the property and franchises, but as a reasonable means to the accomplishment of the consolidation of the two companies.

But we cannot doubt that, as was held by both courts below, the statute of Indiana of 1883 superseded and repealed, as to matters within its scope and terms, the provisions of all former statutes of the state on the subject.

The statute of Indiana of 1883 is entitled "An Act to Authorize Railroad Corporations Organized under the Laws of the State of Indiana to Indorse and Guarantee the Bonds of Any Railroad Company Organized under the Laws of Any Adjoining State"; and enacts, in § 1, that "the board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial *to the business or traffic of the rail- [569]
way so indorsing or guaranteeing such bonds." Section 2 provides that such petition of the stockholders shall state the facts relied on to show the benefits accruing to "the company indorsing or guaranteeing the bonds." And section 3 provides that "no railway company shall, under the provisions of this act," indorse or guarantee such bonds to an amount exceeding half the par value of the stock of "the railway company so indorsing or guaranteeing."

The Louisville, New Albany, & Chicago Railway Company was a railway company organized under and pursuant to the laws of Indiana, and its line of railway extended across the state from south to north. On October 8, 1889, the board of directors, at a regular meeting, passed a resolution, entered upon its records, authorizing the president and secretary to execute under seal of the company a contract by which the company agreed with a corporation which was constructing the railroad of the Beattyville Company, a railroad corporation of Kentucky, to guarantee the payment by the Beattyville Company of the principal and interest of bonds of that company, by indorsing on each bond a guaranty, executed in like manner, by which "for value received, the Louisville, New Albany, & Chicago Railway Company hereby guarantees to the holder of the within bond the payment, by the obligor thereon, of the principal and interest thereof in accordance with the tenor thereof." The contract, as well as the guaranty on many of the bonds, was accordingly executed by the president and secretary and under the seal of the company, and the contract was spread upon the records of the board of directors. No petition of a majority of the stockholders for the execution of the guaranty was ever presented, as required by the statute; there was no evidence that the stockholders ever authorized or ratified the contract or the guaranty; and, at the next annual meeting of the stockholders, in March, 1890, it was voted to reject and disapprove both the contract and the guaranty, as having been made without legal authority or the approval of the stockholders.

Before that meeting was held, one hundred and twenty-five *of the bonds thus guaranteed [570]
had been sold by the construction company to the Louisville Trust Company, and ten bonds to the Louisville Banking Company, each of which companies took those bonds in good faith and without notice that no petition had been presented by a majority of the stockholders for the execution of the guaranty.

Forty-five more of the bonds were purchased by the Louisville Banking Company

from the construction company after that meeting, and with notice that a majority of the stockholders had never petitioned for, but had disapproved, the execution of the guaranty. The Louisville Banking Company, thus having notice, when it took these forty-five bonds, that the prerequisite to the execution of the guaranty, under the statute of Indiana of 1883, had not been complied with, was not a bona fide holder of these bonds, and should not be allowed to enforce the guaranty thereon against the plaintiff.

The controverted question is whether the bonds which the Louisville Trust Company and the Louisville Banking Company, respectively, purchased in good faith, and without notice of the want of the assent of the majority of the stockholders, are valid in the hands of these companies.

The guaranty by the Louisville, New Albany, & Chicago Railway Company of the bonds of the Beattyville Company was not *ultra vires*, in the sense of being outside the corporate powers of the former company; for the statute of 1883 expressly authorized such a company to execute such a guaranty, and its board of directors to direct its execution by the company. The statute, indeed, made it a prerequisite to the action of the board of directors that it should be upon the petition of a majority of the stockholders; but this was only a regulation of the mode and the agencies by which the corporation should exercise the power granted to it.

The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court.

It was clearly indicated in two of its earli-
[571] est judgments on *the subject of *ultra vires*, both of which were delivered by Mr. Justice Campbell.

In *Pearce* v. *Madison & Indianapolis Railroad Co.* 21 How. 441 [16: 184], two railroad corporations of Indiana were held not to have the power to purchase a steamboat to be employed on the Ohio river, to run in connection with their railroads, because this "diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction;" "persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation;" "the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority;" and the contract in question "was a departure from the business" of the railroad corporations, and "their officers exceeded their authority." 21 How. 443, 445 [16 L. ed. 185].

In *Zabriskie* v. *Cleveland, Columbus, & Cincinnati Railroad Co.* 23 How. 381 [16: 488], the statutes of Ohio empowered railroad corporations, "by means of their subscription to the capital stock of any other company, or otherwise," to aid it in the construction of its road, for the purpose of forming a connection between the two lines, provided that no such aid should be furnished until two thirds of the stockholders represented and voting at a meeting called by the directors should have assented thereto. The directors of three railroad corporations made a contract with another railroad corporation to guarantee its bonds, as part of an arrangement for connecting the four roads; and the bonds were accordingly guaranteed, and were issued to bona fide holders, without any meeting of the stockholders having been called. But, upon evidence that the stockholders had subsequently assented to the transaction, the bonds were held to be valid; and the court expressly declared that the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of its organization, does not apply to "those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation *which it should not [572]
have neglected, but which it has chosen to disregard." 23 How. 398 [16: 497].

Again, in *Central Transportation Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55], this court, in summing up the result of previous decisions, stated the same distinction as follows: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect; the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it; the contract cannot be ratified by either party, because it could not have been authorized by either; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws." 139 U. S. 59 [35: 68].

In *St. Louis, Vandalia, & Terre Haute Railroad Co.* v. *Terre Haute & Indianapolis Railroad Co.* 145 U. S. 393 [36: 738], one of the parties relied on a provision of a statute of Illinois that it should not be lawful for any railroad company of Illinois, or its directors, to consolidate its road with any railroad out of the state, to lease its road to any railroad company out of the state, or to lease any railroad out of the state, "without having first obtained the written consent of all of the stockholders of said roads residing in the state of Illinois, and any contract for such consolidation or lease which may be made

without having first obtained said written consent, signed by the resident stockholders [573] in Illinois, shall be null and void." *Of that statute, this court said: "It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny." 145 U. S. 403 [36: 752].

A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking, the representatives of the corporation in its dealings with others. Shaw, Ch. J., in *Burrill* v. *Nahant Bank*, 2 Met. 163, 166, 167 [35 Am. Dec. 395]; Comstock, J., in *Hoyt* v. *Thompson*, 19 N. Y. 207, 216. And the appropriate form of verifying any written obligation to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal.

The bonds of the Beattyville Company were instruments negotiable by delivery; and the guaranty indorsed upon each of them by the Louisville, New Albany, & Chicago Railway Company was signed by the president and secretary and under its corporate seal, and was in terms payable to the holder thereof and itself negotiable.

One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation.

In *Merchants' Nat. Bank* v. *State Nat. Bank*, 10 Wall. 604 [19: 1008], this court stated, as an axiomatic principle in the law of corporations, this proposition: "Where a party deals with a corporation in good faith —the transaction is not *ultra vires*—and he is unaware of any defect of authority or oth- [574] er irregularity on the *part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." 10 Wall. 644, 645 [19: 1018]. The proposition was supported by citations of many English and American cases, and among them *Royal British Bank* v. *Turquand* (1856) 6 El. & Bl. 327. And the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Royal British Bank* v. *Turquand* as well decided upon its facts. *Knox County Comrs.* v. *Aspinwall*, 21 How. 539, 545 [16: 208, 210]; *Moran* v. *Miami County Comrs.* 2 Black, 722, 724 [17: 342, 344]; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203 [17: 520, 525]; *St. Joseph Twp.* v. *Rogers*, 16 Wall. 644, 666 [21: 328, 339]; *Humboldt Twp.* v. *Long*, 92 U. S. 642, 650 [23: 752, 756]. And see *Zabriskie* v. *Clevland, Columbus, & Cincinnati Railroad Co.* 23 How. 381 [16: 488], above cited.

Royal British Bank v. *Turquand* was an action upon a bond signed by two directors, and under the seal of the company, and given for money borrowed by a joint-stock company formed under an act of Parliament limiting its powers to the acts authorized by its deed of settlement, and whose deed of settlement provided that the directors might so borrow such sums as should, by a resolution passed at a general meeting of the company, be authorized to be borrowed. The defense was that no such resolution had been passed, and that the bond had been given without the authority of the shareholders. The court of exchequer chamber, affirming the judgment of the Queen's bench, without passing upon the sufficiency of the resolution in that case, held the company liable on the bond; and, speaking by Chief Justice Jervis, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a *permission to do so on certain conditions. [575] Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." 6 El. & Bl. 332.

The decision in *Royal British Bank* v. *Turquand* has been followed, and Lord Wensleydale's *dicta* to the contrary, a year later, in *Ernest* v. *Nicholls* (1857) 6 H. L. Cas. 401, 418, 419, have been disapproved or qualified, in a long line of decisions in England. *Agar* v. *Athenæum Life Assurance Society* (1858) 3 C. B. N. S. 725, 753, 755; *Prince of Wales Life & Educational Assurance Co.* v. *Harding* (1858) El. Bl. & El. 183, 221, 222; *Re Athenæum Life Assur. Society* (1858) 4 Kay & J. 549, 560, 561; *Fountaine* v. *Carmarthen R. Co.* (1868) L. R. 5 Eq. 316, 321; *Colonial Bank of Australasia* v. *Willan* (1874) L. R. 5 P. C. 417, 448; *Mahony* v. *East Holyford Min. Co.* (1875) L. R. 7 H. L. 869, 883, 893, 894, 902; *County of Gloucester Bank* v. *Rudry Merthyr Steam & H. C. Colliery Co.* [1895] 1 Ch. 629, 633. The only English decision cited at the bar, which appears to support the opposite conclusion, is *Commercial Bank* v. *Great Western Railway Co.* (1865) 3 Moore, P. C. C. N. S. 295, which, unless it can be distinguished on its peculiar circumstances, is against the general current of authority. See also a very able judgment of the court of errors and appeals of New Jersey, delivered by Mr. Justice Depue, in *Hacken-*

sack Water Co. v. *De Kay*, 36 N. J. Eq. 548, 559–567.

In the present case, all natural persons or corporations by whom bonds of the Beattyville Company bearing the guaranty of the Louisville, New Albany, and Chicago Railway Company, signed by the proper officers of the company and under its seal, were purchased in good faith, and without notice that there had been no petition of a majority of the stockholders for their execution, had the right to assume that such a petition had been presented, as required by the statute of 1883.

The records of the railroad corporation and of its board of directors, which would naturally show whether such a petition had or had not been filed, were private records,
[576] which a purchaser *of the bonds was not obliged to inspect, as he would have been if the fact had been required by law to be entered upon a public record. Brewer, J., in *Blair* v. *St. Louis, Hannibal, & Keokuk Railroad Co.* 25 Fed. Rep. 684; *Hackensack Water Co.* v. *De Kay*, 36 N. J. Eq. 548, 568; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 551 [41: 817, 822]; *Irvine* v. *Union Bank of Australia*, L. R. 2 App. Cas. 366, 379.

It follows that the decree of the circuit court of appeals, so far as it ordered the bill to be dismissed with regard to the guaranty on the bonds which the Louisville Trust Company and the Louisville Banking Company took in good faith, and without notice of any want of authority to execute the guaranty, was correct.

But, in regard to the guaranty on the bonds which the Louisville Banking Company took with notice that the guaranty had not been authorized by a majority of the stockholders, the decree of the circuit court of appeals needs to be modified.

That court, in its opinion and decree, undertook to determine whether the Louisville, New Albany, & Chicago Railway Company was liable upon the guaranty as a corporation of Kentucky, and as a corporation of Illinois.

Apart from the question whether it was a corporation of Kentucky, and from the difficulty of treating the negotiable guaranty upon each bond as itself divisible, binding the guarantor as a corporation of one state, and not binding it as a corporation of another state, there is an insurmountable objection to the decree in its present form.

The Louisville, New Albany, & Chicago Railway Company is a party to this suit as a corporation of Indiana only, and not as a corporation of Kentucky. It could not, either as a corporation of both states, or as a corporation of Kentucky only, have brought this suit against corporations and citizens of Kentucky, in the circuit court of the United States for the district of Kentucky, without ousting the jurisdiction of the court. *Baltimore & Ohio Railroad Co.* v. *Wheeler*, 1 Black. 286 [17: 130]; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545 [40: 802]. And citizens of Illinois also be-
[577] ing defendants in the bill, it *is equally impossible to take jurisdiction of the plaintiff as a corporation of Illinois.

It necessarily follows that the rights and liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois, cannot be adjudicated in this case; and that the decrees both of the circuit court and of the circuit court of appeals, so far as regards the Louisville Banking Company, must be reversed, and the case remanded to the circuit court with directions to dismiss the bill as to the guaranty on the ten bonds of which the Louisville Banking Company was a bona fide purchaser, and to enter a decree, as to the guaranty on the forty-five bonds of which it was not a bona fide purchaser, that an injunction be issued against bringing suit upon the guaranty on these bonds against the Louisville, New Albany, & Chicago Railway Company, a corporation of Indiana, and that there be stamped on these bonds the following words: "This guaranty is not binding on the Louisville, New Albany, & Chicago Railway Company, a corporation of Indiana, and is to that extent canceled, without prejudice to the rights or liabilities, if any, that it may have as a corporation of Kentucky, or as a corporation of Illinois."

Accordingly, *in the first case, the decree of the Circuit Court of Appeals is affirmed*, and the case remanded to the Circuit Court of the United States with directions to dismiss the bill as against the Louisville Trust Company; and, *in the second case, the decrees of both those courts are reversed*, and the case remanded to the Circuit Court of the United States with directions to enter a decree in conformity with the opinion of this court.

UNITED STATES, *Appt.*, **[578]**

v.

EARL B. COE.

(See S. C. Reporter's ed. 578, 579.)

Void Mexican grant.

A Mexican grant of lands made in 1838 by the state of Sonora, without approval by the general government, was void.

[No. 8 of October Term, 1897.]

Leave granted to submit petition for rehearing, May 31, 1898. Petition for rehearing ordered to be filed and leave granted to counsel to file additional briefs, October 31, 1898. Resubmitted on briefs heretofore filed, December 5, 1898. Decided May 22, 1899.

APPEAL from a decree of the Court of Private Land Claims. Petition for rehearing of the decision reported in 170 U. S. 681, 42 L. ed. 1195. *Rehearing denied.*

See same case, 170 U. S. 681, 42 L. ed. 1195.

The facts are stated in the opinion.

Messrs. **Amos Steck** and *Carpenter & McBird* for petitioner.

Messrs. **A. M. Stevenson** and **John F. Shafroth** for appellee.

[578] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

After a careful re-examination of this record we adhere to the judgment heretofore rendered, and the petition for rehearing must be denied.

In the opinion heretofore delivered, and reported 170 U. S. 681 [42: 1195], it was stated that a grant from the state of Sonora was relied on, and not a grant from the Mexican government. This was in accordance with the petition originally filed, but it appears that it had been stipulated and agreed below between counsel for the government and the claimant that the petition should be considered as amended so as to claim title from both the nation and the state. That stipulation, however, did not appear in the record, but this was not material, as we did not regard the grant, whichever its alleged source, as a valid one, for the reasons given.

We remain of opinion that, from and after the adoption of the Constitution of 1836, no
[579] power existed in the separate *states to make such a grant as this. *Camou* v. *United States*, 171 U. S. 277 [43: 163], related to a grant made prior to 1836, and ruled nothing to the contrary of the decision in this case.

Construing the various applicable statutes and decrees in relation to the sale of public lands, which were in force April 12, 1838, the date of the alleged grant, together, we think it clear that the Board of Sales which assumed to act in this matter had no power to sell and convey these lands so as to vest the purchaser with title, unless the sale was approved by the general government, and that it was not so approved. Furthermore, this Board of Sales did not assume to comply with the requirements of the law in making this sale. The members of the board really professed to be officers of the state, and to act for the state, although the grant was declared to be made in the "name of the free, independent, and sovereign state of Sonora as well as of the august Mexican government." But it seems to us that they referred to the nation as it existed under the Federal system of 1824, as contradistinguished from the supreme central system that was in existence in 1838. We understand that when this grant purports to have been made, the officers and people of Sonora were undertaking to carry on their government as a sovereign and independent state under the national Constitution of 1824 and the laws passed thereunder, as well as the state Constitution of 1825, and subsequent laws, in violation of the National Constitution of 1836 and the laws promulgated under that instrument. This refusal to recognize their constitutional obligations put them in antagonism to the general government, and, although appellee's counsel deny that Sonora was in rebellion, and say that at the time of the sale she "was a conservative protestant against the dictatorial proceedings which gave rise to the central system," we cannot agree that this sale was conducted in accordance with the paramount law, and it does not appear that the national government ever ratified or approved the grant. The various Constitutions and laws bearing on the subject are set out in our previous opinion, and also to a considerable extent repeated in *Faxon* v. *United States*, 171 U. S. 244 [43: 151].

Petition denied.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plff. in Err.*, [580]

v.

McCANN & SMIZER, A Copartnership Composed of William C. McCann and Milton P. Smizer.

(See S. C. Reporter's ed. 580 590.)

Interpretation of State statute—carrier's power to restrict his liability under Missouri statute.

1. This court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.
2. The Missouri statute of 1889 making a railroad company issuing bills of lading for the transportation of property liable for damages to the property caused by the negligence of another railroad company over whose lines the property passes does not curtail the power of the company to restrict its liability by contract, to its own line, by a restriction in unambiguous terms put into the portion of its agreement reciting the contract to carry, and such statute is not, as affecting interstate transportation, repugnant to the Federal Constitution.

[No. 11.]

Argued January 7, 10, 1898. Reargument ordered January 24, 1898. Reargued October 11, 1898. Decided May 22, 1899.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming the judgment of the trial court in favor of plaintiffs McCann & Smizer against the Missouri, Kansas, & Texas Railway Company for damages to cattle transported upon its contract of shipment. *Affirmed.*

See same case below, 133 Mo. 59, 35 L. R. A. 110.

The facts are stated in the opinion.

Mr. **George P. B. Jackson**, for plaintiff in error:

In the absence of the statute under consideration, Mo. Rev. Stat. 1889, § 944, what has been designated as the "American rule" was in force in the state of Missouri; and under that the carrier, plaintiff in error here, was not to be regarded as a "forwarder" beyond its own line, and not liable for delays which occurred on a subsequent connecting line, in the absence of a special contract assuming the duties and liabilities of a common carrier beyond its own line.

Michigan C. R. Co. v. *Mineral Springs Mfg. Co.* 16 Wall. 318–324, 21 L. ed. 297–301; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 22 Wall. 123, 22 L. ed. 827; *St. Louis Ins. Co.* v. *St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Coates*

v. *United States Exp. Co.* 45 Mo. 238; *Snider* v. *Adams Exp. Co.* 63 Mo. 376; *Grover & Baker Sewing Mach. Co.* v. *Missouri P. R. Co.* 70 Mo. 672, 35 Am. Rep. 444; *Dimmitt* v. *Kansas City, St. J. & C. B. R. Co.* 103 Mo. 433.

In the absence of the statute in question, the carrier could lawfully contract against liability for loss or damage occurring on a connecting line, or occasioned by the negligence of a connecting carrier.

Hunter v. *Southern P. R. Co.* 76 Tex. 195; *Central Trust Co.* v. *Wabash St. L. & P. R. Co.* 31 Fed. Rep. 247; *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.* 19 S. C. 353.

Beyond its own line a railroad company is not a common carrier in the strict sense of the term, but is a private carrier for hire; that is, but a bailee for hire, and as such may contract against its own negligence, and certainly against that of any other party.

Story, Bailm. §§ 33, 495; 2 Story, Contr. § 752*a*, and note; *Fish* v. *Chapman*, 2 Ga. 349; *Griswold* v. *Illinois C. R. Co.* 90 Iowa, 265, 24 L. R. A. 647; *Stephens* v. *Southern P. Co.* 109 Cal. 86, 29 L. R. A. 751; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193.

If a special consideration for the agreement limiting the liability of the carrier is necessary, it can be found in the special rate charged for shipment. The statement in the contract that the rate was a special one is prima facie evidence of the fact; and that the same rate is given to everyone under the same circumstances does not prevent its being a reduced or special rate.

McFadden v. *Missouri P. R. Co.* 92 Mo. 343; *Rogan* v. *Wabash R. Co.* 51 Mo. App. 665; *Duvenick* v. *Missouri P. R. Co.* 57 Mo. App. 550.

Prior to the last opinion of the supreme court of Missouri in this case the statute in question received a construction which gave it the effect of making an unlimited bill of lading prima facie evidence of a special contract assuming the duties of a common carrier to the destination on another line, but still recognizing the right to limit the carrier's liability to its own road.

Dimmitt v. *Kansas City, St. J. & C. B. R. Co.* 103 Mo. 433; *Nines* v. *St. Louis, I. M. & S. R. Co.* 107 Mo. 475; *F. A. Drew Glass Co.* v. *Ohio & M. R. Co.* 44 Mo. App. 416; *Historical Pub. Co.* v. *Adams Exp. Co.* 44 Mo. App. 421; *Hill* v. *Missouri P. R. Co.* 46 Mo. App. 519.

The statute as now construed is a regulation of commerce; and as by its terms it applies to shipments to points "within or without this state" (Missouri), and in the case at bar is made to control the shipment from a point in Missouri to a point in Illinois, it is regulation of commerce among the states.

Hall v. *DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 571, 30 L. ed. 249, 1 Inters. Com. Rep. 31; *Illinois C. R. Co.* v. *Illinois*, 163 U. S. 142, 41 L. ed. 107; *Stanley* v. *Wabash, St. L. & P. R. Co.* 100 Mo. 435, 8 L. R. A. 549, 3 Inters. Com. Rep. 176; *Grimes* v. *Eddy*, 126 Mo. 168, 26 L. R. A. 638; *Selvege* v. *St. Louis & S. F. R. Co.* 135 Mo. 163.

Because it is a regulation of interstate commerce the statute in question, Mo. Rev. Stat. 1889, § 944, is in conflict with U. S. Const. art. 1, § 8, and is therefore void.

Messrs. **J. H. Rodes**, *R. B. Bristow*, and *Charles E. Yeater*, for defendant in error:

The supreme court of Missouri did not err in deciding that Mo. Rev. Stat. 1889, § 944, is not repugnant to the Constitution of the United States.

Dimmitt v. *Kansas City, St. J. & C. B. R. Co.* 103 Mo. 440; *McCann* v. *Eddy*, 133 Mo. 59, 35 L. R. A. 110; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 12 L. ed. 465; *Michigan C. R. Co.* v. *Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 22 Wall. 123, 22 L. ed. 827; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

The court did not err in refusing to give the three instructions asked by plaintiff, whereby it claimed release from all liability after the stock left its road. The carrier cannot stipulate to release itself from its own negligence or the negligence of its agents.

Grover & Baker Sewing Mach. Co. v. *Missouri P. R. Co.* 70 Mo. 674; *Halliday* v. *St. Louis, K. C. & N. R. Co.* 74 Mo. 162, 41 Am. Rep. 309; *Ohio & M R. Co.* v. *McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 22 Wall. 123, 22 L. ed. 827; *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 21 L. ed. 627.

A carrier cannot make a through contract, or undertake to ship or deliver to a point beyond its line, unequivocally by contract binding itself to carry and deliver to a point of destination, and at the same time limit its liability for negligence occurring on its own road. Such contracts are against public policy.

McCann v. *Eddy*, 133 Mo. 59, 35 L. R. A. 110; *Halliday* v. *St. Louis, K. C. & N. R. Co.* 74 Mo. 161, 41 Am. Rep. 309.

Contracts limiting liability are to be construed by the courts most strongly against the carrier, and all doubts and ambiguities will be resolved in favor of the shipper.

Hale, Bailm. & C. 9, 433; *Levering* v. *Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320; Hutchinson, Carriers, 223, § 262.

The plaintiff in error has not effectually contracted against such negligence in this case, because (a) it has not done so in clear, plain, and specific terms, and because (b) by the terms of the fourth clause of the contract the carrier is bound specifically for his negligence.

Westcott v. *Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Maguin* v. *Dinsmore*, 56 N. Y. 168; *Nicholas* v. *New York C. & H. R. R. Co.* 89 N. Y. 370; *Canfield* v. *Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268;

Holsapple v. *Rome, W. & O. R. Co.* 86 N. Y. 275.

There was an expressed, but no real, consideration for such alleged releases. Plaintiff's uncontradicted evidence shows a total lack of such alleged consideration.

McFadden v. *Missouri P. R. Co.* 92 Mo. 351; *Fontaine* v. *Boatmen's Sav. Inst.* 57 Mo. 552; *York Mfg. Co.* v. *Illinois C. R. Co.* 3 Wall. 107, 17 L. ed. 170; *McMillan* v. *Michigan S. & N. I. R. Co.* 16 Mich. 116, 93 Am. Dec. 208.

[580] *Mr. Justice **White** delivered the opinion of the court:

A statute of the state of Missouri, found in the Revised Statutes of that state, 1889, chap. 26, reads as follows:

[581] *"Sec. 944. Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company, through whose negligence the loss, damage, or injury may be sustained."

Whilst this statute was in force the defendants in error shipped from Stoutsville in the state of Missouri, on the line of the Missouri, Kansas, & Texas Railway, to Chicago, Illinois, which was beyond the line of that road, ninety-nine head of cattle. At the time of the shipment a bill of lading was delivered to the shippers. The portions of the contract pertinent to the questions here arising for consideration are as follows:

"This agreement made between George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas, & Texas Railway, parties of the first part, and M. B. Smizer, party of the second part, witnesseth that whereas the receivers of the Missouri, Kansas, & Texas Railway transport the live stock as per above rules and regulations, and which are hereby made a part of this contract, by mutual agreement between the parties hereto; now, therefore, for the consideration and mutual covenants and conditions herein contained, said party of the first part is to transport for the second party the live stock described below, and the parties in charge thereof, as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from
[582] Stoutsville *station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union Stock Yards at Chicago, Illinois, at the through rate of 17½ c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois, subject to minimum weights applying to cars of various lengths as per tariff rules in effect on the day of shipment, the same being a special rate, lower than the regular rates, or at a rate mutually agreed upon between the parties, for and in consideration of which said second party hereby covenants and agrees as follows:

"1st. That he hereby releases the party of the first part from the liability of common carrier in the transportation of said stock, and agrees that such liability shall be that of a mere forwarder or private carrier for hire. He also hereby agrees to waive release, and does hereby release, said first party from any and all liability for and on account of any delay in shipping said stock, after the delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent.

. . . .

"4th. That the said second party for the consideration aforesaid hereby assumes, and releases said first party from, risk of injury or loss which may be sustained by reason of any delay in the transportation of said stock caused by any mob, strike, threatened or actual violence to person or property, from any source; failure of machinery or cars, injury to track or yards, storms, floods, escape or robbery of any stock, overloading cars, fright of animals, or crowding one upon another, or any and all other causes except the negligence of said first party, and said negligence not to be assumed, but to be proved by the said party of the second part.

. . . .

"13th. And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said live stock shall have left its road, and the party of the second part
*hereby so expressly stipulates and agrees. [583]
the understanding of both parties hereto—that the party to the first part shall not be held or deemed liable for anything beyond the line of the Missouri, Kansas, & Texas Railway, excepting to protect the through rate of freight named herein."

When this bill of lading was executed an ancillary agreement was indorsed thereon, as follows:

"We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass furnished us by the Missouri, Kansas, & Texas Railway, Geo. A. Eddy, and H. C. Cross, receivers, and of the other covenants and agreements contained in said contract, including rules and regulations at the head thereof and those printed on the back thereof, all of which for the consideration aforesaid are hereby accepted by us and made a part of this contract, and of the terms and conditions of which we hereby agree to observe and be severally bound by, do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employees of said receivers of the Missouri, Kansas, &

Texas Railway, for the purposes of said contract stated, and that we do agree to assume, and do hereby assume, all risks incident to such employment, and that said receivers shall in no case be liable to us for any injury or damages sustained by us during such time for which it would not be liable to its regular employees.

(Signed) J. O. Richart.
M. B. Smizer.

The cattle were transported over the line of the Missouri, Kansas, & Texas Railway to Hannibal, Missouri, and from that point the cars in which they were contained passed to the line of the Wabash Railway destined for Chicago. At or near Chicago an unreasonable delay was occasioned in the transportation of the cattle by the negligence of employees of the Wabash Railway, resulting in damage, for which the shippers subsequently brought an action against the receivers of the Missouri, Kansas, & Texas Railway to
[584] recover for the breach *of the contract of shipment. Judgment having been entered upon the verdict of a jury in favor of the plaintiffs, an appeal was prosecuted by the receivers to the supreme court of the state, and was heard in division No. 2. There was a judgment reversing the lower court, and a motion for a rehearing was denied. Between the time of the decision of the supreme court and the overruling of a motion for a rehearing both the receivers had died, and the railway company has resumed possession of its road. This fact having been called to the attention of the supreme court, the railway company was substituted as appellant instead of the receivers, and a rehearing was ordered. The case was transferred to the court in banc, and was argued before that tribunal. Thereafter a decision was rendered affirming the judgment of the trial court, and motion for a rehearing was denied. 133 Mo. 59 [35 L. R. A. 110]. The case was then brought by writ of error to this court.

By the assignments of error it is asserted, and in the argument at bar it has been strenuously urged, that the Missouri statute above quoted is in conflict with the Constitution of the United States, because it is a regulation of commerce between the states, and that the supreme court of Missouri hence erred in giving effect to the statute in the decision by it rendered. The statute as interpreted by the supreme court is asserted to operate to deprive the railway of the power of making a through shipment of interstate commerce business over connecting lines, without becoming liable for the negligence of the connecting carriers. In other words, the argument is that the effect of the Missouri statute, as interpreted by the highest court of that state, is to deprive a railway company, transacting the business of interstate commerce, of all power to limit its liability to its own line, and, hence, compels it, if interstate commerce is engaged in or a through bill of lading for such traffic is issued, to become responsible for the articles carried throughout the entire route, thereby entailing upon the carrier receiving the goods the risk of negligence by other carriers along the line, even although such lines are situated beyond the state in which the contract was made or the business originated. This, it is insisted, is a direct *burden im- [585]
posed by the state upon interstate commerce, since it forbids a carrier from engaging in that commerce, unless it subjects itself to a liability for the faults of others, against which it cannot guard and for which it was not previously liable, and, moreover, by necessary effect, punishes the carrier for issuing a through bill of lading for interstate commerce, thereby tending to discourage the through transportation of merchandise from state to state, and having a direct and inevitable tendency to defeat the portion of the provisions of the sixth section of the Act to Regulate Commerce, as amended March 2, 1889 (25 Stat. at L. 855, chap. 382), referring to the subject of joint rates of tariffs over continuous roads of differeut carriers, and the seventh section of the original act, approved February 4, 1887 (24 Stat. at L. 382), which was designed to cause the carriage of freight to be continuous from the place of shipment to the place of destination.

The contention advanced in these several propositions is, however, without foundation, from the fact that it proceeds upon an erroneous assumption of the purport of the Missouri statute in question, since the supreme court of Missouri, in applying that statute in the case before us, has, in the most positive terms, declared that it was not intended to and did not prevent a carrier engaged in interstate commerce traffic limiting his liability to his own line, and that far from doing this the statute left the carrier the amplest power to make such limitation in receiving goods for interstate carriage and in issuing a through bill of lading therefor. In commenting on the statute the court said:

"The provision of the statute is that 'wherever any property is received by a common carrier to be transferred from one place to another.' This language does not restrict, but rather recognizes, the right of the carrier to limit its contract of carriage to the end of its own route, and there deliver the property to the connecting carrier.

"There can be no doubt, then, that under the statute, as well as under the English law, the carrier can, by contract, limit its duty and obligation to carriage over its own route."

Again, in summing up its conclusions, the court said:

*"We are unable to see, as contended by defendant, that the construction we give this statute makes it repugnant to the provisions of the Constitution of the United States, which gives to Congress alone the power to regulate commerce among the states. 586]

"The act in no way operates as a regulation of trade and business among the states. No burden or restriction on transportation is imposed. Carriers are left free to make their own contracts in regard to compensation for their services for transportation between the states, subject to congressional regulations."

The reasoning now relied on then is, that

although the supreme court of the state of Missouri has interpreted the statute of that state as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, that this court should disregard the interpretation given to the state statute by the court of last resort of the state, and hold that the statute means the very contrary of its import, as declared by the supreme court of the state, and upon such construction decide that the state law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof. *Sioux City Trust Company* v. *Trust Company*, 172 U. S. 642 [probably intended for *Sioux City Terminal & Warehouse Co.* v. *Trust Co. of N. A.* 173 U. S. 99, *ante*, 628], and authorities there cited.

It is urged, however, that even although it be conceded that the supreme court of Missouri has interpreted the statute in question, in an abstract sense, as not depriving a railway company of the power to limit its liability to its own line when receiving goods for interstate shipment, the court has nevertheless given the statute practical enforcement as if it meant exactly the contrary of the interpretation affixed to it. In other words, the proposition is, although the supreme court of Missouri has declared that the statute did not deprive a carrier of its right to limit its liability to its own line, yet it has, as a necessary consequence of its application of the statute to the bill of lading in controversy in this cause, given to the statute the very meaning which it expressly declared it
[587] *had not. An examination, however, of the opinion of the supreme court of Missouri demonstrates that it is not justly susceptible of the construction thus placed upon it. Analysing the opinion of the court, it results that the court decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract, in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn.

Considering the statute as thus interpreted by the supreme court of the state of Missouri, it cannot be held to be repugnant to the Constitution of the United States. The subject of the power of the states to legislate as to the mere form of contracts for interstate commerce carriage was fully considered in *Richmond & Alleghany Railroad Co.* v. *R. A. Patterson Tobacco Co.* 169 U. S. 311 [42: 759]. In that case the court said (p. 314 [42: 761]):

"The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form, is as obvious as is the difference between the sum of the obligation of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

. . . . .

"Of course, in a latitudinarian sense any restriction as to the *evidence of a contract, re- [588]
lating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary."

But it is pressed that, conceding the statute to have the purport given it by the Missouri court, nevertheless it does not come within the rule announced in the case just referred to, because the requirement of the Missouri statute, as interpreted, is so unreasonable as to amount in substance to a denial of the right of a carrier to confine by contract his duty of carriage and his liability for negligence to his own line. If the regulation of the statute be equivalent to a denial of the right to so limit, this court, it is asserted, must consider its substantial results, and not its mere theoretical significance. This contention, however, is also without a solid basis to rest upon. The requirement as to form held to be valid in *Richmond & Alleghany Railroad Co.* v. *R. A. Patterson Tobacco Co., supra*, was that every contract confining the liability upon an interstate shipment to the line of the receiving carrier should be signed by the shipper or be invalid. The manifest intent of such a regulation was to protect the shipper, by having it clearly manifested by his signature that his attention had been directed to the contract limitation of liability, so that no question might arise of inadvertence on his part in delivering the merchandise and accepting the contract for its carriage, which is usually prepared by the railroad company receiving goods for transportation. Whilst differing in form of requirement, the exaction that the carrier, in unambiguous terms, in the portion of the contract acknowledging the receipt of the goods and expressing the obligation to transport should state the limitation of his obligation as a carrier to his own line, but effectuates the purpose designed by the Virginia statute, which was upheld in the *Patterson Case*.

If the bill of lading in the case before us did not contain a *positive statement of an [589]
obligation by the receiving carrier to trans-

port from the point of shipment to the ultimate destination of the cattle, of course it would not come under the control of the statute But as, on the contrary, the contract contains an expression of such obligation, limited by reference solely to subsequent conditions inserted in the bill of lading, it is plainly brought within the import of the statute as interpreted by the Missouri court. It would have been within the power of the receivers of the Missouri, Kansas, & Texas Railway to have stipulated that the goods were received, to be transported by them from Stoutsville to the termination of the line of railway operated by the receivers and there to be delivered to a connecting carrier, who was to complete the transportation. If this had been done, the bill of lading would have had the plain import which the statute requires; nothing would have been left for construction, and the contract would have conveyed its obvious significance to the shipper who accepted it from the carrier. Because, instead of doing this, the carrier chose, in the body of the bill of lading, to stipulate that they were "to transport for the second party the live stock described below, and the parties in charge thereof as hereinafter provided, namely: six cars said to contain 95 head of cattle m. or l. o. r. from Stoutsville station, Missouri, to Chicago, Illinois, station, consigned to Brown Bros. & Smith, care Union Stock Yards at Chicago, Illinois, at the through rate of 17½c. per hundred pounds, from Stoutsville, Missouri, to Chicago, Illinois," thus carrying out the limitation with respect to carriage, if any, by reference to subsequent conditions, it cannot be reasonably complained that the contract is governed by the statute. The ancillary agreement which was indorsed on the bill of lading, it is to be noted, adds cogency to this view, since it declares that during the whole length of the transit the parties who were to be in charge of the cattle should be deemed employees of the receivers of the Missouri, Kansas, & Texas Railway, the initial carrier, and that they should have no right to recover in the event of an injury or damage sustained for which the receivers would not be liable to their regular employees.

[590] *To assert that because there is a liability arising from the application of the statute to the bill of lading which would not result from the bill of lading itself, therefore the statute must necessarily have been held to impose on the carrier a liability for an interstate shipment beyond its own line, is without merit. True, if there had been no statute regulating the form of the bill of lading, and we were called upon to construe the instrument, we might consider that the limitations referred to in the contract restricted the liability of the carrier to his own line. This result, however, is rendered impossible in view of the statute, not because from its provisions a liability is imposed, but because of the failure of the contract to conform to the requisites of the statute. Such was the exact condition in the *Patterson Case, supra*, for it cannot be doubted that if in that case there had been no statute requiring the signature of the shipper to a contract limiting liability, a contract not signed by the shipper, containing an exemption, would have been efficacious. But, as the statute required the signature, the contract, unsigned by the shipper, was ineffective to relieve the carrier from a liability stipulated against, it is true, but which was inoperative because not expressed in legal form. Such is, in substance, the situation here presented.

Judgment affirmed.

Mr. Justice **Harlan** dissents.

GEORGE M. WEST COMPANY, *Appt.*,
v.
LEA BROTHERS & COMPANY.

(See S. C. Reporter's ed. 590-599.)

General assignment is act of bankruptcy—insufficient plea.

1. A deed of general assignment for the benefit of creditors constitutes in itself an act of bankruptcy which *per se* authorizes an adjudication of involuntary bankruptcy under § 3 of the act of Congress of 1898, entirely irrespective of actual insolvency.
2. A plea that the party against whom the petition was filed "was not insolvent, as defined in the bankrupt act, at the time of the filing of the petition against him," is not a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of creditors.

[No. 755.]

Submitted May 1, 1899. Decided May 22, 1899.

ON CERTIFICATE from the United States Circuit Court of Appeals for the Fourth Circuit desiring instructions from this court upon a question certified to it in a bankruptcy case brought by Lea Brothers & Company in the District Court of the United States for the Eastern District of Virginia against the George M. West Company for the purpose of having it adjudicated a bankrupt. *Question answered in the negative.*

The facts are stated in the opinion.

Mr. **W. W. Henry** for appellant.

Messrs. **J. H. Ralston** and *Emmett Seaton* for appellee.

*Mr. Justice **White** delivered the opinion of the court: [591]

The facts stated in the certificate of the circuit court of appeals are substantially as follows:

Lea Brothers & Company and two other firms filed, on December 18, 1898, a petition in the district court of the United States for the eastern district of Virginia, praying that an alleged debtor, the George M. West Company a corporation located in Richmond, Virginia, be adjudicated a bankrupt, because of the fact that it had, on the date of the filing of the petition, executed a deed of general assignment, conveying all its property and assets to Joseph V. Bidgood, trustee. The George M. West Company pleaded denying

that at the time of the filing of said petition against it the corporation was insolvent, within the meaning of the bankrupt act, and averring that its property at a fair valuation was more than sufficient in amount to pay its debts. The prayer was that the petition be dismissed. The court rejected this plea, and adjudicated the West Company to be a bankrupt. The cause was referred to a referee in bankruptcy, and certain creditors secured in the deed of assignment, who had instituted proceedings in the law and equity court of the city of Richmond, under which that court had taken charge of the administration of the estate and trust under the deed of assignment, were enjoined from further prosecuting their proceedings, in the state court, under said deed of assignment. From this decree an appeal was allowed to the circuit court of appeals for the fourth circuit. On the hearing of said appeal the court, desiring instructions, certified the case to this court. The certificate recites the facts as above stated, and submits the following question:

[592] *"Whether or not a plea that the party against whom the petition was filed 'was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him' is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors."

The contentions of the parties are as follows: On behalf of the debtor it is argued that under the bankrupt act of 1898 two things must concur to authorize an adjudication of involuntary bankruptcy, first, insolvency in fact, and, second, the commission of an act of bankruptcy. From this proposition the conclusion is deduced that a debtor against whom a proceeding in involuntary bankruptcy is commenced is entitled, entirely irrespective of the particular act of bankruptcy alleged to have been committed, to tender, as a complete bar to the action, an issue of fact as to the existence of actual insolvency at the time when the petition for adjudication in involuntary bankruptcy was filed. On the other hand, for the creditors it is argued that whilst solvency is a bar to proceedings in bankruptcy predicated upon certain acts done by a debtor, that as to other acts of bankruptcy, among which is included a general assignment for the benefit of creditors, solvency at the time of the filing of a petition for adjudication is not a bar, because the bankrupt act provides that such deed of general assignment shall, of itself alone, be adequate cause for an adjudication in involuntary bankruptcy, without reference to whether the debtor by whom the deed of general assignment was made was in fact solvent or insolvent.

A decision of these conflicting contentions involves a construction of section 3 of the act of 1898. 30 Stat. at L. 546. The full text of the section in question is printed in the margin.†

*It will be observed that the section is di- [593] vided into several paragraphs, denominated as *a, b, c, d,* and *e.* Paragraph *a* is as follows:

*"Sec. 3. Acts of Bankruptcy.—*a.* Acts of [594] bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate, not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4, and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph *a*, it results that the nonexistence of insolvency, at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in 1, 4, or 5 (which embrace the making of a deed of general assignment) does not constitute a defense to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice.

The result arising from considering the paragraph in question *would not be different [595] if it be granted, *arguendo,* that the text is ambiguous. For then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern. Applying this rule to the enumerations contained in paragraph *a*, it follows that the making of a deed of general assignment, referred to in enumeration 4, constitutes in itself an act of bankruptcy, which *per se* authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency. This is clearly demonstrated from considering the present law in the light afforded by previous legislation on the subject.

Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modeled), and our own bankruptcy statutes down to and including

†Sec. 3. Acts of Bankruptcy.—*a.* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted,

the act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy *per se.* This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co.* v. *Cleveland Insurance Co.* 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in *Re Beisenthal,* 14 Blatchf. 146, where it was held that a voluntary assignment, without preferences, valid under the laws of the state of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed* v. *McIntyre,* 98 U. S. 513 [25: 173]. So, also, in *Boese* v. *King,* 108 U. S. 379, 385 [27: 760, 763], it was held, citing (p. 387 [27: 763]) *Reed* v. *McIntyre,* that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867 (14 Stat. at L. 536, chap. 176), or the amendments thereto of 1874 and 1876 (18 Stat. at L. 180, chap. 390; 19 Stat. at L. 102, chap. 234). Nei-
[596]ther, however, *the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result of the clause, in the act of 1867, forbidding assignments with "intent to delay, defraud, or hinder" creditors, and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act. Rev. Stat. 5021, ¶¶ 4, 7. Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous rule, by an express statement in the present statute have been lucidly expounded by Addison Brown, J. *Re Gutwillig,* 90 Fed. Rep. 475, 478.

But it is argued that whatever may have been the rule in previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition reliance is placed upon paragraph *c* of section 3, which reads as follows:

"*c.* It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved

---

while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors shall have received actual notice of such transfer or assignment.

c. It shall be a complete defense to any proceedings in bankruptcy, instituted under the first subdivision of this section, to allege and prove that the party proceeded against was not insolvent, as defined in this act, at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed, as hereinbefore provided under the second and third subdivisions of this section, takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to examination, and give testimony as to all matters tending to establish solvency or insolvency, and, in case of his failure to so attend and submit to examination, the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representative, all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court, or withdrawn by the petitioner, the respondent, or respondents, shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages, shall be fixed and allowed by the court, and paid by the obligors in such bonds.

by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."

The argument is that the words "under the first subdivision of this section" refer to all the provisions of paragraph *a*, because that paragraph, as a whole, is the first part of the section, separately divided, and although [597] designated by *the letter *a*, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words "first subdivision of this section," if considered intrinsically and apart from the context of the act, would be held to refer to paragraph *a* as an entirety or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph *a*. Thus, in the last sentence of paragraph *c* the matter intended to be referred to by the words "first subdivision of this section," used in the prior sentences, is additionally designated as follows: "and under said subdivision one," etc., language which cannot possibly be in reason construed as referring to the whole of paragraph *a*, but only to subdivision 1 thereof.

This is besides more abundantly shown by paragraph *d*, which provides as follows:

"*d*. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegations of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

This manifestly only refers to enumerations 2 and 3 found in paragraph *a*, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent. Indeed, if the contention advanced were followed, it would render section 3 in many respects meaningless. Thus, if it were to be held that the words "first subdivision of this section," used in paragraph *c*, referred to the first division of the section —that is, to paragraph *a* as a whole—it would follow that the words "second and third subdivisions of this section," used in paragraph *d*, would relate to the second and [598] third divisions of *the section—that is, to paragraphs *b* and *c*. But there is nothing in these latter paragraphs to which the reference in paragraph *d* could possibly apply, and therefore, under the construction asserted, paragraph *d* would have no significance whatever. To adopt the reasoning referred to would compel to a further untenable conclusion. If the reference in paragraph *c* to the "first subdivision of this section" relates to paragraph *a* in its entirety, then all the provisions in paragraph *a* would be governed by the rule laid down in paragraph *c*. The rule, however, laid down in that paragraph would be then in irreconcilable conflict with the provisions of paragraph *d*, and it would be impossible to construe the statute harmoniously without eliminating some of its provisions.

Despite the plain meaning of the statute as shown by the foregoing considerations, it is urged that the following provision contained in paragraph *b* of section 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proved that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph *c*, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph *a*, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph *d*, conforming in this respect to the requirements of paragraph *a*, contemplates an issue as to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor *at the time of the commission of the act of bankruptcy*. Further, a petition in a proceeding in involuntary bankruptcy is defined in section 1 of the act of 1898, enumeration 20, to mean "a paper filed . . . by creditors *alleging the commission of an act of bankruptcy* by a debtor therein named."

*It follows that the mere statement in the [599] statute, by way of recital, that a petition may be filed "against a person who is insolvent and who has committed an act of bankruptcy," was not designed to superadd a further requirement to those contained in paragraph *a* of section 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer. These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.

Our conclusion, then, is that, as a deed of general assignment for the benefit of credi-

tors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, that the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment, is not warranted by the bankruptcy law; and, therefore, that *the question certified must be answered in the negative.*

And it is so ordered.

---

[600] COLUMBUS CONSTRUCTION COMPANY, *Plff. in Err.*,

v.

CRANE COMPANY.

(See S. C. Reporter's ed. 600–603.)

Several separate appeals, or writs of error, not allowed in same case, at same time, to separate courts.

The act of 1891 (26 Stat. at L. 826) does not authorize several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts; and therefore the writ of error in this court, which was taken while the case was pending in the circuit court of appeals, is dismissed.

[No. 462.]

Submitted April 17, 1899. Decided May 22, 1899.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois in an action brought by the Columbus Construction Company against the Crane Company. On motion to dismiss. *Dismissed.*

See same case below, 46 U. S. App. 52, 73 Fed. Rep. 984, 20 C. C. A. 233.

Statement by Mr. Justice **Shiras:**

In May, 1891, the Columbus Construction Company, a corporation of the state of New Jersey, brought in the circuit court of the United States for the northern district of Illinois an action at law against the Crane Company, a corporation of the state of Illinois. The case was put at issue, and the trial resulted in a verdict and judgment in favor of the plaintiff in the sum of $48,000. This judgment was reversed by the circuit court of appeals upon a writ of error sued out by the defendant. 46 U. S. App. 52. Thereafter the case was again tried and resulted in a verdict and judgment in favor of the defendant, upon a plea of set-off, in the sum of $98,085.94, as of the date of March 2, 1898.

On the 25th day of August, 1898, a writ of error to reverse this judgment was sued out by the plaintiff from the circuit court of appeals of the seventh circuit, where the case is now pending.

On the 27th day of September, 1898, the plaintiff also sued out a writ of error from this court. On April 17, 1899, the defendant in error filed a motion to dismiss this writ of error; and on the same day the plaintiff in error filed a petition for a writ of certiorari to the circuit court of appeals of the seventh circuit.

Messrs. **Charles S. Holt,** *Russell M. Wing,* and *Thomas L. Chadbourne, Jr.,* for defendant in error, in favor of motion to dismiss.

Messrs. **J. R. Custer** and **S. S. Gregory** for plaintiff in error, in opposition to motion to dismiss.

*Mr. Justice **Shiras** delivered the opinion [601] of the court:

This record discloses that there are pending two writs of error to the judgment of the circuit court—one in the United States circuit court of appeals for the seventh circuit, sued out on the 25th day of August, 1898, and one in this court, sued out on the 27th day of September of the same year. It also appears that the jurisdiction of the circuit court is not in question, but the contention is that that court erred in the exercise of its jurisdiction.

We are of the opinion that the act of 1891 (26 Stat. at L. 826), under which these writs of error were sued out, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and that, therefore, the writ in this court, which was taken while the case was pending in the circuit court of appeals, ought to be dismissed.

Such a question was considered by this court in *McLish* v. *Roff*, 141 U. S. 661 [35: 893].

That was a case of a writ of error from this court to the United States court for the Indian territory, where a suit was pending and undecided, and the object of the writ was to get the opinion of this court on the question whether the lower court had jurisdiction of the suit. This court held that it was not competent for a party denying the jurisdiction of the trial court to bring that question here on a writ of error sued out before final judgment, and the writ was accordingly dismissed.

In the opinion, read by Mr. Justice Lamar, it was said:

"It is further argued, in support of the contention of the plaintiff in error, that if it should be held that a writ of error would not lie upon a question of jurisdiction until after final judgment, such ruling would lead to confusion and absurd consequences; that the question of jurisdiction would be certified to this court, while the case on its merits would be certified *to the circuit court of appeals; [602] that the case would be before two separate appellate courts at one and the same time; and that the supreme court might dismiss the suit upon the question of jurisdiction while the circuit court of appeals might properly affirm the judgment of the lower court upon the merits.

"The fallacy which underlies this argument is the assumption that the act of 1891 contemplates several separate appeals in the

same case, and at the same time to two appellate courts. No such provision can be found in the act, either in express terms or by implication. The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in section 7 of the act.

"When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court."

We think the main purpose of the act of 1891, which was to relieve this court of an enormous overburden of cases by creating a new and distinct court of appeals, would be defeated, if a party, after resorting to the circuit court of appeals and while his case was there pending, could be permitted, of his own motion, and without procuring a writ of certiorari, to bring the cause into this court.

Moreover, it is evident that such a movement is premature, for the controversy may be decided by the circuit court of appeals in favor of the plaintiff in error, and thus his resort to this court be shown to have been unnecessary.

Pullman's Palace Car Co. v. *Central Transp. Co.* 171 U. S. 138 [*ante*, 108], is referred to as a case in which there was pending at the same time an appeal from a decree of the circuit court to the circuit court of appeals and to this court. An obvious distinction between that case and this is that there the appeal was first taken to this court. Accordingly the circuit court of appeals declined either to decide the case on
[603] its merits or *to dismiss the appeal, while the case was pending on a prior appeal to this court, and continued the cause to await the result of the appeal to the supreme court. 39 U. S. App. 307.

Without, therefore, considering other grounds urged in the brief of the defendant in error on its motion to dismiss, we think a due regard for orderly procedure calls for a *dismissal of the writ of error;* and it is so ordered.

COLUMBUS CONSTRUCTION COMPANY, *Petitioner*,
v.
CRANE COMPANY, *Respondent*.

(See S. C. Reporter's ed. 603.)

[No. 782.]

Submitted April 17, 1899. Decided May 22, 1899.

ON PETITION for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. *Writ of certiorari denied.*

Messrs. **J. R. Custer** and **S. S. Gregory** for petitioner.

Messrs. **Charles S. Holt**, *Russell M. Wing*, and *Thomas L. Chadbourne, Jr.*, for respondent.

The petition for the writ of certiorari is *denied.*

RIO GRANDE IRRIGATION & COLONIZATION COMPANY, *Appt.*,
v.
CHARLES H. GILDERSLEEVE.

(See S. C. Reporter's ed. 603-610.)

Withdrawal of appearance of attorney—how brought into the record—motion to set aside judgment.

1. The withdrawal of the appearance of an attorney without leave of the court leaves the record in a condition for a valid judgment by default for want of appearance, if there is no claim that the attorney has acted in collusion with the plaintiff, or without authority, or by mistake.
2. A letter of an attorney withdrawing appearance may be brought into the record by bill of exceptions which sets it forth at length, and states that it was filed by the plaintiff in the case.
3. A motion to set aside a judgment is addressed to the discretion of the trial court, and where the exercise of that discretion has been approved by the supreme court of the territory, this court will not overrule those courts, unless misuse or abuse of discretionary power plainly appears.

[No. 254.]

Argued April 20, 21, 1899. Decided May 22, 1899.

APPEAL from a judgment of the Supreme Court of the Territory of New Mexico affirming the judgment of the District Court for Bernalillo County in that Territory denying a motion to vacate a judgment, etc., in an action brought by Charles H. Gildersleeve, plaintiff, against the Rio Grande Irrigation Company, upon a promissory note. *Affirmed.*

See same case below, 9 N. M. —, 48 Pac. 309.

Statement by Mr. Justice **Shiras:**

This was action of assumpsit begun in the district court for Bernalillo county, territory of New Mexico, on the 17th day of July, 1894, by Charles H. Gildersleeve against the Rio Grande Irrigation Company. The declaration is in the ordinary form, containing a special count upon a promissory note for the sum of $50,760, dated June 30, 1890, bearing interest at the rate of twelve per cent, and containing also the common counts in assumpsit. The note sued on was payable to P. R. Smith and indorsed by him and defendant in error, and a copy thereof was filed with the declaration, and also a copy *of a **[604]**
resolution of the directors of defendant authorizing the giving of a note, not to P. R. Smith, but to the Second National Bank of New Mexico. Upon this declaration process was issued, service of which was made upon

J. Francisco Chavez, a director and stockholder of plaintiff in error. Process was returnable on the first Monday of August, 1894, under the provision of the practice act of 1891, and on the 3d day of August, 1894, defendant below entered its appearance by H. L. Pickett, its attorney. On the 15th day of September, 1894, the plaintiff filed in the office of the clerk of the district court a letter from Mr. H. L. Pickett, addressed to plaintiff's attorneys, in which the writer states that he withdraws the appearance at the request of Colonel P. B. Smith (who is the original payee of the note sued on). Thereupon the clerk of the district court made and filed a certificate of nonappearance, and on the same day a judgment was entered, based upon the said certificate, which judgment is for the sum of $76,-393.80.

Afterward, and on the 15th day of November, 1894, during the next term of the district court after the judgment had been entered in vacation, the defendant below filed a motion to vacate the judgment for defects and irregularities apparent on the face of the record. This motion was not heard until the 6th of September, 1895, when it was denied by the court; and on the 9th day of September, 1895, defendant below filed a second motion to vacate the judgment for reasons set forth in the accompanying affidavit filed therewith and also filed at the same time its proposed pleas verified by oath. The affidavit with said motion shows, in substance, that the plaintiff below received from defendant below, in the summer of 1889, 50,000 shares of its capital stock and the sum of $1,510,000 in its first-mortgage bonds, for the purpose of purchasing certain property in New Mexico for said company. It further appears from said affidavit that the plaintiff below did purchase a portion of the property in New Mexico and turned back to the company a portion of the bonds and stock in lieu of the property which he did not purchase, and retained the remainder of the bonds and stock as his own
[605] property, but induced *the company to assist him in raising the money necessary to make final payment for the Vallecito grant by executing a promissory note for $47,000, the note in the present case having been subsequently given in renewal of the first note. In other words, it is shown that the indebtedness was that of the plaintiff below, and not of the company; that the company never received any money on said note nor any benefit therefrom, but was merely an accommodation maker to assist the plaintiff below in carrying out his contract with the company. At the time of the execution of said note for $47,000 the plaintiff below agreed to deposit as collateral security thereto $120,000 of bonds of the company, and it is further shown by said affidavit that the said collateral has never been accounted for in any manner. The district court entered judgment denying the motion.

The defendant company sued out a writ of error to review the case in the supreme court of the territory, where the judgment of the district court was affirmed. The case was then brought to this court by writ of error, and afterwards an appeal was taken, the case thus appearing twice on the docket of this court as Nos. 163 and 254.

Mr. **Frank W. Clancy** for appellant.
Messrs. **J. H. McGowan** and *H. L. Warren* for appellee.

*Mr. Justice **Shiras** delivered the opinion of the court: [605]

It is conceded that the Rio Grande Irrigation & Colonization Company was duly served with process, and that an appearance was entered on its behalf by H. L. Pickett, a qualified attorney. The essential question in the case is whether the subsequent withdrawal of his appearance by the attorney, without leave of the court, left the record in a condition in which a judgment by default for want of an appearance could be validly entered.

*Cases are cited by the appellant's counsel in which it has been held that the appearance of a defendant, once regularly entered, cannot be withdrawn without leave of the court. *United States* v. *Curry*, 6 How. 111 [12: 365]; *Dana* v. *Adams*, 13 Ill. 692. [606]

But an examination of those cases discloses that this is a rule designed for the benefit and protection of the plaintiff. Usually the question has arisen where there had been no service of process on the defendant, and where, therefore, a withdrawal of appearance by the attorney would leave the plaintiff without ability to proceed by defaulting the defendant for want of an appearance. It was said by this court in *Creighton* v. *Kerr*, 20 Wall. 13 [22:311]: "The appearance gives rights and benefits in the conduct of a suit to destroy which by a withdrawal would work great injustice to the other parties."

United States v. *Curry*, *supra*, was a suit in equity which had passed to a final decree, and the defendant, desiring to appeal, issued a citation to the complainant, which citation was served on the person who had been attorney of record during the trial of the suit. The attorney subsequently by affidavit stated that he was not the attorney of the appellee at the time the citation was served on him; that he had been discharged from all duty as attorney, and had so informed the marshal at the time of the same. The validity of the appeal was therefore attacked on the ground that there had been no proper service of the citation. This court said:

"The citation is undoubtedly good and according to the established practice in courts of chancery. No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial, with the sanction of the party, express or implied, to

withdraw his name after the case was finally decided. For if that could be done, it would [607] be impossible *to serve the citation where the party resided in a distant country or his place of residence unknown, and would in every case occasion unnecessary expense and difficulty, unless he lived at the place where the court was held. And, so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke."

Sloan v. *Wittbank*, 12 Ind. 444, was a suit on a promissory note, and to which the defendant appeared. He then withdrew his appearance and the case went to trial, and resulted in a judgment in favor of the plaintiff. On error, the supreme court of Indiana held that the withdrawal of appearance carried with it the answer, and the court should then have entered judgment as by default, instead of going to trial, but that this was a mere irregularity which could not injure the defendant, and could not be taken advantage of on appeal.

So it was held by the supreme judicial court of Massachusetts, that it was no ground for reversing a judgment rendered on the default of the defendant, after he had appeared and then withdrawn his appearance, that the date of the writ was a year earlier than the fact. *Fay* v. *Hayden*, 7 Gray, 41.

A case, indeed, might arise of collusion between the plaintiff and the attorney of the defendant, but in such case the court, on due and prompt application to it, would no doubt defeat any attempt on the part of the plaintiff to take advantage of a corrupt dereliction of duty on the part of the defendant's attorney. But it is not pretended in the present case that there was any collusion practised between the plaintiff and the defendant's attorney, nor that the latter, either in entering or withdrawing defendant's appearance, acted without authority or by mistake.

It is, however, strenuously contended that the record does not show that the defendant below ever attempted to withdraw its appearance, and that hence the judgment by default for want of an appearance had no basis. By this is meant that the letter of Pickett, the attorney, cannot be regarded as part of the record.

[608] *We agree, however, with the supreme court of the territory, that this letter, which constituted the withdrawal of appearance, was sufficiently brought into the record by the defendant's bill of exceptions, in which it is set forth at length, and wherein it is averred that said paper, signed by Pickett, was filed by plaintiff in said cause. The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. But it may be put into the record by a bill of exceptions, or something which is equivalent; so, at least, to enable the supreme court of the territory to deal with it as part of the record. *England* v. *Gebhardt*, 112 U. S. 502 [28: 811].

It is not claimed that this court, upon this record, can look into the merits of the case. The only matter for our consideration is whether the supreme court of the territory erred in affirming the judgment of the trial court denying the defendant's motion to vacate the judgment entered in default of an appearance.

The judgment by default was entered on September 15, 1894, in vacation, and on November 15, 1894, and during the next succeeding term, a motion was made on behalf of the defendant company to vacate the judgment. This motion was, on September 5, 1895, denied; and on September 9, 1895, another motion, accompanied with an affidavit of a defense on the merits, was filed, and this motion was likewise denied.

There is a rule prescribed by the supreme court of the territory, in the following terms:

"No motion to set aside any finding or judgment rendered in vacation shall be entertained, unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment."

As no discretionary power was reserved to the trial judge he could not dispense with this rule of court. As was said in *Thompson* v. *Hatch*, 3 Pick. 512:

"A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . . The courts may *rescind or repeal their rules, [609] without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

However, the supreme court of the territory did not consider it necessary to determine whether the trial court could have set aside the judgment on an application filed after the ten days had expired, if a diligent effort and a showing of merit had been made, but held that there was such an apparent lack of diligence in this case that the trial court properly refused to set the judgment aside.

A motion, even if made within the time prescribed by the rule, to set aside a judgment, is addressed to the discretion of the trial court, and where the exercise of that discretion has been approved by the supreme court of the territory, we should not feel disposed to overrule those courts, unless misuse or abuse of discretionary power plainly appeared; and we cannot say that this is such a case.

Even if we could regard this, not as a mere application under the rule to vacate a judgment, but as a proceeding of an equitable character outside of the rule, we should be compelled to reach the same conclusion. In *Bronson* v. *Schulten*, 104 U. S. 417 [26: 800], it was said:

"The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the

authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.

"We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time,
[610] could *not, according to its established principles, have granted the relief which was prayed for in this case. It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief."

The judgment of the Supreme Court of the Territory, affirming that of the District Court, is *affirmed.*

In the case of THE RIO GRANDE IRRIGATION & COLONIZATION COMPANY, *Plaintiff in Error*, v. CHARLES H. GILDERSLEEVE, No. 163, October Term, 1898, *the writ of error is dismissed.*

JOHN W. McDONALD, as Receiver of the Capital National Bank of Lincoln, Nebraska, *Appt.*,

v.

CHEMICAL NATIONAL BANK.

(See S. C. Reporter's ed. 610-621.)

Conduct of banking institutions—payment by insolvent bank, when not invalid as preference—taking possession of bank by the comptroller—remittances, when delivered.

1. It is a matter of common knowledge that banks and other corporations continue in many instances to do their regular and ordinary business for long periods, though in a condition of actual insolvency as disclosed by subsequent events.

Payments made in the due course of business by a bank which is actually insolvent do not constitute invalid preferences, if they were not made in contemplation of insolvency, or with a view to prefer one creditor over another.

3. The taking possession of a bank by the Comptroller of Currency does not prevent remittances then in course of transmission by mail to another bank in the regular course of business, in pursuance of a general arrangement by which they are to be credited on a constantly overdrawn account, from constituting payments on the account.

4. The mailing of checks and remittances by a bank to another with which its account is constantly overdrawn, in accordance with a general understanding that the proceeds of such remittances are not to be returned but to be credited on the account, constitutes a delivery to the bank to which they are sent, whose property therein is not destroyed or impaired by an act of bankruptcy by the sender before the remittances are actually received.

[No. 242.]

Argued April 13, 1899. Decided May 22, 1899.

APPEAL from a decree of the United States Circuit Court of Appeals for the Second Circuit affirming the decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity brought by the receiver of the Capital National Bank of Lincoln, Nebraska, against the Chemical National Bank of New York, for an accounting for moneys received by defendant belonging to and for the account of the Capital National Bank, which the defendant had refused to account for and pay over to plaintiff, and for a decree that defendant should pay over the amount found due. *Affirmed.*

Statement by Mr. Justice **Shiras:**

In January, 1896, Kent K. Hayden, as the duly appointed receiver of the Capital National Bank of Lincoln, Nebraska, filed in the circuit court of the United States for the southern district of New York a bill of complaint against the Chemical National Bank of New York.

*The bill alleged that the Capital National [611] Bank, on the 21st day of January, 1893, was insolvent and stopped doing business, and that on the 22d day of January, 1893, the Comptroller of the Currency closed said bank and took possession of its assets and affairs; that for a period long prior to the 15th day of January, 1893, the said bank was insolvent, and its insolvency was known to all its officers; that ever since the 2d day of June, 1884, there had been mutual and extensive dealings between the two banks above named, in which each had acted for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof; that the Capital National Bank kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled.

That the defendant bank had refused to pay or honor the drafts drawn upon it by the Capital National Bank presented on or since January 21, 1893; that since January 22, 1893, the defendant bank had received many and large sums of money belonging to and for the account of the Capital National Bank, some of it being the sums of \$2,935.60, \$815.79 and \$735, from the officers of the Capital National Bank, and the rest from the third parties which remitted the same to the defendant for account of the Capital Na-

tional Bank, and that, in particular, it had received on January 23, 1893, five thousand dollars from the Packers' National Bank, and two thousand dollars from the Schuster Hax National Bank, and divers other sums from others, on that day and since; that the defendant had refused to account for and pay over to the complainant the said collections. Wherefore it was prayed that an accounting be had, and that the defendant be ordered to pay over what might be thereby found due.

The defendant bank answered, admitting the preliminary allegations of the bill, but
[612] denying its knowledge of the *insolvency of the Capital National Bank on or prior to January 21, 1893, but averring that up to the 23d day of January, 1893, it was informed and did believe that the said Capital National Bank was entirely solvent, and dealt with it and gave it credit as a solvent bank.

The answer denied that on and after January 21, 1893, it had ceased to pay and refused to pay all drafts drawn upon the defendant by the Capital National Bank, but admitted that on the 23d day of January, 1893, because of information then for the first time received of the struggling condition of said bank, the defendant bank did refuse to pay the drafts of the Capital National Bank, which was then indebted to the defendant in the sum of at least $13,992.93 on balance of account, besides large amounts of negotiable paper, indorsed by the Capital National Bank, then held by and previously purchased or discounted by the defendant bank, and the proceeds of which had been credited to the account of the Capital National Bank—all of which transactions were averred to have been made in the usual course of business between the banks and without any knowledge, notice, or belief on the part of the defendant bank that the Capital National Bank was insolvent or in danger of becoming so.

The answer denied that the defendant had, since January 22, 1893, received many and large sums of money belonging to and for account of the Capital National Bank, but admitted that since January 21, 1893, it had received certain remittances and payments in the form of checks or drafts, for account of the Capital National Bank, all which it had placed to the credit of the Capital National Bank, which had left the Capital National Bank indebted to the defendant bank in a large sum, in the form of balance of account and negotiable paper indorsed to the defendant by the Capital National Bank; and the answer alleged, on information and belief, that said remittances and payments were made by the Capital National Bank, or by other banks and bankers, by the direction and order of said Capital National Bank, through the United States mails, and were
[613] so ordered, made, and remitted *before the appointment of any receiver for said Capital National Bank, and before it ceased to pay its obligations or had suspended its usual and ordinary banking business, and that said remittances by said Capital National Bank, or by other banks and bankers, by it ordered to be made to the defendant, were made in the ordinary and accustomed course of business between the defendant and the Capital National Bank, and when received by the defendant were by it placed to the credit of the Capital National Bank.

The answer admitted that it had received the sums of $2,935.60, $815.79, $735, $5,000, and $2,000 on the 23d day of January, 1893; that the said sums of $2,935.60 and $815.79 were remitted to the defendant on or about the 19th day of January, 1893, and the said sum of $735 on or about the 20th day of January, 1893, by the said Capital National Bank, which, on said respective days, deposited and delivered the same in the United States mail, in letters addressed to the defendant, in the usual and accustomed course of business, and before said Capital National Bank had suspended payment or stopped business, and before it was taken charge of by the receiver; that the said sum of $5,000 was remitted to the defendant on or about the 19th day of January, 1893, by the Packers' National Bank, and the said sum of $2,000 was remitted to this defendant by the Schuster National Bank on or about January 19, 1893, by being by said banks respectively deposited in the United States mail, in letters addressed to the defendant, in the usual course of business, and before the Capital National Bank suspended payment or stopped business, and before it was taken charge of by the receiver. And the answer alleged, on information and belief, that said remittances to it by the Packers' National Bank and the Schuster National Bank respectively were made in virtue of orders and directions previously given to them by said Capital National Bank on or about January 18, 1893, in the usual course of business between them and the Capital National Bank.

A replication was filed and evidence put in on behalf of the respective parties. It was stipulated that the Capital National
*Bank continued to transact the usual and [614]
ordinary business of a national bank up to the close of banking hours on January 21, 1893; that the ordinary mail time between Lincoln, Nebraska, and the city of New York is fifty hours; between Lincoln and South Omaha, Nebraska, where the Packers' National Bank is situated, is two hours and forty minutes; between South Omaha and New York City, forty-eight hours and thirty-seven minutes; between Lincoln and St. Joseph, Missouri, where the Schuster Hax National Bank is located, is seven hours and twenty-eight minutes, and between St. Joseph and New York City is fifty hours and fifty-five minutes. The complainant put in evidence an account or statement, furnished by the defendant to the complainant, showing the transactions between the Capital National Bank and the Chemical National Bank from January 3, 1893, to January 27, 1893, showing a balance on the last day of $13,317.94, against the Capital National Bank and in favor of the Chemical National Bank.

The complainant likewise put in evidence a draft drawn on January 13, 1893, by the

Capital National Bank on the Chemical National Bank for $5,000, to the order of T. M. Barlow, cashier; and a protest of said draft for nonpayment on January 17, 1893; also a statement of various drafts drawn by the Capital National Bank on the Chemical National Bank, at different times, in favor of third parties, and protested for nonpayment on and after January 24, 1893. These protested drafts amounted to $44,264.66.

The defendant called as a witness its cashier, William I. Quinlan, who testified that when the draft for $5,000 to the order of T. M. Barlow, cashier, was presented and payment refused, the Capital National Bank had no deposits or funds on deposit with the Chemical National Bank out of which such draft could be paid, and that the account of the Capital National Bank had been overdrawn for some time. The defendant put in evidence a letter dated January 19, 1893, from the Packers' National Bank, inclosing its draft for $5,000 on the Fourth National Bank of New York, to be placed to the credit of the Capital National Bank, and letter,
[615] dated January 18, 1893, *from the Schuster Hax National Bank, inclosing its draft for $2,000 on the Chemical National Bank, to the credit of the account of the Capital National Bank.

Further evidence was put in by the respective parties, which it does not seem necessary to state.

On March 16, 1897, after argument, upon the pleadings and proofs, the circuit court dismissed the bill of complaint with costs. An appeal was taken from this decree to the circuit court of appeals for the second circuit, and on January 31, 1898, that court affirmed the decree of the circuit court. And from the decree of the circuit court of appeals an appeal was taken and allowed to this court.

Mr. **Edward Winslow Paige,** for appellant:

After the Comptroller of the Currency, through his examiner, had taken possession, no creditor could keep anything.

First Nat. Bank v. *Colby,* 21 Wall. 609, 22 L. ed. 687; *White* v. *Knox,* 111 U. S. 784, 28 L. ed. 603; *Scott* v. *Armstrong,* 146 U. S. 499, 36 L. ed. 1059.

The fact that the other remittances were mailed before the bank examiner took possession does not make them the property of the Chemical National Bank as of the date of mailing.

Canterbury v. *Bank of Sparta,* 91 Wis. 53, 30 L. R. A. 845; *Johnson* v. *Sharp,* 31 Ohio St. 611, 27 Am. Rep. 529; *M'Kinney* v. *Rhoads,* 5 Watts, 343; *Dargan* v. *Richardson,* Cheves, L. 197; *Kirkman* v. *Bank of America,* 2 Coldw. 397; *Mitchell* v. *Byrne,* 6 Rich. L. 171.

The remittances were mailed after the commission of an act of insolvency, as well as in contemplation of insolvency.

Brown v. *Montgomery,* 20 N. Y. 287, 75 Am. Dec. 404.

Messrs. **George H. Yeaman,** and *George C. Kobbé,* for appellee:

The bill of complaint should have been dismissed for want of equity, there being no allegation of any act of insolvency, nor of intent to prefer, nor of intent to prevent the application of assets.

Case v. *Citizens' Bank,* 2 Woods, 23; *Hayes* v. *Beardsley,* 136 N. Y. 299; *Roberts* v. *Hill,* 23 Fed. Rep. 311; *Dutcher* v. *Importers' & T. Nat. Bank,* 59 N. Y. 5; *Utley* v. *Smith,* 24 Conn. 310, 63 Am. Dec. 163; *Tiffany* v. *Lucas,* 15 Wall. 410, 21 L. ed. 198.

Title vests by deposit in the United States mail.

The deposit of drafts or checks in the post-office to be carried to the Chemical National Bank was such a delivery as to vest the title in that bank.

Johnson v. *Sharp,* 31 Ohio St. 611, 27 Am. Rep. 529; *M'Kinney* v. *Rhoads,* 5 Watts, 343; *Kirkman* v. *Bank of America,* 2 Coldw. 397; *Buell* v. *Chapin,* 99 Mass. 594, 97 Am. Dec. 58; *Morgan* v. *Richardson,* 13 Allen, 410; *United States* v. *Jackson,* 29 Fed. Rep. 503; *United States* v. *Jones,* 31 Fed. Rep. 725.

It is not sufficient that the payment did operate as a preference. There must be the actual commission of an act of insolvency, or the payment must be made in contemplation of insolvency, or with the intent to prefer.

Jones, Corp. § 23; *Bergen* v. *Porpoise Fishing Co.* 42 N. J. Eq. 397.

*Mr. Justice **Shiras** delivered the opinion of the court: [615]

The Capital National Bank of Lincoln, Nebraska, was organized as a banking association under the laws of the United States in June, 1884, and continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893. On January 22, 1893, a bank examiner took possession, and thereafter, about February 6, 1893, a receiver was duly appointed.

The Chemical National Bank of New York, a banking association organized under the laws of the United States and doing business as such in the city of New York, carried on, for some years, a large business intercourse with the Capital National Bank.

The receiver filed the bill in this case, seeking to make the Chemical National Bank account for certain moneys received by it after the suspension of the Capital National Bank.

The nature of the intercourse between the two banks was thus described in a paragraph of the bill:

*"Ever since the second day of June, 1884, [616] there have been mutual and extensive dealings between the two banking associations above named, in which each was acting for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof and transmitting accounts of the same, including costs of protest and other expenses, and the Capital National Bank also kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance, after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or

debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled."

The complainant's case depends, under the evidence, on an application of the provisions of section 5242 of the Revised Statutes, which is as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."

It appears in evidence that on January 18, 1893, the account of the Capital National Bank with the defendant bank was overdrawn to the amount of $84,486.19, and that, by sundry remittances made, the amount overdrawn stood, on January 21, 1893, at the sum of $25,515.32. It further appears that on January 18, 1893, the
[617] Schuster Hax National Bank of St. *Joseph, Missouri, remitted by mail $2,000 to the defendant for the credit of the Capital National Bank; on January 19 the Packers' National Bank of South Omaha, Neb., remitted by mail to the defendant $5,000 for the credit and advice of the Capital National Bank; on January 20 the Capital National Bank remitted to the defendant by mail a package of small items amounting to $735 and a package amounting to $2,935.60, and on the 21st a similar package amounting to $833.64. On January 23 the defendant received the remittance of $2,000 of the 18th, and of $5,000, $815.79, and $2,935.60 of the 19th, and the remittance of $735 of the 20th; and on the 24th of January it received the remittance of $833.04. With these remittances credited the account of the Capital National Bank stood, on January 24, 1893, overdrawn $13,317.94.

The claim of the complainant is to recover all the sums received by the defendant bank on January 23 and 24 as having been transferred and received contrary to the statute. The bill of complaint contains no allegation of any act of insolvency prior to January 22, 1893, or of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the statute or of any payment made with a view to the preference of one creditor to another.

It is true that, in the course of the trial, it appeared that, on the 17th day of January, 1893, the Chemical National Bank refused to pay a check for $5,000 drawn on it by the Capital National Bank to the order of T. M. Barlow, and it is contended that such refusal by the Chemical National Bank is to be regarded as an act of insolvency on the part of the Capital National Bank. It is difficult to see any foundation for this contention in the mere fact that the Chemical National Bank refused, on January 17, to make further advances on the credit of the Capital National Bank. Such refusal may have been occasioned by a shortage of money on the part of the bank in New York, and because its funds on that day were needed for other purposes, and was entirely consistent with the absolute solvency of the Nebraska bank.

*Nor can a finding that the payments and [618]
remittances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.

In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up

to the close of banking hours on January 21, 1893.

[619] *The view of the courts below was that these payments and remittances were not made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, and our examination of the evidence has led us to the same conclusion.

It remains to consider another proposition very strongly pressed on behalf of the appellant, and that is, that the moneys and checks remitted to the defendant bank which did not reach it till after the bank examiner had taken possession could not, in law, become the property of the defendant bank, but remained part of the assets of the insolvent bank, for which the defendant must account to the receiver in order that the proceeds may be ratably divided among the creditors.

It is said that the taking possession of the bank by the Comptroller of the Currency is a distinct declaration of insolvency, and cases are cited in which it has been said by this court that the business of the bank must stop when insolvency is declared (*White* v. *Knox*, 111 U. S. 784 [28: 603]); and that the state of case, where the claim sought to be offset is acquired after the act of insolvency, cannot sustain such a transfer, because the rights of the parties become fixed as of that time. *Scott* v. *Armstrong*, 146 U. S. 499 [36: 1059].

The law is doubtless as thus stated, but does it apply to the present case?

It is conceded in his brief by the learned counsel of the appellee that if the drafts and checks had been deposited in the mail pursuant to any agreement or even if the defendant had known anything about them, they might have been regarded as the property of the Chemical National Bank as of the date of mailing. But he urges that this was only the case of a bank sending the checks of other parties to its agents for collection and deposit; that it could have sent them to any other agent had it pleased, and that after it had once put them in the mail it could have taken them out again. And queries are put as to which bank would have suffered the loss if the checks had been destroyed in transit, or if they had proved to be worthless.

But here we have the case, not of a casual remittance, but of remittances sent from
[620] time to time, and frequently, during a *long course of business between the banks concerned. There may have been no special agreement as to each particular remittance, but there was plainly a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital National Bank, but were to be credited to its constantly overdrawn account.

Whose the loss might be, if the packages were destroyed *in transitu*, or if the checks proved uncollectible, are not questions that concern us now. It is sufficient, for present purposes, to say that the inference is warranted that it was understood between the parties that these remittances were to be made through the mails, and that they were in the nature of payments on general account.

Nor can it be conceded that, except on some extraordinary occasion and on evidence satisfactory to the postoffice authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a postoffice they are within the legal custody of the officers of the government and it is the duty of postmasters to deliver them to the persons to whom they are addressed. *United States* v. *Pond*, 2 Curt. C. C. 265; *Buell* v. *Chapin*, 99 Mass. 594 [97 Am. Dec. 58]; *Morgan* v. *Richardson*, 13 Allen, 410; *Tayloe* v. *Merchants' F. Ins. Co.* 9 How. 390 [13: 187].

However, it is not pretended in this case that the checks were destroyed or proved worthless, or that the Capital National Bank either withdrew the remittances or countermanded their delivery.

We think that the courts below well held that, under the facts of this case, the mailing of these checks and remittances was a delivery to the Chemical National Bank, whose property therein was not destroyed or impaired by a subsequent act of bankruptcy.

It is finally urged that, however it may be as to the remittances received through the mail on January 23, 1893, yet that the payment or remittance of $833.64, received on January 24, was a payment made after the declaration of insolvency, and must therefore be accounted for by the defendant bank.

*It is claimed that there was no evidence [621]
that this remittance came by mail, and that all there is in the case is the admission by the defendant bank of its receipt of that sum on January 24, 1893.

But it is to be observed that no mention is made in the bill of this particular item, though the other litigated items are specified, and to the latter only was the proof directed. In the absence of evidence as to any other method of transmission, and in view of the fact that all the other payments were made by mail, it would seem to be a reasonable inference that such was the case of this remittance. The record discloses that the cashier of the Chemical National Bank testified in the case. He had furnished the complainant with a statement of the accounts between the banks from January 3, 1893, to January 24, 1893, including this particular item; but he was not cross-examined as to this item. Had he been so examined, a more particular statement in respect to it would have been, no doubt, elicited. It was apparently assumed that the history of this payment did not differ from that of the others; and the effort now made in respect to it seems to be in the nature of an afterthought, too late to permit an explanation.

Upon the whole case, we are of the opinion that the decree of the Court of Appeals was correct, and its decree is accordingly *affirmed*.

Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** dissented.

[622]NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.
JAMES DE LACEY.

(See S. C. Reporter's ed. 622-639.)

Railroad land grant—pre-emption claim—resolution of Congress—forfeiture of claim—evidence.

1. The filing of a map of definite location of a railroad determines the right of the railroad company to the land under the land grant acts of Congress.
2. Where there was a pre-emption claim at the time of the passage of the land grant act of 1864, the land would not pass under that grant.
3. The grant of land by the act of Congress of July 2, 1864, was not blotted out, with respect to an intervening pre-emption claim, by the resolution of Congress adopted May 31, 1870, making a further grant.
4. The failure of a pre-emption claimant to make proof and payment within the thirty months required by U. S. Rev. Stat. § 2267, forfeits his right without any cancelation on the records.
5. When no proof and no payment have been made within the time provided for by the law, the record will show the fact, and that the right of the claimant has expired and the claim itself has ceased to exist.

[No. 154.]

Submitted January 18, 1899. Ordered for reargument March 13, 1899. Leave granted to file brief on behalf of United States January 9, 1899. Resubmitted April 11, 1899. Decided May 22, 1899.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Washington, dismissing the complaint of the plaintiff, the Northern Pacific Railway Company, against the defendant, James De Lacey, for the recovery of the possession of 160 acres of land in the state of Washington. Judgment of the United States Circuit Court of Appeals for the Ninth Circuit *reversed* and case remanded to the United States Circuit Court for the Western Division, District of Washington, for further proceedings.

See same case below, 66 Fed. Rep. 450, 44 U. S. App. 257.

Statement by Mr. Justice **Peckham:**

This is an action of ejectment brought by the plaintiff in error against the defendant to recover possession of 160 acres of land situated not far from Tacoma in the state of Washington.

The land lies within the primary limits of the land grant both of the main line of the railroad of plaintiff in error, as definitely located between Portland and Puget sound, and the Cascade branch, as definitely located between the point where the railroad leaves the main line and crosses the Cascade mountains to Puget sound.

It appears from the facts found upon the trial, without a jury, that the plaintiff's predecessor was incorporated under the act of Congress of July 2, 1864, and received a grant of public lands by virtue of § 3 of that act. (13 Stat. at L. 365, chap. 217.) A further grant was made by virtue of the joint resolution of Congress, adopted May 31, 1870. 16 Stat. at L. 378, Resolution No. 67.

The company surveyed and definitely located the line of its *branch road extending [623] from Tacoma to South Prairie, and on March 26, 1884, filed its map showing such line of definite location in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant to the company as defined by this map of definite location, and is within the limits of the grant under the act of July 2, 1864.

The following statement is taken from the finding of facts by the trial judge:

"XII. April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase certain lands which are described in the complaint, under the laws of the United States authorizing the pre-emption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the pre-emption or homestead laws does not appear.

"XIII. In the fall of 1869 Flett left the land in controversy and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, DeLacey, Flett, *et al.*, before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove upon his claim; that they told him it was railroad land, and that he had lost it; that Flett did not then actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to sumbit proof under his filing."

"XV. The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

"XVI. September 7, 1887, John Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869.

*"XVII. Afterward, under the instruc- [624] tions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr, and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Sec-

retary of the Interior. September 28, 1891, the Secretary of the Interior reversed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

"December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff."

"XIX. Flett's declaratory statement was not formally canceled upon the records until December 23, 1891.

"XX. The defendant is in possession of the land and withholds such possession from the plaintiff."

It also appeared that the railroad company on May 10, 1879, transmitted to the office of the Secretary of the Interior a map showing its relocated line of general route, which map was on June 11, 1879, sent to the Commissioner of the General Land Office by the Secretary for filing, with instructions to withdraw the lands coterminous therewith from sale, pre-emption, or entry for the benefit of the railroad company, and the map was duly filed on that day. The land in controversy is within the line as relocated.

The conclusions of law of the circuit court were in favor of the railroad company, and the court held that prior to June 11, 1879, when the map of general route as relocated was filed, and after the abandonment of the land by John Flett, the same was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; and that from that date (June 11, 1879) the

[625] land was reserved from sale,* pre-emption, or entry, except by the railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith; that this reservation became effective from and after the receipt of the order of the Commissioner at the United States district land office on July 19, 1879.

Judgment in favor of the plaintiff for the recovery of the possession of the land was duly entered. Upon appeal by the defendant to the circuit court of appeals for the ninth circuit, that court reversed the judgment and remanded the cause to the circuit court for further proceedings not inconsistent with the views expressed in the opinion of the court of appeals. Judgment in accordance with the opinion of that court was subsequently entered by the circuit court, dismissing the plaintiff's complaint, and awarding costs to the defendant. This was under objection of plaintiff, which claimed the right to a new trial, and exception was taken thereto.

It appearing that the plaintiff, the Northern Pacific Railway Company, had subsequently to the hearing acquired the rights of the original plaintiff to the property described in the complaint, it was substituted as plaintiff in this action. A writ of error was then taken to the United States circuit court of appeals for the ninth circuit, where the judgment of the circuit court was affirmed. The plaintiff by writ of error brought the case here for review.

The opinion of the circuit judge, given upon the trial of the cause, is reported in 66 Fed. Rep. 450, and that of the circuit court of appeals in 44 U. S. App. 257.

Messrs. **C. W. Bunn** and *James B. Kerr* for plaintiff in error.

Messrs. **W. H. Pritchard,** *A. W. Ballard,* and *H. F. Norris* for defendant in error.

Mr. Charles W. Russell, Assistant Attorney, Department of Justice, filed a brief for the United States by leave of the court.

*Mr. Justice **Peckham,** after stating the facts, delivered the opinion of the court: **[626]**

The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, between Portland and Puget sound, dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, 292 [38: 443, 447].

At the time of the adoption of the resolution of 1870 there had been filed, April 9, 1869, in the local land office the statement of John Flett, declaring his intention to purchase the lands in dispute under the laws of the United States authorizing the pre-emption of unoffered lands, and that entry being unforfeited and uncanceled, operated to except the lands from that grant. We may therefore confine our attention to the grant under the act of July, 1864, and the subsequent proceedings which relate to that grant.

At the time of the passage of that act the United States owned the land in question as public land, and as to that land it had, as specified in the third section thereof, "full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights," and no portion of this land had at that time been "granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of." On the 26th of March, 1884, the plaintiff had filed its map of definite location in the office of the Commissioner of the General Land Office, which map embraced the land in controversy.

The filing of such a map of definite location of a railroad determines the right of the railroad company to the land under the land grant acts of Congress. *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629 [28: 1122]; *Sioux City & I. F. Town Lot & Land Company* v. *Griffey*, 143 U. S. 32 [36: 64], a grant similar in its nature to the one under consideration.

If there had been a pre-emption claim at the time of the passage of the act of 1864, the land would not have passed under that grant. *Bardon* v. *Northern Pacific Railroad Co.* 145 U. S. 535 [36: 806].

*It is contended that at the time (March **[627]** 26, 1884) when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a pre-emption claim, and the defendant maintains that under the case of *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906], the land described in that

declaratory statement was excepted from the grant to the railroad company, and that the company therefore never acquired title to the land by filing its map of definite location under the grant contained in the act of 1864.

The learned judge, in delivering the opinion of the circuit court of appeals in the case at bar, quoted the following language from the opinion of this court in *Whitney* v. *Taylor, supra*, p. 92 [39: 908].

"That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this, notwithstanding such claim may not be enforceable by the claimant, and is subject to cancelation by the government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard."

The circuit judge then stated that the controlling fact in this case was "that at the time of the definite location of the plaintiff's road, opposite which the land in controversy is situated, there was on the record of the local land office Flett's declaratory statement which had not been altered, amended, canceled, or set aside; and that fact operated to except the land in respect to which the claim existed from the grant to the railroad company."

[628] *The single question in this case is, therefore, whether the proceedings in the case of Flett were of such a nature as to prevent the grant to the company under the act of 1864 from taking effect at the time of the filing of its map of definite location, March 26, 1884.

The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands. If at that time (1870) certain claims had been filed against this land by reason of which it was excepted from the grant of 1870, such fact has no bearing upon the provisions of the act of 1864, at which time there was no claim upon this land, and if none existed when the map of definite location was filed in 1884, the grant included the land. The assertion that when the grant of 1864 was made there was a pre-emption claim in existence is not borne out in law or fact by asserting the existence of such a claim when the grant of 1870 was made, and that by operation of that resolution the grant of 1864 was so amended as to exclude that land. It was not excluded. The fact that no claim existed at the time the act of 1864 was passed remained notwithstanding the adoption of the resolution of 1870, and the question therefore still recurs whether in 1884, when the map of definite location was filed, there was any claim upon this land which excepted it from the grant by virtue of the act of 1864.

It is well to examine the statutes relating to the right of pre-emption under which the declaratory statement of Flett was filed in order to determine the rights, if any, which he had at the time when the company's map of definite location was filed.

That statement, filed by Flett in 1869, was to the effect that he intended to purchase the land which he described, "under the laws of the United States, authorizing the pre-emption of unoffered lands." By the term "unoffered lands" is meant those public lands of the United States which have not been *of- [629] fered at public sale. By section 3, chapter 51, of the act of Congress making further provision for the sale of public lands, approved April 24, 1820 (3 Stat. at L. 566), the price for which public lands should be offered for sale after the first day of July, 1820, was fixed at $1.25 an acre, and it was provided that at every public sale the highest bidder, who should make payment as prescribed, should be the purchaser, but no land was permitted to be sold at either public or private sale for a less price than $1.25 an acre; and it was further provided in that section that "all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception," etc.

After the passage of this act the public lands came to be spoken of as "unoffered lands," or those which had not been exposed to public sale, and "offered lands," or those which had been so exposed and remained unsold, and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. *Johnson* v. *Towsley*, 13 Wall. 72, 88 [20: 485, 488].

By the act approved September 4, 1841, entitled "An Act to Appropriate the Proceeds of the Sales of the Public Lands, and to Grant Pre-Emption Rights" (5 Stat. at L. 453, chap. 16), there was granted, by the tenth section thereof, to every person being the head of a family, etc., "who since the first day of June, A. D. eighteen hundred and forty, has made or who shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and im-

prove the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the
[630] land office *for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions," etc.

By this section it will be seen that the right of pre-emption was extended equally to unoffered and offered lands.

By section 14 it was provided, however, that the selection of unoffered lands should not delay the sale of such lands beyond the time which might be appointed by the proclamation of the President, nor should the provisions of the act be available to any person who should fail to make the proof and payment and file the affidavits required, under section 13 of the same act, before the day appointed for the commencement of the sales.

In regard to the so-called offered lands, it was provided by section 15 of the act as follows:

"Sec. 15. *And be it further enacted*, That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and within the last thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

The result of the passage of this act was to grant the right to pre-empt 160 acres of
[631] either offered or unoffered land, and *that as to the unoffered lands the filing of a pre-emption declaratory statement was not required, and the right of the pre-emptor to make due proof and payment remained until the time fixed by the proclamation of the President for the public sale of lands, at which time (if the proper proof and payment had not been made) the lands might be offered and sold to the highest bidder, and if not sold they would become subject to private entry by the first applicant at the minimum price. As to the offered lands, the right of the pre-emptor was dependent upon his filing a declaratory statement in the local office, as stated in section 15 of the act above quoted.

By the fifth section of the act approved March 3, 1843 (5 Stat. at L. 619, chap. 86), it was provided that settlers under the pre-emption act of 1841, upon unoffered land, should "make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has already been made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice and otherwise complied with the conditions of the law."

Taking these two acts of 1841 and 1843 and reading them together, it is seen that there was a difference between unoffered and offered lands by reason of the fact that on unoffered lands the right or privilege to secure land by a pre-emption filing continued up to the commencement of the public sale whenever that might be, and if that right or privilege had not been exercised and the land was offered at public sale and not sold, it then became subject to private entry by the first applicant, while on offered lands the right or privilege to secure them by a pre-emption filing continued for twelve months after the date of the settlement, and if the pre-emptor failed to file the declaratory statement or make the proper affidavit within the twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

*Congress by an act approved May 20, 1862 [632]
(12 Stat. at L. 392, chap. 75), provided for the sale of public lands for homesteads, and since that time the practice of disposing of the public lands at public sale has gradually been abandoned, although the authority remained. The abandonment of these public sales resulted in giving to those who had made pre-emption filings upon unoffered land an uncertain time within which to prove or complete their proof and payment, because their time lasted until the day of the public sale proclaimed by the President. As these public sales were abandoned, the result was that these claimants were not under any obligation to make proof and payment at all.

By the second section of the act approved July 14, 1870 (16 Stat. at L. 279, chap. 272), it was provided that "all claimants of pre-emption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage of this act, said pre-emptors shall have one year after the passage hereof in which to make such proof and payment."

That act was amended by resolution No. 52, approved March 3, 1871 (16 Stat. at L.

601), by which twelve months in addition to that provided in the act were given to claimants to make proof and payment. Adding the twelve months given by this resolution to the eighteen months given by the act of 1870 all claimants of pre-emption rights were given thirty months to make the proper proof and payment for the lands claimed.

These various provisions are found in the United States Revised Statutes from section 2257 to and including section 2267, the latter section giving the thirty months as stated.

We thus find that since 1871 all claimants of pre-emption rights lost those rights by operation of law, unless within thirty months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed.
[633] The filing of their declaratory statement *and the record made in pursuance of that filing became without legal value if within the time prescribed by the statute proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and if they were not so made the original claim was canceled by operation of law and required no cancelation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancelation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancelation before it is to take effect. The expiration of time is a most effective cancelation.

In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that an acknowledgment of the fact should be made by an officer in the land office. The law is not thus subject to the act or the omission to act of that officer.

The case of *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906], cited in the opinion of the circuit court of appeals as decisive of the case at bar, we think has not the effect given to it by the learned court below. The land in that case was within the granted limits of the grant to the Central Pacific Railroad Company by the act of July 1, 1862. 12 Stat. at L. 489, chap. 120. That company filed its map of definite location March 26, 1864. It was held that the tract being subject to the pre-emption claim of one J., at the time when the grant to the railroad company took effect, was excepted from the operation of that grant. It was subject to the claim of J. because in May, 1857, he had filed his statement, paid the fees required by law, and the filing was duly entered in the proper government record; and at that time, as has been seen by the above review of the statutes, *there was no period within which a pre- [634] emptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President. The tract in dispute had not been so offered at the date of the definite location of the road, and it was held that J.'s time to make proof and payment had not expired at the time of the filing of the map of definite location, and that consequently his was an existing claim of record at that date.

The citation from the opinion of the court in *Whitney* v. *Taylor* shows that the statement was made with reference to that important and material fact: that it was an existing claim on the part of the claimant at the time of the filing of the map of definite location. Whether that claim were an enforceable one or whether there were facts which when brought to the attention of the government might induce it to cancel it, or the fact that the government might at its own suggestion cancel the claim, were held not to affect the question. The material fact that it was an existing claim was the fact upon which the case was decided.

In this case, such fact does not exist. There was no existing claim at the time of the filing of the map of definite location by the plaintiff herein. It had expired and become wholly invalid by operation of law. The thirty months had expired years before the filing of this map.

In *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, 388 [41: 479, 480], it was stated in the course of the opinion that there were "other questions in this case, such as the significance of an *expired filing*," which were not considered by the supreme court of the state or noticed by counsel, and which were left for consideration thereafter. This shows that the case of *Whitney* v. *Taylor* was not regarded by the court, or by the justice who wrote the opinion therein, as having a controlling bearing upon the question as to the effect of an expired filing under circumstances such as are developed in this case.

If claims which were of such a nature as to be described as "existing" were made in regard to any of the lands which *otherwise [635] might be included in the grant to the railroad company, we reiterate what was said in the *Dunmeyer Case* (*supra*)—that it is not conceivable that Congress intended to place those parties, the railroad company and the various claimants to the land, in the attitude of contestants, with the right in each to require proof from the other of complete performance of its obligations. On the contrary, we would say that if there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant. This has been decided as lately as *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620 [41: 1139]. In the case under consideration there was, at the time of the filing of the map of definite location, no claim within the meaning of the statute.

The right of Flett, obtained by the filing

of his statement, was the right of pre-emption only. In other words, the right of purchase before any other person, and by the law of Congress that right ceased at the expiration of thirty months from the filing of that statement. Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed. After the filing of a statement and while the time is running within which to make proof, there is an inchoate right on the part of the preemptor which the government recognizes, as in *Frisbie* v. *Whitney*, 9 Wall. 187 [19: 668].

It was held in *Johnson* v. *Towsley*, 13 Wall. 72, 90 [20: 485, 489], that in case the preemptor failed to file his declaration of intention within three months from the time of settlement, as provided for in the fifth section of the act of 1843 (5 Stat. at L. 620, chap. 86), he nevertheless would have the right after the expiration of the three months, being in possession, to then make and file his declaration, provided no other party had made a settlement or had given notice of his intention to make one and no one would be injured by the delay. But the case is far from holding that after the declaration has been filed and the time in which to prove up and
[636] make payment *upon his claim has wholly expired, that the claim nevertheless still exists in sufficient force to prevent the transfer of title to the company under the act of Congress, simply because the officer of the land office has failed to perform a mere ministerial duty by canceling of record a claim which has really ceased to exist by operation of law. A claim is not an existing one where by the record it appears that the right to make proof and payment has expired under the terms of the statute.

It appears that it has not been the practice of the Interior Department to enter any formal cancelation of an expired pre-emption filing upon the books of the office; its practice has been to take no action concerning them. They have simply been treated as abandoned claims. State of Alabama, 3 Land Dec. 315, 317.

Reference is made in the briefs to the circular of Commissioner Drummond, dated September 8, 1873, in which he says:

"By the operation of law limiting the period within which proof and payment must be made in pre-emption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

And again in the circular of November 8, 1879, the Commissioner said:

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

The effect given by the land department to what is termed an "expired filing" of the nature of the one in suit has not been uniform. It was in substance held in some cases that such expired filing amounted to a claim within the meaning *of the statute, and that the [637]
land did not pass under the grant to the railroad company. *Emerson* v. *Central Pacific Railroad Company*, 3 Land Dec. 117; same case on motion for a rehearing, 3 Land Dec. 271; *Schetka* v. *Northern Pacific Railroad Company*, 5 Land Dec. 473; *Allen* v. *Northern Pacific Railroad Company*, 6 Land Dec. 520; *Fish* v. *Northern Pacific Railroad Company*, 21 Land Dec. 165: same case on motion for a rehearing, 23 Land Dec. 15. On the other hand, we have been referred to the cases of *Northern Pacific Railroad Company* v. *Stovenour*, 10 Land Dec. 645; *Meister* v. *St. Paul etc. Railroad Company*, 14 Land Dec. 624; *Union Pacific Railroad Company* v. *Hartwich*, 26 Land Dec. 680; *Wight* v. *Central Pacific Railroad Company*, 27 Land Dec. 182; *Central Pacific Railroad Company* v. *Hunsaker*, 27 Land Dec. 297. The last two cases cited touch the question very remotely, it at all.

The latest decision of the land office to which our attention has been called is that of *Union Pacific Railroad Company* v. *Fisher*, decided February 1, 1899. 28 Land Dec. 75. In that case the Secretary refers to the cases which have been cited above, holding that an expired filing excepted the land from a grant to the railroad company, and he gives his reasons for the decisions of the department in those cases, which he thinks render them not altogether in conflict with the other decisions of the department.

Although these decisions are somewhat inharmonious, it would seem that the practice of the department not to enter as canceled an expired filing has been uniform, and the record has been left to speak for itself.

For the reasons which we have already given, we think it was unnecessary to enter the cancelation on the record of the office in order to permit the law of Congress to have its legal effect. That effect should not be dependent upon the action or nonaction of any officer of the land department. When no proof and no payment have been made within the time provided for by the law, the record will show that fact, and that the right of the claimant has expired and the claim itself has ceased to exist.

A case of this kind, which simply necessitates a reference *to the record to ascertain [638]
whether the filing had expired and with it the rights of the claimant, differs from the case where a filing may have become subject to cancelation; but the record does not show it, and the right to cancel depends upon evidence to be found *dehors* the record. In such case, while the facts might invalidate the claim, yet as they are not of record and require to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancelation had taken place or some other act done legally terminating the existence of the claim.

Upon the facts as found in this case, it

seems to us that there was no claim against the land at the time of the passage of the act of 1864, and that years before the time of the filing of the map of definite location in 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title to the land passed to the railroad company by virtue of the grant contained in the act of 1864 and by reason of the filing of its map of definite location March 26, 1884. When, therefore, the defendant settled upon the land in April, 1886, and applied to make homestead entry thereon, his application was rightfully rejected for the reason that title to the land had passed to the railroad company, as above mentioned, and therefore he was not entitled to make the entry.

For the same reason, when John Flett, in September, 1887 (submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869 (and which claim he had abandoned since 1870), he was too late. His right had expired many years before 1884, at which time the right to the land passed to the company, and he had no right to prove up on his abandoned and expired claim.

The record shows that at the time of the commencement of this action the railroad company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor, and the courts below erred in dismissing its complaint.

[639] **The judgment* of the United States Circuit Court of Appeals for the Ninth Circuit *is reversed*, and the case remanded to the Circuit Court for the Western Division, District of Washington, for further proceedings not inconsistent with the opinion of this court.

So ordered.

Mr. Justice **Harlan** and Mr. Justice **McKenna** dissented.

JOHN McMULLEN, *Petitioner*,
v.
JULIA E. HOFFMAN, Executrix of Lee Hoffman, Deceased.

(See S. C. Reporter's ed. 639-670.)

Secret agreement between bidders for public contract, when illegal—action on contract—unity of contract—contract partly written and partly parol—partnership accounting.

1. A secret agreement between bidders for a public contract, by which their separate bids are put in after mutual consultation and agreement, and they have a common interest in each bid, if any are accepted, and are to share as partners in any contract obtained, is illegal in its nature and tendency. It is not necessary to show the particular effect of the contract, as such contracts are condemned by public policy.
2. One of the parties cannot maintain an action on the valid part of the contract relating to the partnership, by discarding or omitting to prove that portion which is illegal.
3. The unity of such a contract cannot be severed or its effect altered by putting part of it in writing and leaving the rest in parol.
4. A written contract which appears to be legal on its face may be proved to be only part of a contract the other portions of which were illegal.
5. In any action brought in which it is necessary to prove an illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce alleged rights directly springing from such contract.
6. An accounting of the profits of a partnership will not be awarded where the partnership was only part of a contract of which the other portions were illegal.

[No. 271.]

Argued April 27, 28, 1899. Decided May 22, 1899.

On WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree of that court in an action brought by John McMullen against Lee Hoffman and on his death revived against Julia E. Hoffman as the executrix of his will for an accounting of profits upon a contract with the city of Portland which the circuit court of appeals holds to be illegal, reversing the decree of the Circuit Court of the United States for the District of Oregon. *Judgment of Circuit Court of Appeals affirmed.*

See same case below, 69 Fed. Rep. 509, 75 Fed. Rep. 547, 48 U. S. App. 596, 83 Fed. Rep. 372, 28 C. C. A. 178. See also 170 U. S. 705, mem.

Statement by Mr. Justice **Peckham:**

*This action was originally brought by the [640]
complainant McMullen against one Leo Hoffman, and he having died before the trial, the action was revived against the defendant Julia E. Hoffman, as the executrix of his will. When the defendant is hereinafter spoken of the original defendant is intended.

The complainant filed his bill against the defendant seeking an accounting of profits that he alleged had been made by the defendant upon a certain contract for the construction of what is termed the Bull Run pipe line and which contract was entered into between the city of Portland in the state of Oregon, and the defendant on or about March 10, 1893. The complainant bases his right to share in the profits of that contract by virtue of another contract in writing between himself and the defendant herein, executed March 6, 1893. That agreement reads as follows:

This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull

Run water system for Portland, submitted the lowest bid for such work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid:

[641] *It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom.

And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike.

Witness our hands and seals this 6th day of March, A. D. 1893.

John McMullen. [Seal.]
Lee Hoffman. [Seal.]

The contract for manufacturing and laying the steel pipe was awarded to the defendant at a public letting of the whole work at Portland of which the manufacturing and laying of the pipe was a part, and the whole work was divided into classes, and separate bids called for and received for each class.

The defendant put in bids in the name of Hoffman & Bates for several classes, while the plaintiff in the name of the San Francisco Bridge Company (of which he was an officer) put in separate bids for the same classes.

The bids of complainant and defendant for the several classes of the work were as follows:

Conduit from head works to Mount Tabor of wrought iron or steel, making and laying pipe:

Hoffman & Bates	$465,722 00
San Francisco Bridge Company	514,664 00

(The profits arising out of this contract are the subject of the controversy herein.)

Head works—

Hoffman & Bates	$17,800 00
San Francisco Bridge Company	16,550 00

[642] *Bridges—

Hoffman & Bates	$33,562 94
San Francisco Bridge Company	31,279 07

Also for steel conduit for head works to Mount Tabor—

Hoffman & Bates	$359,278 00
San Francisco Bridge Company	348,781 00

There were several other bids by different bidders for these various classes. The bid in the name of Hoffman & Bates for the manufacture and laying of the wrought iron or steel pipe from the head works to Mount Tabor being $465,722, was the lowest out of eight bids, the various bids from the highest to the lowest being as follows:

The Risdon Iron & Locomotive Works	$600,737 00
The Bullon Bridge Company	533,507 00
Oscar Huber	521,775 40
San Francisco Bridge Company	514,664 00
Wolff, Buener, & Zwicker	495,682 00
Ferry Hinckle & Robert Wakefield	481,040 00
E. W. Jones & O. W. Wagner	477,552 00
Hoffman & Bates	465,667 00

All these bids were before the committee on the part of the city, and were taken into consideration at the time the award was made to the defendant. After the acceptance of his bid for the manufacturing and laying of the pipe the defendant entered into a contract with the city of Portland to do the work mentioned in such bid and commenced the performance of the contract as provided for therein. The work was duly completed and the city paid defendant the contract price for the same, retaining the percentage provided for therein, as security that the terms of the contract had been fully complied with.

The complainant alleges that defendant, after securing the contract, went on with the work thereunder, but refused to permit him to participate in the profits arising therefrom or to examine the books of the partnership, and that although he (complainant) furnished some of the capital and performed *some of the services provided for in the con- [643] tract with the city, and participated in some of the expenses of the execution of the contract, and devoted some of his time and attention to the proper performance thereof, and was at all times ready to do everything required of him by his agreement of partnership, yet that the defendant received all the moneys paid by the city and absolutely refused to account to him for any part thereof, and denied that he had any interest in or right to any portion of such moneys. The complainant, therefore, asked for an accounting between himself and defendant, as partners, and for a decree for the payment to him of one half the profits arising from the contract, the whole of which he alleged amounted to $80,000 (the courts below say the evidence shows they were $140,000); that a receiver might be appointed to take charge of the property of the partnership, its records, books, papers, etc., and that the defendant might be restrained during the pendency of the suit from making sale or other disposition of the tools, equipments, or other personal property belonging to the partnership, and from drawing from the city of Portland the moneys withheld by it on account of the contract, as well as any other money due for other work done by the defendant under the contract of partnership.

The answer of the defendant, while denying many of the allegations of the complaint, set up as a special defense the making of an agreement between the parties (of which the partnership agreement was a portion), by the terms of which they were to put in bids

for the construction of the work, the complainant in the name of the San Francisco Bridge Company and the defendant in the name of Hoffman & Bates; that the bids should not be in reality competitive, but should be submitted to each other before they were put in, and their terms should be mutually agreed upon, the higher bids to be merely formal, and the bids themselves as agreed upon should be delivered to the water committee; that if either party received the contract, they should both share in the profit or loss resulting from its performance, but that their mutual interest in each other's bids should not be made known when the bids were offered, so that it would appear
[644] that they were apparently *competing for the various classes of the work and for furnishing the material, when in fact they were not. This agreement, the defendant alleged, was carried out, and the contract secured by means thereof.

The court upon motion of the complainant granted a temporary injunction as prayed for in the bill. Exceptions were taken to certain parts of the answer of the defendant as being insufficient. Material portions of these exceptions were overruled by the court upon the ground that the answer set up an illegal contract between the parties, and one which could not be enforced by either. 69 Fed. Rep. 509.

Upon the final hearing of the case the same judge, becoming convinced that he had erred in his former decision in overruling the exceptions to the answer, decided that the case as made on the part of the defendant showed no defense to the complainant's cause of action, and thereupon he made a decree for an accounting substantially as asked for in the complainant's bill. 75 Fed. Rep. 547.

An appeal from the decree of the circuit court was taken to the United States circuit court of appeals for the ninth circuit, and that court held that the contract between the parties was illegal, and that no action could be maintained thereon by either, and the decree in favor of the complainant was therefore reversed. 48 U. S. App. 596. Complainant then applied to this court for a writ of certiorari to review the judgment of the circuit court of appeals, which was granted May 9, 1898. 170 U. S. 705, mem.

Messrs. **William A. Maury** and **L. B. Cox,** for petitioner:

No partnership touching the work in controversy resulted from anything which transpired between Hoffman and McMullen prior to the award made upon Hoffman's bid, nor until they had signed the partnership agreement of March 6, and entered upon the performance of the work contemplated therein.

Powell v. *Maguire*, 43 Cal. 11; *Reboul* v. *Chalker*, 27 Conn. 114; *Wilson* v. *Campbell*, 10 Ill. 383; *Lycoming Ins. Co.* v. *Barringer*, 73 Ill. 230; *Doyle* v. *Bailey*, 75 Ill. 418; *Meagher* v. *Reed*, 14 Colo. 335, 9 L. R. A. 455.

McMullen's cause of suit was not based upon the partnership contract, but upon the duty of Hoffman to account to him for half their earned profits, which duty grew out of and rested upon their relationship as partners.

Hanks v. *Baber*, 53 Ill. 292; *Chace* v. *Trafford*, 116 Mass. 532, 17 Am. Rep. 171; *Tenant* v. *Elliott*, 1 Bos. & P. 3; *Farmer* v. *Russell*, 1 Bos. & P. 296.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case.

Swan v. *Scott*, 11 Serg. & R. 155; *Armstrong* v. *American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747; *Frost* v. *Plumb*, 40 Conn. 111, 16 Am. Rep. 18; *Wright* v. *Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701.

The grounds upon which McMullen is entitled to recover in this suit have been established and repeatedly declared by this court and by other courts of the Union, both Federal and state.

Planters' Bank v. *Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Union P. R. Co.* v. *Durant*, 95 U. S. 576, 24 L. ed. 391; *Wann* v. *Kelly*, 2 McCrary, 628; *Hipple* v. *Rice*, 28 Pa. 406; *Gilliam* v. *Brown*, 43 Miss. 641; *Willson* v. *Owen*, 30 Mich. 474; *Owen* v. *Davis*, 1 Bail. L. 315; *Harvey* v. *Varney*, 98 Mass. 118; Lewin, Trusts, 68; *McDaniel* v. *Maxwell*, 21 Or. 202; *Smith* v. *Hubbs*, 10 Me. 71; *Ownes* v. *Ownes*, 23 N. J. Eq. 60; *King* v. *Winants*, 71 N. C. 469, 17 Am. Rep. 11.

Each portion of said agreement between Hoffman and McMullen was readily severable from the other, and each was substantially a distinct contract, which could, if necessary, be enforced quite independently of the other.

Oregon Steam Nav. Co. v. *Winsor*, 20 Wall. 70, 22 L. ed. 319; *Pickering* v. *Ilfracombe R. Co.* L. R. 3 C. P. 235; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. C. 200; *Treadwell* v. *Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Erie R. Co.* v. *Union Locomotive & Exp. Co.* 35 N. J. L. 240.

The action of McMullen in submitting a high bid for the work in suit had no rational tendency to deceive the water committee.

Wicker v. *Hoppock*, 6 Wall. 94, 18 L. ed. 752; *Veazie* v. *Williams*, 8 How. 134, 12 L. ed 1018; *Conolly* v. *Parsons*, cited in 3 Ves. Jr. 625, note e; *National Bank of the Metropolis* v. *Sprague*, 20 N. J. Eq. 159.

Mr. **Rufus Mallory,** for respondent:

McMullen and Hoffman combined, not as honest bidders, but to prevent competition.

Atcheson v. *Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Doolin* v. *Ward*, 6 Johns. 195; *Wilbur* v. *How*, 8 Johns. 444; *Swan* v. *Chorpenning*, 20 Cal. 182; *Gulick* v. *Ward*, 10 N. J. L. 107; *Thompson* v. *Davies*, 13 Johns. 112; *Holladay* v. *Patterson*, 5 Or. 177; *Richardson* v. *Crandall*, 48 N. Y. 348; *Gibbs* v. *Smith*, 115 Mass. 592; *Engelman* v. *Skrainka*, 14 Mo. App. 438; *Woodruff* v. *Berry*, 40 Ark. 251; *Jenkins* v. *Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Hunter* v. *Pfeiffer*, 108 Ind. 197.

Agreements, the natural tendency of which is to prevent competition in sales at

auction or letting upon sealed bids, are contrary to public policy, and cannot have the aid of the courts to enforce them.

Sharp v. *Wright*, 35 Barb. 236; *People* v. *Stephens*, 71 N. Y. 527; *Hilton* v. *Eckersley*, 6 El. & Bl. 64; *Gibbs* v. *Smith*, 115 Mass. 592.

The law leaves parties to illegal contracts as it found them.

Bartle v. *Nutt*, 4 Pet. 187, 7 L. ed. 825; *Dent* v. *Ferguson*, 132 U. S. 50, 33 L. ed. 242; *Meguire* v. *Corwine*, 101 U. S. 108, 25 L. ed. 899; *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819; *Miller* v. *Davidson*, 8 Ill. 518, 44 Am. Dec. 715.

[644] *Mr. Justice **Peckham**, after stating the facts, delivered the opinion of the court:

The foregoing statement shows that there is a difference of opinion in the courts below
[645] as to the law applicable to the *case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract and upon the right of the complainant to obtain redress for his alleged wrongs.

It was on account of the general importance of the question and the many lettings for public works by the government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and so far as possible to remove the doubts which seemingly have arisen in this branch of the law.

Looking in the record before us, we find that the pleadings, and proofs taken herein, show that for some time prior to the 6th of March, 1893, the city of Portland intended to add to its water supply by bringing to the city the water from a creek or river called Bull Run, some thirty miles distant, and for that purpose it had issued through its water committee proposals for bids to build the works, which proposals were divided into several different classes as already stated.

The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and *all bids were to be put [646]
in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly $50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a bona fide bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, *viz.*, that relating to the partnership, was reduced to writing, and is set out in the foregoing statement.

Upon these facts the question arising is whether a contract between the parties themselves, such as is above set forth, is illegal? In order to answer the question we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a bona fide bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid
thus made *amounts to a representation that [647]
the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a bona fide bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. The fact that there were other bids even higher than that of the San Francisco Bridge Company, for the manufacture and laying of the pipes, does not alter the tendency of the agreement, when carried into effect, to create

or to strengthen the belief on the part of the committee in the fact of an active competition and the bona fide character of that competition, and that the lowest bid would be in all probability a reasonable one. It is, in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been.

The natural tendency and inherent character of the agreement are also unaffected by any evidence produced on the part of the complainant, that the chairman of the water committee had, when examined nearly three years after the occurrence, no recollection as to the bid of the bridge company or that it had any particular effect upon his mind, and that he said that the contract was awarded to the lowest bidder simply because he was the lowest bidder, and without reference to the bid of the bridge company.

The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid, or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made be-
[648] tween the parties; and that tendency *or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made. The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of a bona fide character, the more the committee would be impressed with the idea that there was active competition for the work to be done.

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural.

In *Richardson* v. *Crandall*, 48 N. Y. 348, 362, the court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression, or corruption. The law looks to the general tendency of such contracts. The vice is in the very nature of the contract, and it is considered as belonging to a class which the law will not tolerate," citing *Atcheson* v. *Mallon*, 43 N. Y. 147 [3 Am. Rep. 678].

Although these remarks were made when the court was dealing with the case of a bond taken *colore officii*, yet the principle applies equally to a case like the one at bar, and indeed it is seen that such was the view of the judge delivering the opinion, since he cited *Atcheson* v. *Mallon*, which in its nature is a case very similar to the one now before us.

The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.

In *Providence Tool Company* v. *Norris*, 2 Wall. 45, 56 [17: 868, 871], the court said, in speaking as to illegal agreements:

"It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution."

*And in *King* v. *De Berenger*, 3 Maule & S. 67, 72, cited in *Scott* v. *Brown* [1892] 2 Q.B. 724, 730, Lord Ellenborough, Ch. J., said: [649]

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them.

In the case at bar the illegal character of the agreement is founded, not alone upon the fact that it tends to lessen competition, but also upon the fact of the commission of a fraud by the parties in combining their interests and concealing the same, and in submitting different bids as if they were bona fide, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. The tendency of such agreements is bad, although in some particular case it might be difficult to show that it actually accomplished a fraud, while its intention to do so would be plain enough. Therefore, when it is urged that these parties had no intention of bidding for this work alone, and that unless they had combined their bids neither would have bid at all, and hence the agreement between them tended to strengthen instead of to suppress competition, this answer to *the illegality of the trans- [650]
action is insufficient. The evidence, however, does not show that if these parties had not agreed upon a combination neither would have bid alone. It shows complainant came to Portland to see the defendant and to conclude their arrangements to go into the combination, but we are by no means of the opinion that the evidence shows that if they had

not combined they would not have bid at all. Complainant's company had bid alone at a prior letting, some time before, and had then been the lowest bidder for the contract, which the city did not award because of a lack of means of payment for the work consequent upon a veto by the governor of the bill providing for the issuing of bonds to make such payment. And it seems that the defendant himself was well able to carry on the contract alone.

If it be granted that the fact was proved that neither party would have bid separately and that by virtue of the combination a bid was made which otherwise would not have been offered, the significance of the other facts in the case is not thereby altered. Those other facts are the concealment of the interest which the parties had in each other's bids, and the making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement.

The reason given for the making of these fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light.

[651] *Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is to but carry into effect the public policy upon which the rule itself is founded. People who have been guilty of the conduct exhibited in this record cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because the bids show they were the lowest bidders. The bids might have been lower yet if there had been competition where there was in fact combination. The parties must accept the consequences resulting from entering into the agreement proved in this case all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves.

In *Hyer* v. *Richmond Traction Company*, 168 U.S. 471 [42 L. ed. 547], in *speaking as to [652] the character of the agreement in that case, Mr. Justice Brewer remarked that the vice of a combination "lies in the fact of secrecy, concealment, and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse, but in fact friendly, source."

In that case the demurrer admitted the allegation of the complaint that the combination of the two interests asking for the concession from the common council was known and announced to that body before its decision was made. The case simply shows the part which concealment takes in a combination, being in fact one of the great dangers springing therefrom.

In *Atcheson* v. *Mallon*, 43 N. Y. 147, 151, Judge Folger, in delivering the opinion of the court, said:

"But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and, where no concealment is practised and the fact is known, there may be no ground whatever for judging it to be in any manner improper.

But in this case there is more even than

concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not [653] too much to say that the most perfect *good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

The evidence shows that this written partnership agreement was only a part of the entire agreement existing between the parties. That agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. The agreement (of which that for a partnership was but a portion) was that they should combine their interests; that they should put in bids known to each; that they should conceal the fact of their combination; that they should put in fictitious bids without expectation or purpose of having them taken; that if the contract were procured they should perform the work as partners and share expenses and divide profits. No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties, can be made. The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its [654] character. The unity of the *contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol.

Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.

There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject, and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio; Ex pacto illicito non oritur actio; Ex turpi causa non oritur actio.* About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman.* It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. 1 Lindley, Partnership, 5th ed. 94, note *n;* 9 Law Quarterly Review (London), pp. 105-197.

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis.*

*The following are only a few of the numer- [655] ous cases upon the subject in England and in this country: *Holman* v. *Johnson* (1775) 1 Cowp. 341; *Booth* v. *Hodgson* (1796) 6 T. R. 405; *Thomson* v. *Thomson* (1802) 7 Ves. Jr. 470; *Shiffner* v. *Gordon* (1810) 12 East, 296; *Sykes* v. *Beadon* (1879) L. R. 11 Ch. Div. 170; *Scott* v. *Brown* (1892) 2 Q. B. 724; *Belding* v. *Pitkin* (1804) 2 Cai. 147*a; Atcheson* v. *Mallon* (1870) 43 N. Y. 147; *Leonard* v. *Poole* (1889) 114 N. Y. 371 [4 L. R. A. 728]; *Wheeler* v. *Russell* (1821) 17 Mass. 258, 281; *Snell* v. *Dwight* (1876) 120 Mass. 9; *Marshall* v. *Baltimore & O. Railroad Company* (1853) 16 How. 314, 334 [14: 953, 961]; *McBlair* v. *Gibbes* (1854) 17 How. 232 [15: 132]; *Coppell* v. *Hall* (1868) 7 Wall. 542 [19: 244]; *Trist* v. *Child* (1874) 21 Wall. 441, 448 [22: 623, 624]; *Woodstock Iron Company* v. *Richmond & D. Extension Company* (1888) 129 U. S. 643 [32: 819]; 1 Lindley, Partnership, 5th ed. 93, note, giving the result of the American cases.

The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.

If the partnership agreement that is contained in the writing above set forth is in

truth but part of an entire agreement, which contains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him without resorting to the contract, the court will permit a recovery in such case. The cases cited as illustrating the exception are, among others, *Tenant* v. *Elliott* (1797) 1 Bos. & P. 2; *Farmer* v. *Russell* (1798) 1 Bos. & P. 296; *Sharp* v. *Taylor* (1849) 2
[656]Phill. Ch. 801, 817; **Armstrong* v. *Toler* (1826) 11 Wheat. 258, 269 [6: 468, 471]; *McBlair* v. *Gibbes, supra,* 17 How. 232, 235 [15: 132, 134]; *Brooks* v. *Martin* (1863) 2 Wall. 70 [17: 732]; *Planters' Bank* v. *Union Bank* (1872) 16 Wall. 483 [21: 473]; *Armstrong* v. *American Exchange National Bank of Chicago* (1889) 133 U. S. 433, 466 [33: 747, 759].

Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. *Booth* v. *Hodgson,* 6 T. R. 405, 408; *Thomson* v. *Thomson,* 7 Ves. Jr. 470; *Embrey* v. *Jemison,* 131 U. S. 336, 348 [33: 172, 177].

In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord Kenyon, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff "that if the whole case were disclosed to the court there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

Mr. Justice Ashhurst, in the same case, said: "The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover."

Mr. Justice Grose said: "We cannot decide on a part of the case; and taking the whole together, and assumpsit cannot be raised from one part of the case when the other parts *of it negative an assumpsit." [657]
The defendant therefore had judgment.

In *Thomson* v. *Thomson, supra,* the plaintiff was not permitted to recover, because he had no claim to the money except through the medium of an illegal agreement. The master of the rolls (Sir William Grant) said: "If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. *Tenant* v. *Elliott* is, I think, an authority for that. But in this instance it is paid to the party; for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it. I must therefore dismiss the bill."

And in *Embrey* v. *Jemison, supra,* although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice Harlan, in delivering the opinion of the court, said that the plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected *with, a wagering contract. [658]
They must therefore be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law," citing *Coppell* v. *Hall,* 7 Wall. 542, 558 [19: 244, 248].

In the latter case Mr. Justice Swayne, delivering the opinion of the court, said:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The

principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance which was not necessary for plaintiff to prove.

The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action being founded on some new consideration, or upon a contract collateral to the original illegal one.

In *Tenant* v. *Elliott, supra,* it was held that where two persons had entered into an illegal contract in regard to insurance, and, a loss having occurred, the insured paid the money to a third person to be paid to plaintiff, the third person could not himself retain the money because it arose out of an illegal contract. Eyre, Chief Justice, asked "whether he who had received the money to another's use on an illegal contract can be allowed to retain it, and that not even at the desire of those who paid it to him?"

In such case clearly the defendant had nothing whatever to do with the illegality of
[659] the original contract. He received *the money to be paid to another, and when he received it for that purpose he promised, either expressly or by implication arising from the facts, that he would deliver the money to the plaintiff, and when he refused to do it the plaintiff could recover upon this express or implied contract, without resorting in any manner to the original contract between himself and another, which in its nature was illegal, but with which the defendant was in nowise concerned.

Farmer v. *Russell, supra,* is to the same effect. The defendant received the money from a third person to deliver to the plaintiff, and it was held that he was bound to pay it to the plaintiff, athough the original consideration upon which the money was to be paid the plaintiff by the third person was illegal. Eyre, Chief Justice, said:

"It seems to me that the plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* in law arises, and on that action on the case may be maintained. . . . The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract; for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, *viz.*, that he was lending his assistance to an infamous traffic. In that case, the rule *Melior est conditio possidentis* will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a court of law."

*The verdict in this case had been for the defendant. [660]

There was a question in the case whether the defendant was privy to the contract between the plaintiff and the man at Portsmouth. The goods transported were counterfeit pennies or half pence, and it was the opinion of Eyre, Chief Justice, that if the defendant had been privy to the original illegal agreement so that the whole thing was but one transaction, the plaintiff could not have recovered. Mr. Justice Rooke was of opinion that it was not important whether the defendant were privy or not; that if the contract were illegal, the plaintiff could not recover from the defendant in any event. The other two judges were of opinion that the money having been delivered to the defendant for the purpose of being paid to the plaintiff, the defendant was bound to make such payment without reference to the illegality in the original transaction.

The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defense in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defense of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise to pay the plaintiff, would have no possible defense to an action by the plaintiff to compel such payment. Such an action is in no sense founded upon an illegal contract. That
matter was closed when the party *owing the [661]
money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character.

The next case cited by complainant as an authority for the maintenance of this action is *Sharp* v. *Taylor, supra.* It was stated by the chancellor in that case that where one of two partners had possessed himself of the prop-

erty of the firm, he could not be allowed to retain it by merely showing that in realizing it some provision of some act of Parliament had been violated or neglected or that some provision of a foreign statute relating to the registry of vessels had not been complied with.

Lord Chancellor Cottenham, in the course of his opinion, said:

"The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has aris-
[662] en from them is distinctly taken in *Tenant v. Elliott* and *Farmer* v. *Russell*, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*. But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell* v. *Innes* [4 Barn. & Ald. 426]. The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to anyone; assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defense to Sharp's claim. Upon these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right."

These observations show that the judgment did not go upon the illegality arising from a mere violation or neglect of a provision of an act of Parliament relating to vessels, and the agreement was not classed among those contracts which are of such an illegal nature that courts refuse to enforce them. Some of the observations of the chancellor, made by way of illustration regarding the rule itself, have been since doubted by the English courts, as in the case of *Sykes* v. *Beadon*, *supra*, where Jessel, master of the rolls, in holding that an illegal contract could not be enforced by one party to it as against the other, directly or indirectly, said that there were several *dicta* of Lord Cottenham's in *Sharp* v. *Taylor*, which he thought were not good law, and the master of the rolls remarked:

"It is no part of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

Continuing, the master of the rolls observed:

"Then Lord Cottenham goes on, in *Sharp* v. *Taylor*, to say: 'Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant* v. *Elliott* and *Farmer* v. *Russell*, *and recognized and [663]
approved by Sir William Grant in *Thomson* v. *Thomson*.' Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to an illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp* v. *Taylor* in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it directly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it."

Sharp v. *Taylor* should not be carried at all beyond the facts of the case as set out in the report.

In *McBlair* v. *Gibbes*, *supra*, the question was in relation to the validity of an assignment by an assignor of his interest in an illegal contract. The payment of the money arising therefrom had been, subsequently to the assignment, provided for by the party owing it, and the dispute arose between the representatives of the assignor and those of the assignee as to which were entitled to the share originally due to the assignor. It was claimed on the part of the representatives of the assignor that the original contract being illegal, the sale and assignment of an interest therein from him to the assignee was also illegal, and consequently that such interest, equitable or legal, passed to the assignor's executors. Mr. Justice Nelson, however, in delivering the opinion of the court, said:

"But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver (the assignee) *was not a [664]
party to these transactions, nor in any way

connected with them. It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfilment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defense, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfilment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."

What is meant by a collateral contract or a cause of action arising therefrom, which does not require reference to the principal illegal contract or transaction, is still further illustrated in *Armstrong* v. *Toler*, 11 Wheat. 258 [6: 468]. In the course of his opinion Mr. Chief Justice Marshall assumed the facts to be that the plaintiff, during a war between this country and Great Britain, contrived a plan for importing goods on his own account from the country of the enemy, and goods were also sent to B by the same vessel. The plaintiff, at the request of B, became surety for the payment of the duties which accrued on the goods of B, and was compelled to pay them, and the question was whether he could maintain an action on the promise of B to return this money, and the
[665] *court held that such an action could be sustained. The court said:

"The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted."

And again: "The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation."

And at page 274: "In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction."

The case of *Armstrong* v. *American Exchange Nat. Bank*, *supra*, is similar to the cases of *Tenant* v. *Elliott* and *Farmer* v. *Russell*, and was decided upon the same principle.

Counsel for the complainant also refer to a case where a plaintiff had let his horse to the defendant on Sunday, and the defendant had injured the horse by his recklessness and negligence, and a recovery against him was had for the damages *occasioned by such neg- [666]
ligence, notwithstanding the illegality of the contract of hiring, because in violation of the law relating to the Sabbath day. *Hall* v. *Corcoran*, 107 Mass. 251 [9 Am. Rep. 30].

In that case the court held the cause of action was not founded upon the contract, but defendant was held liable by reason of his improper and neglectful conduct in regard to the horse in his possession, and which conduct was a violation of the legal duty he owed to the owner of such horse, irrespective of contract. The case was a clear instance of a proper recovery based upon collateral facts, and not founded upon any original illegal contract.

The same principle was held in *Welch* v. *Wesson*, 6 Gray, 505, as the damage done plaintiff by the wilful act of defendant in running into him with his sleigh had nothing to do with the race they were engaged in.

To the same effect is *Woodman* v. *Hubbard*, 25 N. H. 67 [7 Am. Dec. 310]. The act of damage to the horse upon which the liability rested was not connected with or part of the illegal Sunday hiring.

We think it clear that these cases cited as authority for a recovery in this case upon the ground of completion of the illegal contract or of a new contract upon a good consideration, do not touch the case before us, with the possible exception of *Sharp* v. *Taylor*, *supra*, and that case ought not to be extended.

In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was illegal. The partnership part of the agreement cannot be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he cannot sepa-

rate his cause of action from the illegal part and claim a recovery upon the written portion providing for and evidencing the partnership.

We come now to a consideration of the two cases upon which the counsel for the complainant specially rely for the maintenance of this action. They are *Brooks* v. *Martin*, 2 Wall. 70 [17: 732], and *Planters' Bank* v. *Union Bank*, 16 Wall. 483 [21: 473]. Of [667] the *two cases, *Brooks* v. *Martin* is the more like this one, although the cases are by no means precisely similar. The partnership in that case was stated by the court, in its opinion, to have been really engaged, probably with the full knowledge of all its members, in dealing in soldiers' claims long before any scrip or land warrants were issued by the government and contrary to the ninth section of the act of February 11, 1847, providing for the granting of land warrants to be issued to the soldiers.

The main object of the ninth section of the act was, as the court stated, to protect the soldiers against improper contracts of the precise character of those shown in the record. It was further said that the traffic for which this partnership was formed was illegal, and that if a soldier who had sold his claim to these partners had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it or give them any relief against it; or if one of the partners, after the signing of the articles, had said to the other, "I refuse to proceed with this partnership because the purposes of it are illegal," the other partner would have been entirely without remedy. And if, on the other hand, one of the partners had said, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance, according to your contract," the other partner might have refused to comply with such demand, and no court would have given either of the partners any remedy for such refusal.

The court further stated that upon the facts existing, all the claims purchased by the partner having been turned into land warrants and the warrants having been sold or located, and where the purchase of the claim had been made prior to the date of the warrant, assignments having been subsequently made by the soldiers, and the portion of the lands located having been sold partly for cash and partly on mortgage, and the assets of the partnership consisting then almost wholly of cash securities or of lands,—all these facts appearing, the partner in whose possession the profits of the partner- [668] ship *were could be compelled to account by the other partner, and that the fact that such partner had given a release procured from him by fraud was no bar to his action for such an accounting.

The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The wrong originally done or intended to the soldier had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts, and could not be affected by any action which the court might take. The cases of *Sharp* v. *Taylor*, *Tenant* v. *Elliott*, *Farmer* v. *Russell*, *Thomson* v. *Thomson*, and *McBlair* v. *Gibbes* were cited as authority for the proposition.

We have already adverted to each of them, and we admit it is quite difficult to see how, with the exception of *Sharp* v. *Taylor*, the principle upon which they were decided could be applied to the case then before the court.

There is a difference between the case before us and that of *Brooks* v. *Martin*, because in the latter case the fact existed that the transactions, in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated. We think it should not control the decision of the case now before us.

*In *Planters' Bank* v. *Union Bank*, *supra*, [669] Confederate bonds had been sent by one party to the other for sale, and the bonds had been sold by such party as agent of the plaintiff and their price paid to such agent of the party selling, and the court held that an action would lie to recover the proceeds of that sale thus paid to the plaintiff's agent, although no suit could have been maintained by plaintiff against the purchaser for the purchase price of the bonds, because their sale was an illegal transaction. But when the purchase price of the bonds was paid, it certainly did not rest with the person who received the money upon an express or implied promise to pay it over to set up the illegality of the original transaction. When the bank received the funds, there was raised an implied promise to pay them to their owner, and a recovery could be sustained upon the same ground taken in *Tenant* v. *Elliott* and the other cases above mentioned.

It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the

action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

We must therefore come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to
[670] an illegal *contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them.

The judgment of the Circuit Court of Appeals was right, and must be affirmed.

UNITED STATES, *Appt.*,
v.
FRANK DUDLEY.

(See S. C. Reporter's ed. 670-674.)

Duty on sawed boards and plank.

Sawed boards and plank planed on one side, tongued, and grooved, are to be classified as dressed lumber and admitted free of duty under ¶ 676 of the tariff act of August 28, 1894, and are not dutiable under ¶ 181 as furniture or manufactures of wood.

[No. 103.]

Argued April 19, 1899. Decided May 22, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming (by division of opinion) the judgment of the Circuit Court of the United States for the District of Vermont, reversing the decision of the board of general appraisers, which held that sawed boards and plank planed on one side, tongued and grooved, were not entitled to be admitted free of duty under the tariff act of 1894, and which sustained the action of the collector in imposing a duty of 25 per cent upon said lumber as a manufacture of wood. Judgment of the Circuit Court of Appeals *affirmed.*

See same case below, 45 U. S. App. 654, 79 Fed. Rep. 75, 24 C. C. A. 449.

Statement by Mr. Justice **Brown:**

This case originated in a petition filed in the circuit court of the United States for the district of Vermont, for the review of a decision of the board of general appraisers to the effect that certain imports made by the petitioner into the port of Newport, of "sawed boards and plank, planed on one side, tongued and grooved," and entered as "dressed lumber," were not entitled to be admitted free of duty as "sawed boards, plank, deals, and other lumber, rough or dressed," under the tariff act of August 28, 1894.

In June, 1895, Dudley imported from Canada eight carloads *of boards and plank, [671]
planed on one side and grooved, or tongued and grooved. The collector imposed a duty of twenty-five per cent upon this lumber as a "manufacture of wood," under paragraph 181 of the tariff act of August 28, 1894, which reads as follows (28 Stat. at L. 521): "House or cabinet furniture, of wood, wholly or partly finished, manufactures of wood or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The importer protested, claiming that they should have been imported free of duty as "dressed lumber" under paragraph 676.

The board of general appraisers sustained the action of the collector, and the importer filed this petition for review in the circuit court, which reversed the decision of the board. On appeal by the United States to the circuit court of appeals, where the cause was heard by two judges, who were divided in opinion, the judgment of the circuit court was affirmed.

Whereupon the United States applied for and were granted a writ of certiorari from this court.

Mr. **Henry M. Hoyt**, Assistant Attorney General, for appellant.

Mr. **C. A. Prouty** for appellee.

*Mr. Justice **Brown** delivered the opin- [671]
ion of the court:

The imports in this case were eight carloads of spruce boards and plank, planed on one side, and tongued and grooved. They varied from one to three inches in thickness, from four to eleven inches in width, and from twelve to twenty feet in length. Some were "butted to exact lengths." They were prepared for use by what is known as a "flooring machine," which is a combination of a simple planing machine with a matching — or tonguing and grooving—machine. Some of the smaller mills use separate machines for planing and matching, the combination ma-
chine seeming to be of comparatively *recent [672]
origin. The boards were adaptable for flooring, ceiling, sheathing, etc.

They were assessed for duty under para-

graph 181 of the tariff act of August 28, 1894, which imposed a duty of twenty-five per cent ad valorem upon "house or cabinet furniture, of wood, wholly or partly finished, manufactures of wood or of which wood is the component material of chief value, not specially provided for in this act."

Upon the other hand, the importer insisted that they should have been admitted free of duty under paragraph 676, which exempts "sawed boards, plank, deals, and other lumber, rough or dressed," except certain lumber of valuable cabinet woods.

Forty-seven witnesses were examined before the board of general appraisers, twenty-three of whom testified that lumber which had been planed, grooved, tongued, or beaded was still "dressed lumber," even when finally shaped for the carpenter to put together in roofing, flooring, ceiling, etc., and twenty-four testifying, in substance, that the term was only applicable to such as had been merely planed upon one or both sides, and brought to an even thickness. It was admitted by witnesses upon both sides that in ordering such articles the term "dressed lumber" would not sufficiently describe them, and that they were usually ordered by description or by their specific designation, as flooring, etc.

Ordinarily, the fact that an article in the process of manufacture takes a new name is indicative of a distinct manufacture, as was intimated in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210 [*ante*, 139] but we do not think it important in this case that "dressed lumber" is divisible into flooring, sheathing, and ceiling, since sawed lumber is none the less sawed lumber, though in its different forms and uses it goes under the names of beams, rafters, joists, clapboards, fence boards, barn boards, and the like. In other words, a new manufacture is usually accompanied by a change of name, but a change of name does not always indicate a new manufacture. Where a manufactured article, such as sawed lumber, is usable for a dozen different purposes, it does not ordinarily become a new manufacture until reduced to a condition where it is used for one
[673] *thing only. So long as "dressed lumber" is in a condition for use for house and ship building purposes generally, it is still "dressed lumber"; but if its manufacture has so far advanced that it can only be used for a definite purpose, as sashes, blinds, moldings, spars, boxes, furniture, etc., it becomes a "manufacture of wood." It follows that the words "flooring, ceiling, sheathing," do not under this act describe a new manufacture, but rather the different purposes for which sawed lumber may be used. It is much like the commercial division of lumber into "selects, common, and culls," which are all lumber, but of different qualities. None of these are in reality new names, but merely specifications of the more general term "lumber." Indeed a manufacturer receiving an order for lumber could not possibly fill it to the satisfaction of his customer, without knowing the purpose for which it was designed, or the quality desired.

The fact that "dressed lumber" is ordered under the names of flooring, ceiling, sheathing, does not indicate that it is not still "dressed lumber," but rather that it is of a quality or width specially adapted to those purposes. Had it been of a particular quality, width, and thickness, and sawn into lengths which would make it usable only for the manufacture of boxes, perhaps it might be termed a "manufacture of wood" for the purposes of this act. It is true that the lumber in question was in a condition to be used for flooring without further manufacture, except such reductions in length as the dimensions of the room might require; but it was also usable for ceiling, sheathing, and for similar purposes with no further alterations. Had it so far been changed as to be serviceable for only one thing, it is possible that it might be regarded as a separate and independent manufacture, though under the case of *Tide Water Oil Co.* v. *United States*, 171 U. S. 210 [*ante*, 139], this may admit of some doubt. But while lumber planed upon one or both sides may be "dressed lumber," we think that when tongued and grooved it is still "dressed lumber," and not a new and distinct manufacture. In other words, that tonguing and grooving is an additional dressing, but it does not make it a different article. Lumber treated in this *way is still known in the trade as lumber: [674]
advertised as lumber; handled as lumber; shipped as lumber; bought and sold by the thousand feet like lumber.

We also think that some light upon the proper construction of the words "manufacture of wood" in paragraph 181 is afforded by the fact that it is used in connection with "house or cabinet furniture of wood, wholly or partly finished," and is followed by the words "or of which wood is the component material of chief value." This would indicate an article "made up" of wood analogous to furniture or other article in which wood is used alone or in connection with some other material. It seems to us quite clear that it could not have been intended to apply to lumber which had only passed beyond the stage of planed lumber by being tongued and grooved.

Upon the facts of the present case we are of opinion that the imports in question should have been classified as "dressed lumber," and *the judgment of the Circuit Court of Appeals is therefore affirmed.*

LOUISVILLE TRUST COMPANY, *Petitioner*,

v.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 674-689.)

Foreclosures of railroad mortgages—prior rights of creditors—collusion to destroy interests of unsecured creditors—delay or neglect which will not prevent relief against a foreclosure.

1. It is a fact of common knowledge that foreclosures of railroad mortgages ordinarily mean, not the destruction of all interests of

the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interest of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor.

2. A foreclosure which attemps to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof.

3. Foreclosure of a railroad mortgage by collusion between bondholders and stockholders, for the purpose of destroying the interests of unsecured creditors, may be set aside on their application as a fraud.

4. The failure of an unsecured creditor to intervene at the first instant on a bill for the foreclosure of a railroad mortgage filed in the avowed interest of all creditors, without taking any action to notify them or bring them into court, will not be a fatal delay or neglect which will prevent relief against a foreclosure by collusion to preserve the rights of bondholders and stockholders and to cut off unsecured creditors.

[No. 263.]

Argued April 24, 1899. Decided May 22, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree of that court affirming the decree of the Circuit Court of the United States for the District of Indiana denying an intervening petition filed by the Louisville Trust Company against the Louisville, New Albany, & Chicago Railway Company in an action instituted by John T. Mills, Jr., in said Circuit Court, against the Louisville, New Albany, & Chicago Railway Company, for the appointment of a receiver of said company, and the marshaling of its assets, and the ascertaining and enforcement of the liens and priorities, whether by mortgage or otherwise, of all of the creditors of said company, its assets, and for a division of the proceeds among the creditors. The intervening petition prayed that the decree of foreclosure and sale entered in the cause be set aside, and that certain mortgages be declared to be invalid, and that the assets of said company be declared to be a fund to be distributed among its creditors, and for the distribution thereof. *Decrees of Circuit Court and Circuit Court of Appeals reversed,* and case remanded to the Circuit Court, with instructions to set aside the sale, and to ascertain whether there was any legal agreement between the bondholders and the stockholders to preserve their rights and destroy the interests of unsecured creditors, and, if such was the agreement, to refuse confirmation of the sale until the interests of unsecured creditors shall have been preserved, etc.

See same case below, 69 Fed. Rep. 431, and 43 U. S. App. 550, 75 Fed. Rep. 433, 22 C. C. A. 378, and 56 U. S. App. 208, 84 Fed. Rep. 539, 28 C. C. A. 202.

Statement by Mr. Justice **Brewer:**

[675] *The facts in the case are as follows: The Louisville, New Albany, & Chicago Railway Company, hereinafter called the New Albany company, in 1889 and 1890 placed a guaranty upon $1,185,000 of the first-mortgage bonds of a Kentucky railroad corporation. In April, 1890, the New Albany company, guarantor, commenced a suit in the circuit court of the United States for the district of Kentucky against divers parties claiming to hold such bonds to have the guaranty declared void. In 1894 that court rendered a final decree, sustaining its contention, and adjudging the guaranty *ultra vires* and void. 69 Fed. Rep. 431. From that decree the holders of the guaranty bonds appealed to the circuit court of appeals for the sixth circuit, which, in June, 1896, reversed the decree of cancelation, and held the guaranty binding. 43 *U. S. App. 550. On application of the [676]
New Albany company the case was then removed on certiorari to this court, and at the time of the proceedings hereinafter referred to was still undecided. Judgment therein has since been entered sustaining the guaranty. *Louisville, New Albany, & Chicago Railway Company* v. *Louisville Trust Company* [174 U. S. 552, *ante*, 1081].

After the decision in the circuit court of appeals, and on August 24, 1896, one John T. Mills, Jr., commenced an action in the circuit court of the United States for the district of Indiana, alleging that he was a creditor of the New Albany company to the amount of $494,911.35. That company appeared and confessed judgment, and an execution was issued and returned unsatisfied. Whereupon Mills filed his bill of complaint in the same court, based upon this unsatisfied execution, and praying the appointment of a receiver. The bill set forth the property belonging to the judgment debtor the New Albany company, alleged that its capital stock amounted to $16,000,000, of which $7,000,000 was preferred; that its outstanding funded debt, divided into five classes, amounted to $7,700,000 in six per cent bonds, and $6,100,000 in five per cent bonds. The bill also alleged the existence of a floating debt, amounting to nearly $1,000,000, consisting of outstanding notes and other obligations, held by the complainant and other bona fide creditors. It then set forth the guaranty of the bonds of the Kentucky Railroad Company, the proceedings in court by which the guaranty had been sustained, and averred that the officers of the defendant company reported a diminution of current earnings by reason of a short wheat crop and lessened traffic, and that it would be impracticable to realize from the earnings after the payment of operating expenses, taxes, and rentals a sum sufficient to pay the shortly accruing mortgage interest. The bill also alleged many matters, among others the fact that the lines of the New Albany company were in three different states and subject to the jurisdiction of different courts, which seemed to justify the taking possession of the property by a receiver to prevent its dismemberment or any disturbance of its continued operations as a common carrier. The prayer of the bill was:

*"Inasmuch, therefore, as the complainant [677]
has no adequate remedy at law for the griev-

ances hereinbefore stated, and can only have relief in equity, he files this bill of complaint in behalf of himself and all others in like relation to the said property, and prays that due process of law issue against the defendant, the Louisville, New Albany, & Chicago Railway Company, and that it be summoned to appear in this court and answer this bill, but without oath, all answers under oath being hereby expressly waived under the rules to stand to and abide by such orders and decrees as the judges of this court may from time to time enter in the premises; that for the purpose of enforcing the rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities, and to preserve the unity of the said railway system as it has been and now is maintained and operated, and to prevent the disruption thereof by the separate attachments, executions, or levies, this court will forthwith appoint a receiver for the entire railroad. . . . That the court will fully administer the trust fund, in which the complainant is interested as a judgment creditor, and will for such purpose marshal all the assets of said insolvent corporation, and ascertain the several liens and priorities existing upon the said system of railways or any part thereof and the amount due upon each and every of such liens, whether by mortgage or otherwise, and enforce and decree the rights, liens, and equities of each and all of the creditors of the said Louisville, New Albany, & Chicago Railway Company, as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to, not only the said line of railroad, appurtenances, and equipments, or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation, and that said railroad and all the assets of such corporation shall be sold by proper decree of the court, and the proceeds divided among the different creditors according as their liens and priorities may be decreed by the court, and for such other and further relief as to the court may seem
[678] proper and as may be necessary to *further enforce the rights and equities of the complainant and all other creditors of such corporation."

The New Albany company appeared by its general solicitor, filed its answer admitting the material allegations of the bill and interposing no objections; whereupon the court made an order appointing as receiver a gentleman who was the vice president of the company and its general manager. The order of appointment was in the ordinary form of such orders.

All of these proceedings, including the filing of the original complaint, the confession of judgment, the issue and return of the execution, the filing of the bill and the appointment of a receiver, took place on the same day, to wit, August 24. Up to this time there had been no default in any of the interest due on the several series of bonds. On November 12, 1896, the trustees in one of the mortgages, one executed May 1, 1890, filed a bill of foreclosure, alleging default in the payment of interest on November 1, 1896. On the same day the trustee in another mortgage, dated January 1, 1896, filed a similar bill, alleging default on October 1, 1896. On November 24, 1896, the court, on application of the receiver, entered an order authorizing the receiver to borrow $200,000 on receiver's certificates, payable out of the earnings, and expend the same in the construction of new bridges, the repair of freight cars and engines, the ballasting and making new alignment of track, and the equipment of engines and cars with air brakes and automatic couplers. What action was taken under this order is not disclosed in the record, although the final decree provided for payment in advance of the bonds "of any indebtedness of said receiver which has not been or shall not be paid out of the earnings and income of the property coming into the hands of said receiver." On the 14th day of December, 1896, the trustee in a mortgage executed September 1, 1894, commenced foreclosure, alleging default on December 1, 1896. On the 21st of December, 1896, an order of consolidation was made of these several foreclosure suits.

On the 23d of January, 1897, the petitioner, the Louisville *Trust Company, filed its pe- [679]
tition asking generally to be admitted to appear in the suit and to take such steps and proceedings in its own behalf as it might deem necessary, which petition was sustained, and leave granted accordingly. This petition alleged the indorsement heretofore referred to of the bonds of the Kentucky Railway Company by the New Albany company, that it, the petitioner, was the holder of $125,000 of those bonds, and had obtained a decree adjudging the validity of the guaranty.

On the same day the various parties to the foreclosure suits having all appeared and filed so far as was necessary answers admitting the allegations of the bills, a decree was entered foreclosing the three mortgages in suit and directing a sale of the property.

On February 27, 1897, the Louisville Trust Company filed a full intervening petition, verified by affidavit, setting forth the guaranty of the Kentucky bonds, its ownership of $125,000 of them, the decree of the court of appeals and the certiorari obtained from this court by the New Albany company, the proceedings in the action instituted by John T. Mills, Jr., in respect to which it alleged that "the said J. T. Mills, Jr., claimed to be a creditor to the amount of $494,911.35, but did not disclose or discover to the court in his proceedings that he was not a general creditor, but he was at the time, if a creditor at all, secured with collateral securities, the value whereof is unknown to your petitioner. And the petitioner charges that the proceedings in behalf of the said John T. Mills, Jr., were procured by the said New Albany company for the purpose of hindering and delaying the general or unsecured creditors of the said company in the enforcement of their debts; and that since the entry of the said order of appointment no step has been taken in the said cause, either to

ascertain or to bring into court the assets, which are subject to the payment of the said debts, and no proceeding has been taken to notify or to bring before the court the said general or unsecured creditors." It then set forth the filing of the foreclosure bills, the entry of the decree of foreclosure, and alleged "that prior to the entry of the said
[680] decree the *holders of the bonds secured by the mortgages to the Farmers' Loan & Trust Company and the Central Trust Company aforesaid, and the holders of the preferred and common stock of the said Louisville, New Albany, & Chicago Railway Company, or a part thereof, had entered into an arrangement or agreement for the purpose of procuring the sale of the said property, its purchase by and in behalf of the parties entering into such combination and reorganization thereof, and the issue of securities to the said parties, including said stockholders, without the payment of the debts and liabilities of the said company, and for the purpose of hindering and delaying the said creditors and with a view to prevent the collection or enforcement of such debts and liabilities; and that the said decree of sale was obtained by the said company and said complainants in order to carry out such unlawful purpose and to prevent the general or unsecured creditors of the said company from having an opportunity to be heard in matters arising in the said cause."

It is also alleged that the New Albany company was formed by consolidation, and that one of the consolidating companies was a corporation of Illinois and had its property in that state; that it had no power to enter into such consolidation as had been decided by the supreme court of that state, and therefore that the mortgages executed by the New Albany company and which were being foreclosed were not liens upon so much of its property as had belonged to the Illinois corporation and was situated in that state. It also claimed that under the provisions in the mortgages there had been no such default as justified a foreclosure, and prayed as follows:

"Wherefore, your petitioner prays that the decree of foreclosure and sale heretofore entered in this cause be set aside, that the pretended consolidations herein mentioned be adjudged void, and that the said mortgages before mentioned be declared to be invalid; that this cause be referred to a commissioner to ascertain and report what assets of the said New Albany company are embraced by any liens, and what are not so included, and the amounts and descriptions thereof; and that, among other things, the
[681] master be directed to ascertain *what portion of the capital stock has not been paid for, and the amounts due thereon; and that the receiver herein be directed to take steps to enforce the collection of any amounts due to the said company; that due and proper advertisement be given for the proof of debts, and that said master be directed to ascertain and report the names of the creditors herein and the amounts of debts due to them; that it be adjudged that the said master ascertain what net earnings have accrued, and shall hereafter accrue, from the operation of the said railway in the hands of the receiver, and that the amount thereof be adjudged and declared to be a fund to be distributed among the general and unsecured creditors of the said company; and that all such other and further proceedings be had for the sale of the assets of the said company and the distribution thereof, according to law and the rights of the parties."

On the 9th of March, 1897, its petition was denied. On the 10th of March a sale was made by the master appointed therefor, and on the same day his report thereof was filed and the sale confirmed. An appeal was taken by the Louisville Trust Company to the court of appeals of the seventh circuit, which appeal was argued on the 16th day of November, 1897. On the 5th of January, 1898, the decree of the circuit court was affirmed. 56 U. S. App. 208. Whereupon application was made to this court, and the proceedings were brought before it by certiorari.

Messrs. **St. John Boyle** and **Swagar Sherley** for petitioner.

Messrs. **Adrian H. Joline,** *Herbert B. Turner, George W. Kretzinger,* and *E. C. Field* for respondents.

*Mr. Justice **Brewer** delivered the opinion of the court: [681]

The questions in this case are novel and important. They *arise on the foreclosure of [682]
certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosures of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. Other parties, although claiming rights in antagonism to both or either mortgagor and mortgagee, may be considered outside the scope of the foreclosure, and whatever rights they may have may properly be relegated to independent suits.

But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify, but compel, a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been, said that this ruling implies somewhat of a departure from the apparent priority of right secured by ac ontract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not

simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. These conclusions, while they to a certain extent ignored the positive promises of contract and recorded obligations, were enforced in obedience to equitable and public considerations. We refer to these matters, not for the sake of reviewing those decisions, but to note the fact that foreclosure proceed-
[683]ings of mortgages covering extensive *railroad properties are not necessarily conducted with the limitations that attend the foreclosures of ordinary real-estate mortgages.

We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. While exceptional cases may occur, yet this is the rule, as shown by the actual facts of foreclosure proceedings, as well as one which might be expected from the value of the property and the amount of the mortgage. We may not shut our eyes to any facts of common knowledge. We may not rightfully say that the contract of mortgage created certain rights, and that when those rights are established they must be sustained in the courts, and no inquiry can be had beyond those technical rights. We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property whether as mortgagee, creditor, or mortgagor. We do not stop to inquire, because the question is not presented by this record, whether a court is justified in permitting a foreclosure and sale which leaves any interest in the mortgagor, to wit, the railroad company and its stockholders, and ought not always to require an extinction of all the mortgagor's interest and a full transfer to the mortgagee, representing the bondholders. Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unse-
[684]cured creditors *and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first, of secured, and then of unsecured, creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.

Now, the intervening petition of the petitioner, duly verified, directly charged that the foreclosure proceedings were for the benefit alone of bondholder and stockholder and under an agreement between the two for a sale and purchase for both, and with a view of thereby excluding from any interest in the property all unsecured creditors; that this agreement was entered into after and in consequence of the decree of the United States courts of appeals adjudging the New Albany company liable on its guaranty. If that fact be true would it not be, and we quote the language of the court of appeals, "a travesty upon equity proceedings?" Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of the mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated.

Beyond the positive and verified statement of the petition of the Louisville Trust Company are many facts appearing in the record which strongly support this allegation. That a corporation whose stock consists of $16,000,000, $7,000,000 of which is preferred stock, all of which must be expected to be wiped out if a mortgage interest of $13,800,000 is fully asserted, hastens into court and confesses judgment on an alleged unsecured *lia- [685]
bility; on the same day responds to an application for a receiver and assents thereto; makes no effort during the receivership to prevent default in interest obligations; tacitly, at least, consents to an order made on application of the receiver for the issue of $200,000 worth of receiver's certificates in aid of betterments on the road, when the same sum might have paid the interest and delayed the foreclosure; when foreclosure bills are filed not only makes no denial, but admits all the averments of mortgage obligation and default—in other words, seems a debtor most willing to have all its property destroyed, and this because of one short wheat crop; these matters suggest, at least, that there is probable truth in the sworn averment of the petitioner that all was done by virtue of an agreement between mortgagee and mortgagor (bondholder and stockholder) to preserve the relative interests of both, and simply extinguish unsecured indebtedness. When, in addition to this fact, it appears that these proceedings are initiated within a few days after a decree of the circuit court of appeals—a decree final unless brought to this court for review in its discretion by certiorari; that a large amount of unsecured

indebtedness was by that decree cast upon the mortgagor, we cannot doubt that such a condition of things was presented to the trial court that it ought, in discharge of its obligations to all parties interested in the property, to have made inquiry and ascertained that no such purpose as was alleged in the intervening petition was to be consummated by the foreclosure proceedings.

It is said by the appellee that the Louisville Trust Company was dilatory, and that by reason thereof it was not entitled to consideration in a court of equity. There is some foundation for this contention, and yet there was not such delay as justified the court in refusing to enter upon an inquiry. Indeed it does not appear that either the circuit court or the circuit court of appeals considered the petitioner dilatory or denied its application on the ground of delay. It must be borne in mind that the bill of complaint filed on August 24 by one who had that day become, by consent of the defendant, a judgment creditor, was affirmatively
[686] "for the purpose of enforcing the *rights of complainant and all other creditors of said insolvent corporation according to their due equities and priorities," and to "decree the rights, liens, and equities of each and all of the creditors of the said Louisville, New Albany, & Chicago Railway Company as the same may be finally ascertained and decreed by the court upon the respective claims and interventions of several of such creditors or lienors in and to, not only the said line of railroad appurtenances and equipment or any part of them, but also to and upon each and every portion of the assets and property of the said insolvent corporation."

Although this bill was filed in the avowed interest of himself and all other creditors, no action was taken to notify any creditors or to bring them into court to present their several claims. Any creditor might well have waited, even with knowledge of what had taken place, and after an examination of the bill thus filed, until publication or other notice. Whether this petitioner was, in fact, aware of these proceedings is not disclosed. Even if it were, its waiting a reasonable time for what in the ordinary course of procedure all creditors had a right to expect, is not a neglect which destroys its equities. It, and all other creditors, might justly assume that this proceeding was initiated in good faith to subject the property of the common debtor to the payment of all its debts; primarily it may be its secured debts, but also generally all its debts, secured or unsecured, and that whenever it was necessary due notice would be given and all creditors called upon to present their claims. It would not have been justified in treating this proceeding as solely in the interest of the mortgagee and mortgagor, the bondholder and stockholder, and for the purpose of destroying all claims of unsecured creditors.

It is true that the filing of the bills of foreclosure was notice of an intent to subject the property belonging to the mortgagor to the satisfaction of the mortgage. And for the purposes of the present inquiry it may be conceded that the intervening petition disclosed no legal defense to the claims of the mortgagees to foreclosure. In other words, for the inquiry we desire to pursue we shall assume without question that the matters referred to in the petition in respect to the property *in Illinois, the decison of the su- [687]
preme court of that state and the effect of the attempted consolidation, and all other matters stated or suggested, separately or together, constitute no valid defense to the foreclosure bills. But this foreclosure proceeding did not either directly or by suggestion disclose any purpose to protect the mortgagor, the stockholder, at the expense of unsecured creditors. And, as heretofore stated, this unsecured creditor was not bound to presume that there was any such purpose in the minds of the two parties to the foreclosure. So that its failure to intervene at the first instant cannot be fatal delay or neglect.

It is also true that no evidence was offered by the petitioner in support of the allegations of its petition, but it is not true that in revising and reversing the final action of the circuit court we are acting on mere suspicion, or disturbing either settled rules or admitted rights. The allegations of this intervening petition as to the wrong intended and being consummated were specific and verified. The delay, under the circumstances, was not such as to deprive the petitioner of a right to be heard. The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner, it was the duty of the trial court to have stayed proceedings, and given time to produce evidence in support of the charges. Taking them as a whole, they are very suggestive, independent of positive allegation; so suggestive at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it.

We cannot shut our eyes to the fact that one claiming to be a general creditor for nearly half a million of dollars commences proceedings to establish his right, which, by the consent of the debtor, result on the very day in a judgment, execution, and return thereof unsatisfied, a bill for a receivership and the appointment of a receiver; and yet notwithstanding this was initiated in support of this large claim, as well as for the protection of other unsecured creditors, shortly thereafter foreclosure proceedings are instituted and carried on to completion, which absolutely ignore the rights of this alleged *unsecured creditor, and leave as the [688]
result of the sale himself the actor who has brought on the possibility of foreclosure stripped of all rights in and to the mortgaged property. Was he a real creditor, and did that real creditor make a generous donation of this large claim? Were arrangements made with him and the stockholders to protect both, and by virtue of such arrangements was this foreclosure hastened to its close? Questions like these which lie on the surface of these proceedings cannot be put one side on the suggestion that they present only matter of suspicion.

It is no answer to these objections to say that a bondholder may foreclose in his own separate interest, and, after acquiring title to the mortgaged property, may give what interest he pleases to anyone, whether stockholder or not, and so these several mortgagees foreclosing their mortgages, if proceeding in their own interest, if acquiring title for themselves alone, may donate what interest in the property, acquired by foreclosure they desire. But human nature is something whose action can never be ignored in the courts, and parties who have acquired full and absolute title to property are not as a rule donating any interest therein to strangers. It is one thing for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure. The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor.

We may observe that a court, assuming in foreclosure proceedings the charge of railroad property by a receiver, can never rightfully become the mere silent registrar of the
[689] agreements *of mortgagee and mortgagor. It cannot say that a foreclosure is a purely technical matter between the mortgagee and mortgagor, and so enter any order or decree to which the two parties assent without further inquiry. No such receivership can be initiated and carried on unless absolutely subject to the independent judgment of the court appointing the receiver; and that court in the administration of such receivership is not limited simply to inquiry as to the rights of mortgagee and mortgagor, bondholder, and stockholder, but considering the public interests in the property the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.

While not intending any displacement of the ordinary rules or rights of mortgagor and mortgagee in a foreclosure we believe that under the circumstances as presented by this record there was error; that the charge alleged positively, and supported by many circumstances, of collusion between the bondholder and the stockholder, to prevent any beneficial result inuring by virtue of the decree of the circuit court of appeals for the sixth circuit in reference to the guaranty obligations of the New Albany company, was one compelling investigation, and *the order will therefore be that the decrees of the Circuit Court and of the Circuit Court of Appeals be reversed*, and the case be remanded to the circuit court, with instructions to set aside the confirmation of sale; to inquire whether it is true as alleged that the foreclosure proceedings were made in pursuance of an agreement between the bondholder and stockholder to preserve the rights of both and destroy the interests of unsecured creditors; and that if it shall appear that such was the agreement between these parties to refuse to permit the confirmation of sale until the interests of unsecured creditors have been preserved, and to take such other and further proceedings as shall be in conformity to law.

Decree accordingly.

Mr. Justice **Peckham** dissented.

UNITED STATES, *Appt.*, [690]

v.

RIO GRANDE DAM & IRRIGATION COMPANY, and the Rio Grande Irrigation & Land Company, Limited.

(See S. C. Reporter's ed. 690-710.)

Judicial notice of navigability of river—what is a navigable river—a state cannot destroy the right of the United States—right of general government to preserve navigability of navigable watercourses—appropriation of water for mining or for arid lands—obstruction prohibited by act of Congress.

1. The courts can take judicial notice that a river is navigable, but not of the fact at what point between its mouth and its source navigability ceases; that fact is to be determined by evidence unless it is a matter of general knowledge.
2. The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river.
3. In the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States as owner of the lands bordering on a stream to the continued flow of its waters.
4. The jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country, even against any state action.
5. The acts of Congress which permit the appropriation of water in aid of mining industries and for the reclamation of arid lands do not authorize the appropriation of the waters of the source of navigable streams above the point of navigability, to such an extent as to destroy or seriously injure their navigability.
6. The prohibition by the act of Congress of September 19, 1890, against the creation of any obstruction to the navigable capacity of any waters, includes not only an obstruction in the navigable portion of the stream, but also anything, wherever or however done, to destroy the navigable capacity of one of the navigable waters of the United States.

[No. 215.]

Argued November 7, 8, 1898. Decided May 22, 1899.

APPEAL from a decree of the Supreme Court of the Territory of New Mexico affirming the decree of the District Court of the Third Judicial District of New Mexico in a suit in equity brought by the United States to restrain the Rio Grande Dam & Irrigation Company from constructing a dam across the Rio Grande River in the territory of New Mexico, and from appropriating the waters of that stream for the purposes of irrigation, determining that the Rio Grande River is not navigable within the territory of Mexico, and that the United States is not entitled to the relief asked for, that the complaint is without equity, and that the temporary injunction be dissolved. *Reversed*, and case remanded, with instructions to set aside the decree of dismissal and to make inquiry as to whether the construction of the dam and appropriating of the said waters would diminish the navigability of the Rio Grande, and, if so, to enter a decree restraining such act.

See same case below, 9 N. M. —, 51 Pac. 674.

Statement by Mr. Justice **Brewer:**

On May 24, 1897, the United States, by their Attorney General, filed their bill of complaint in the district court of the third judicial district of New Mexico against the Rio Grande Dam & Irrigation Company, the purpose of which was to restrain the defendant from constructing a dam across the Rio Grande river in the territory of New Mexico, and appropriating the waters of that stream, for the purposes of irrigation. A temporary injunction was issued on the filing of the bill. Thereafter, and on the 19th day of June, 1897, an amended bill was filed, making the Rio Grande Irrigation & Land Company, Limited, an additional defendant, the scope and purpose of the amended bill being similar to that of the original. The amended bill stated that the original defendant was a corporation organized under the laws of the territory of New Mexico, and
[691] the new defendant a corporation *organized under the laws of Great Britain. It was averred that the purpose of the original defendant, as set forth in its articles of incorporation and as avowed by it, was to construct dams across the Rio Grande river in the territory of New Mexico at such points as might be necessary, and thereby "to accumulate and impound waters from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches, and pipe lines." The new defendant was charged to have become interested as lessee of or contractor with the original defendant. The bill further set forth that the new defendant "has attempted to exercise and has claimed the right to exercise all the rights, privileges, and franchises of the said original defendant, and has given out as its objects as said agent, lessee, or assignee, as aforesaid, to construct said dams, reservoirs, ditches, and pipe lines, and take and impound the water of said river, and thereby to create the largest artificial lake in the world, and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power;" "that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos river, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Conchos river, throughout almost its entire course from the latter part to its mouth, flows through an exceedingly porous soil, and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico is so dry that the evaporation proceeds with great rapidity and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river." The bill also averred that the Rio Grande river was navigable and had been navigable by steamboats from its mouth three hundred and fifty miles up to the town of Roma, in the state of Texas; that it *was susceptible of navigation above [692]
Roma to a point about three hundred and fifty miles below El Paso, in Texas, and then, after stating that there were certain rapids or falls which there interfered with navigation, it alleged navigability from El Paso to La Joya, about one hundred miles above Elephant Butte, the place at which it was proposed to erect the principal dam, and that it had been used between those points for the floating and transportation of rafts, logs, and poles. The bill further alleged "that the impounding of the waters of said river by the construction of said dam and reservoir at said point, called Elephant Butte, about one hundred and twenty-five miles above the city of El Paso, said point being in the territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned, will so deplete and prevent the flow of water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth." Then, after denying that any authority had been given by the United States for the construction of said dam, it set forth the treaty stipulations between the United States and the Republic of Mexico in reference to the navigability of the Rio Grande, so far as it remained a boundary between the two nations.

To this amended bill the defendants filed their joint and several pleas and answer. The pleas were principally to the effect that the site of the proposed dam was wholly within the territory of New Mexico, and within its arid region; that in pursuance of several acts of Congress the Secretary of the Interior and the officers of the Geological Survey had located and segregated from the public domain a reservoir site called "38" on the river just above Elephant Butte, and another called "39" just below that point; that

subsequently, in pursuance of another act of Congress, these and all other reservoir sites were thrown open to corporate and private entry; that the original defendant had applied to enter the two sites, "38" and "39";
[693] that it was incorporated under the laws *of New Mexico and had complied with all the laws of that territory in reference to the construction of reservoirs and dams and the diversion of waters of public streams; that it had duly filed proof of its organization, its maps of survey of reservoir and canals, with the Secretary of the Interior, and had secured his approval thereof in accordance with the laws of the United States. The answer admitted incorporation, the purpose to construct a dam and reservoir at Elephant Butte, and then proceeded, "but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation & Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same, has long since been diverted and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights, and that neither one of the defendants is seeking or has ever sought to appropriate or divert by means of structures above referred to, or contemplated diversion by means thereof, of any of the waters of said Rio Grande usually flowing in the bed thereof during the time when the same are usually put to beneficial use by those who have heretofore diverted the same; but on the contrary these defendants state that it has been their intention, and their sole intention, by means of the structures which they contemplate and which are complained of in said bill, to store, control, divert, and use only such of the waters of said stream as are not legally diverted, appropriated, used, and owned by others, and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now unappropriated, useless, and which go to waste."

The answer also denied that the river was susceptible of navigation, or had been navigated above Roma, in the state of Texas, or had been used beneficially for the purposes of navigation in the territory of New Mexico,
[694] or was susceptible *of being so used; that the contemplated use of the waters would deplete the flow thereof through the channel so as to seriously obstruct the navigability of the river at any point below the proposed dam; that defendants were proposing to construct a dam and reservoir without due process of law, or that the contemplated dam and reservoir would be a violation of our treaties with Mexico. The United States filed a general replication. Defendants moved to dissolve the temporary injunction, while the government moved to have the several pleas set down for argument as to their sufficiency as a defense. Several affidavits and documents were filed by the respective parties. On July 31, 1897, the matters came on for hearing, whereupon the court entered a decree, which recited that the parties appeared by their counsel "under the rule heretofore made upon the defendant, Rio Grande Dam & Irrigation Company, to show cause, if any it had, why the injunction, heretofore granted, restraining it from maintaining and erecting a dam in the Rio Grande river at a point called Elephant Butte, fully described in the original and amended bills, filed herein and in said order, should not be continued; and the said complainant, the United States of America, having filed an amended bill in said cause, making the Rio Grande Irrigation & Land Company, Limited, a party thereunder, and the said defendant, in answer to said amended bill, having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein, and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law, and the court having heard the arguments of counsel and having read the affidavits, extracts from geological reports, agricultural reports, reports of engineers and of the Secretary of War, histories and other sources of information, and having had submitted to it an official map of the territory of New Mexico and of the United States of America, showing the source, trend, course, and mouth of the Rio Grande river in New Mexico and throughout the United States, and being fully *advised thereby, doth take judicial notice of [695]
the fact, and doth thereby determine that the Rio Grande river is not navigable within the territory of New Mexico, and doth find, as a matter of law, that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill, and that the same is without equity, and, the complainant having further declined to amend said bill, the court doth order, adjudge, and decree, that the said injunction, heretofore issued, herein be dissolved, and that said cause be, and the same hereby is, dismissed, and that the defendants have and recover their reasonable costs herein to be taxed against complainant."

An appeal was taken to the supreme court of the territory, which, on January 5, 1898, affirmed the decree. From this affirmance the United States appealed to this court.

Mr. **John W. Griggs,** Attorney General, for appellant.

Mr. **J. H. McGowan** for appellee.

*Mr. Justice **Brewer** delivered the opin- [695]
ion of the court:

The first question is as to the scope of the decision of the trial court and what is therefore presented to us for consideration. Was this a final hearing upon pleadings alone,

with all the facts alleged in the answer admitted to be true, or a final hearing upon pleadings and proofs with the decree in effect finding the truth of those facts? Without stopping to inquire whether the record shows a strict compliance with the technical rules of equity procedure, we think the terms of the final order or decree, as well as the language of the opinion filed by the trial judge, clearly disclose what he decided, and what, therefore, is presented to this court for review. It appears that no depositions were taken. Certain affidavits and documents were filed, matter proper for presentation on an application for the continuance or dissolution of a temporary injunction. The final
[696] order or decree enumerates *the different motions, and adds that the court having heard the arguments of counsel and having read the affidavits, etc., 'doth take judicial notice of the fact and doth thereby determine that the Rio Grande river is not navigable within the territory of New Mexico, and doth find, as a matter of law, that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill, and the same is without equity, and the complainant having further declined to amend said bill." the injunction is dissolved and the bill dismissed.

Obviously, the only matter of fact which the court attempted to determine (and that determination appears to have been based partly upon the affidavits and documents filed and partly upon judicial notice) was that the Rio Grande river was not navigable within the limits of the territory of New Mexico, and, so determining, it adjudged and decreed that the complainant's bill was without equity. In other words, finding that the Rio Grande river was not navigable within the limits of the territory of New Mexico, and that the averments of the bill in that respect were not true, it held that, conceding all the other averments of the bill to be true, the plaintiff was not entitled to relief.

The supreme court of the territory, as appears from its opinion, held that the Rio Grande river was not navigable within the limits of the territory of New Mexico; that, therefore, the United States had no jurisdiction over the stream, and that, assuming its non-navigability within the limits of the territory, the plaintiff was not, under the other facts set forth in the bill, entitled to any relief. Whatever criticisms may be expressed as to the form in which the proceedings were had and the decree entered, these distinctly appear as the matters decided by the trial and supreme courts, and to them, therefore, our inquiry should run.

The trial court assumed to take judicial notice that the Rio Grande was not navigable within the limits of New Mexico. The right to do this was conceded by the counsel for the government, on the hearing below, a concession which the Attorney General, on
[697] the argument before us, declined to *continue. The extent to which judicial notice will go is not, in all cases, perfectly clear. There are indisputably certain matters as to which there is a legal imputation of knowledge. In Greenleaf on Evidence, secs. 4, 5 and 6, the author enumerates many of these. Further, he adds as a general proposition: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." *Brown* v. *Piper*, 91 U. S. 37 [23: 200]. While this will undoubtedly be accepted as an accurate statement of the law, it is obvious that there might be, and in fact there is, much difficulty in determining what ought to be generally known. So that the application of this rule has, as might be expected, led to some conflict in the authorities.

It was said in *The Apollon*, 9 Wheat. 362-374 [6: 111-114]: "It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions." In *Peyroux* v. *Howard et al.* 7 Pet. 324 [8: 700], the court held that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place." In *The Montello*, 11 Wall. 411-414 [20: 191, 192], it was observed: "We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States." But the force of this general statement is qualified by the declaration at the close of the opinion: "As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox river as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading."

This case came again to this court (20 Wall. 430 [22: 391]), and the record there discloses that testimony was introduced on the second hearing for the purpose of throwing light on the question of navigability.

In *Wood* v. *Fowler*, 26 Kan. 682-687 [40 Am. Rep. 330], the supreme court of that state said: "Indeed, it would seem absurd to require evidence as to that which every man of common *information must know. [698]
To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet, within the limits of any state the navigibility of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge and take judicial notice thereof."

It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence and to be de-

termined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or one that ought to be generally known? If not, it should be determined by evidence. Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico. The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river. It was said in *The Montello*, 20 Wall. 430, 439 [22: 391, 394], "that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." And again (p. 442 [22: 394]): "It is not, however, as Chief Justice Shaw said [*Rowe* v. *Granite-Bridge Corp.*] 21 Pick.
[699] 344, 'every small creek in *which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to . . . give it the character of a navigable stream, . . . it must be generally and commonly useful to some purpose of trade or agriculture.'"

Obviously, the Rio Grande within the limits of New Mexico is not a stream over which in its ordinary condition trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox river, which was considered in the Montello, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream in its ordinary condition susceptible of use for general navigation purposes. We are not, therefore, disposed to question the conclusion reached by the trial court and the supreme court of the territory, that the Rio Grande within the limits of New Mexico is not navigable.

Neither is it necessary to consider the treaty stipulations between this country and Mexico. It is true that the Rio Grande, for several hundred miles above its mouth, forms the boundary between this country and Mexico, and that the seventh article of the treaty between the United States and Mexico of February 2, 1848 (9 Stat. at L. 928), stipulates that "the River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. . . . The stipulations contained in the present article shall *not impair the territorial rights of [700]
either Republic within its established limits." But by the fourth article of the Gadsden treaty of December 30, 1853 (10 Stat. at L. 1034), it was provided that "the several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31 degree 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe." And on December 26, 1890, a convention was concluded between the United States and Mexico (26 Stat. at L. 1512), which provided for an international boundary commission, to which was given, by article five, the power to inquire, upon complaint of the local authorities, whether works were being constructed in the Rio Grande prohibited by any prior treaty stipulations. There is no suggestion in the bill that any action by these commissioners was invoked, although it appears from one of the affidavits that the commission has been duly constituted. Now it is debated by counsel whether the construction of a dam at the place named in New Mexico, a place wholly within the territorial jurisdiction of the United States, is a violation of any of the treaty stipulations above referred to—they being, primarily at least, limited to that portion of the river which forms the boundary line between the two nations; and also whether the fact that the Rio Grande is partially within the limits of Mexico would give that nation, under the rules of international law, any right to complain of the total appropriation of its waters for legitimate uses of the people of the United States. Such questions might under some circumstances be interesting and important; but here the Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being, where navigable, the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligation of the United States to preserve for their own citizens the *navigability of its navigable [701]
waters is certainly as great as any arising by treaty or international law to other nations or their citizens, and if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty to Mexico, they also constitute an equal injury and wrong to the people of the United States.

We may, therefore, properly limit our inquiry to the effect of the proposed dam and

appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the government to interfere. The intended construction of the dam and impounding of the water are charged in the bill and admitted in the answer. The bill further charges that the purpose is to obtain control of the entire flow of the river, and divert and use it for irrigation and supplying waters for municipal and manufacturing uses; that, by reason of the porous soil, the dry atmosphere and consequent rapid evaporation, but little water thus taken from the river and distributed over the surface of the earth will ever be returned to the river, and that this appropriation of the waters will so deplete and prevent the flow of water through the channel of the river below the dam as to seriously obstruct the navigable capacity of the river throughout its entire course even to its mouth. The answer, while denying an intent to appropriate all the waters of the Rio Grande, states that the entire flow, during the irrigation season, at the point where defendants propose to construct reservoirs, had long since been diverted, and was owned and beneficially used by parties other than defendants, that they did not seek to disturb such appropriation, but that their sole intention was to appropriate only such waters as had not already been legally appropriated, and that the beneficial rights to be acquired in the stream by virtue of the structures would be very largely only so acquired from the excess, storm and flood waters now unappropriated, useless, and going to waste. In other words, the bill charges that the defendants, at the places where they proposed to
[702] construct their dam, *intend thereby to appropriate all the waters of the Rio Grande, and defendants qualify that charge only so far as they say that most of the flow of the river is already appropriated, and they only propose to take the balance. The bill charges that such appropriation of the entire flow will seriously obstruct the navigability of the river from the place of the dam to the mouth of the stream. The defendants deny this, but as the court found that there was no equity in the bill, and dismissed the suit on that ground, we must for the purposes of this inquiry assume that it is true, that defendants are intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable. The right to do this is claimed by defendants and denied by the government, and that, generally speaking, is the question presented for our consideration.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, sec. 439):

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion *a state may change this common-law [703]
rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common-law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a territory, we do not deem it necessary for the purposes of this case to inquire. We concede, *arguendo*, that it does.

Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action. It is true there have been frequent decisions recognizing the power of the state, in the absence of congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges, and other matters which operate as obstructions to navigability. The power of the state to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the states, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. See, among others, the following: *Wilson* v. *Black Bird Creek Marsh Co.* 2 Pet. 245 [7: 412]; *Gilman* v. *Philadelphia*, 3 Wall. 713 [18: 96]; *Escanaba Co.* v. *Chicago*, 107 U. S. 678 [27:

442]; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 [31: 629].

[704] *All this proceeds upon the thought that the nonaction of Congress carries with it an implied assent to the action taken by the state.

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule —a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the state, nothing is presented which calls for any consideration by the Federal courts. In 1866 Congress passed the following act (14 Stat. at L. 253, chap. 262; Rev. Stat. 2339):

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water. In respect to this, in *Broder* v. *Natoma Water & Min. Company*, 101 U. S. 274, 276 [25: 790, 791], it was said:

[705] *"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In 1877 an act was passed for the sale of desert lands, which contained in its first section this proviso (19 Stat. at L. 377, chap. 107):

"*Provided, however,* That the right to the use of water by the persons so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."

On March 3, 1891, an act was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided (26 Stat. at L. 1101):

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its *laterals, and fifty feet on each [706]
side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories."

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts—that all through this mining region in the west were streams not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to

give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the [707]legislation *and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890. On September 19, 1890, an act was passed containing this provision (26 Stat. at L. 454, sec. 10):

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed, by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least, as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law, to the [708]navigable capacity of any *waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that Congress meant that thereafter no state should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of non-navigable streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute, as well as in the act of July 13, 1892 (27 Stat. at L. 88, 110), provide for the mode of asserting that control. It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the national government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

*The creation of any such obstruction may [709] be enjoined, according to the last provision of the section, by proper proceedings in equity under the direction of the Attorney General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson river runs within the limits of the state of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which

flows into it and contributes to the volume of its waters is the Croton river, a non-navigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation.

Without pursuing this inquiry further we
[710] are of the opinion *that there was error in the conclusions of the lower courts; that the *decree must be reversed*, and the case remanded, with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.

Mr. Justice **Gray** and Mr. Justice **McKenna** were not present at the argument, and took no part in the decision.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

E. H. STURM.

(See S. C. Reporter's ed. 710-718.)

Exemption laws—jurisdiction in garnishment.

1. Exemption laws are not part of the contract; they are part of the remedy and subject to the law of the forum.
2. Jurisdiction in garnishment of a debt due to a nonresident creditor may be acquired without service on him except by publication, so as to make a judgment against him valid and entitle it to full faith and credit in other states.

[No. 236.]

Submitted April 5, 1899. Decided May 22, 1899.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court affirming the judgment of the Court of Appeals of that state, which affirmed the judgment of a Justice's Court of Republic County, Kansas, in favor of E. H. Sturm, plaintiff in an action brought by him against the Chicago, Rock Island, & Pacific Railway Company for services rendered to defendant, which pleaded certain garnishment proceedings in another state. *Reversed*, and case remanded for further proceedings.

Statement by Mr. Justice **McKenna:**

The defendant in error brought an action against the plaintiff *in error in justices' [711]
court of Belleville, Republic county, Kansas, for the sum of $140, for wages due. Judgment was rendered for him in the sum of $140 and interest and costs.

The plaintiff in error appealed from the judgment to the district court of the county, to which court all the papers were transmitted, and the case docketed for trial.

On the 10th of October, 1894, the case was called for trial, when plaintiff in error filed a motion for continuance, supported by an affidavit affirming that on the 13th day of December, 1893, in the county of Pottawattomie and state of Iowa, one A. H. Willard commenced an action against E. H. Sturm in justices' court before Oride Vier, a justice of the peace for said county, to recover the sum of $78.63, with interest at the rate of ten per cent per annum, and at the same time sued out a writ of attachment and garnishment, and duly garnished the plaintiff in error, and at that time plaintiff in error was indebted to defendant in error in the sum of $77.17 for wages, being the same wages sought to be recovered in this action;

That plaintiff in error filed its answer, admitting such indebtedness;

That at the time of the commencement of said action in Pottawattomie county the defendant was a nonresident of the state of Iowa, and that service upon him was duly made by publication, and that afterwards judgment was rendered against him and plaintiff in error as garnishee for the sum of $76.16, and costs of suit amounting to $19, and from such judgment appealed to the district court of said county, where said action was then pending undetermined;

That the moneys sought to be recovered in this action are the same moneys sought to be recovered in the garnishment proceedings, and that under the laws of Iowa its courts had jurisdiction thereof, and that the said moneys were not at the time of the garnishment exempt from attachment, execution, or garnishment; that the justice of the peace at all of the times of the proceedings was a duly qualified and acting justice, and that all the proceedings were commenced prior to the commencement of the present action, and that if the case *be continued un- [712]
til the next term of the court the action in Iowa will be determined and the rights of plaintiff in error protected.

The motion was denied, and the plaintiff in error pleaded in answer the same matters alleged in the affidavit for continuance, and attached to the answer a certified copy of the proceedings in the Iowa courts. It also alleged that it was a corporation duly or-

ganized under the laws of the states of Illinois and Iowa, doing business in the state of Kansas.

The defendant in error replied to the answer, and alleged that the amount due from plaintiff in error was for wages due for services rendered within three months next prior to the commencement of the action; that he was a resident, head of a family, and that the wages were exempt under the laws of Kansas, and not subject to garnishment proceedings; that plaintiff in error knew these facts, and that the Iowa court had no jurisdiction of his property or person.

Evidence was introduced in support of the issues, including certain sections of the laws of Iowa relating to service by publication, and to attachment and garnishment, and judgment was rendered for the defendant in error in the amount sued for.

A new trial was moved, on the ground, among others, that the "decision is contrary to and in conflict with section 1, article IV., of the Constitution of the United States."

The motion was denied.

On error to the court of appeals, and from thence to the supreme court, the judgment was affirmed, and the case was then brought here.

The defendant in error was notified of the suit against him in Iowa and of the proceedings in garnishment in time to have protected his rights.

The errors assigned present in various ways the contention that the supreme court of Kansas refused to give full faith and credit to the records and judicial proceedings of the courts of the state of Iowa, in violation of section 1, article IV. of the Constitution of the United States, and of the act of Congress entitled "An Act to Prescribe the Mode in Which the Public Acts, Records, and Judicial Proceedings in Each
[713] State *shall be Authenticated so as to Take Effect in Every Other States," approved May 26, 1890.

Messrs. **W. F. Evans** and **M. A. Low** for plaintiff in error.

No counsel for defendant in error.

[713] *Mr. Justice **McKenna** delivered the opinion of the court:

How proceedings in garnishment may be availed of in defense—whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution—the practice of the states of the Union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defense in some way.

In the pending suit plaintiff in error moved for a continuance, and not securing it pleaded the proceedings in garnishment in answer. Judgment, however, was rendered against it and sustained by the supreme court, on the authority of *Missouri Pacific Railway Co.* v. *Sharitt*, 43 Kan. 375 [8 L. R. A. 385], and "for the reasons stated by Mr. Justice Valentine in that case."

The facts of that case were as follows: The Missouri Pacific Railway Company was indebted to Sharitt for services performed in Kansas. Sharitt was indebted to one J. P. Stewart, a resident of Missouri. Stewart sued him in Missouri, and attached his wages in the hands of the railway company, and the latter answered in the suit in accordance with the order of garnishment on the 28th of July, 1887, admitting indebtedness, and on the 29th of September was ordered to pay its amount into court. On the 27th of July Sharitt brought an action in Kansas against the railway company to recover for his services, and the company in defense pleaded the garnishment and order of the Missouri court. The amount due Sharitt having been for wages, was exempt from attachment in Kansas. It was held that the garnishment was not a defense. The facts were similar therefore to those of the case at bar.

The ground of the opinion of Mr. Justice Valentine was *that the Missouri court had [714]
no jurisdiction because the situs of the debt was in Kansas. In other words, and to quote the language of the learned justice, "the situs of a debt is either with the owner thereof, or at his domicil; or where the debt is to be paid: and it cannot be subjected to a proceeding in garnishment anywhere else. . . . It is not the debtor who can carry or transfer or transport the property in a debt from one state or jurisdiction into another. The situs of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent."

The primary proposition is that the situs of a debt is at the domicil of a creditor, or, to state it negatively, it is not at the domicil of the debtor.

The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law in adapting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said by Mr. Justice Gray in *Wyman* v. *Halstead*, 109 U. S. 656 [27: 1069]: "The general rule of law is well settled, that for the purpose of founding administration all simple-contract debts are assets at the domicil of the debtor." And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requires it to protect home creditors. *Wilkins* v. *Ellett*, 9 Wall. 740 [19: 586]; 108 U. S. 256 [27: 718]. Debts cannot be assets at the domicil of the debtor if their locality is fixed at the domicil of the creditor, and if the policy of the state of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings.

For illustrations in matters of taxation, see *Kirtland* v. *Hotchkiss*, 100 U. S. 491 [25: 558]; *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 18 [35: 613, 3 Inters. Com. Rep. 595]; *Savings & Loan Society*

v. *Multnomah County*, 169 U. S. 421 [42: 803].

Our attachment laws had their origin in [715] the custom of *London. Drake, sec. 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews* v. *Clerke*, Carth. 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows:

"Andrews levied a plaint in the sheriff's courts in London and, upon the usual suggestion that one T. S. (the garnishee) was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S. Which was accordingly done; and then a diletur was entered, which is in the nature of an imparlance in that court.

"Afterwards T. S. (the garnishee) pleaded to the jurisdiction setting forth that the cause of debt due from him to the defendant Sir Robert Clarke, and the contract on which it was founded, did arise, and was made at H. in the county of Middlesex, *extra jurisdictionem curiæ;* and this plea being overruled, it was now moved (in behalf of T. S., the garnishee), for a prohibition to the sheriff's court aforesaid, suggesting the said matter (*viz.*), that the cause of action did arise *extra jurisdictionem*, etc., but the prohibition was denied because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange, and goldsmith's notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed, liveth within the city, without any respect had to the place where the debt was contracted."

The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do [716] it you must go to the *domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney* v. *Buford & George Mfg. Co.* [34 U. S. App. 581] 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

To ignore this is to give immunity to debts owed to nonresident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.

Besides the proposition which we have discussed there are involved in the decision of the *Sharitt Case* the propositions that a debt may have a situs where it is payable, and that it cannot be made migratory by the debtor. The latter was probably expressed as a consequence of the primary proposition, and does not require separate consideration. Besides, there is no fact of change of domicil in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted, and we are not concerned to inquire whether the cases which decide that a debtor temporarily in a state cannot be garnisheed there, are or are not justified by principle.

The proposition that the situs of a debt is where it is to be paid is indefinite. "All debts are payable everywhere, unless *there [717] be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons, Contracts, 8th ed. 702. The debt involved in the pending case had no "special limitation or provision in respect to payment." It was payable generally and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose. *Embree* v. *Hanna*, 5 Johns. 101; *Hull* v. *Blake*, 13 Mass. 153; *Blake* v. *Williams*, 6 Pick. 286; *Harwell* v. *Sharp Bros.* 85 Ga. 124 [8 L. R. A. 514]; *Harvey* v. *Great Northern R'y Co.* 50 Minn. 405 [17 L. R. A. 84]; *Mahaney* v. *Kephart, and the Baltimore & O. R'd Co.* 15 W. Va. 609; *Leiber* v. *Union P. Railroad Co.* 49 Iowa, 688; *National Fire Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; *Holland* v. *The Mobile & Ohio R'd Co.* 16 Lea, 414; *Pomeroy* v. *Rand, McNally, & Co.* 157 Ill. 176; *Berry Bros.* v. *Nelson Davis & Co.* 77 Tex. 191; *Wyeth Hardware & Mfg. Co.* v. *Lang*, 127 Mo. 242 [27 L. R. A. 651]; *Howland* v. *Chicago, R. I. & P. R'y Co.* 134 Mo. 474.

Mr. Justice Valentine also expressed the view that "if a debt is exempt from a judicial process in the state where it is created, the exemption will follow the debt as an incident thereto into any other state or juris-

diction into which the debt may be supposed to be carried." For this he cites some cases.

It is not clear whether the learned justice considered that the doctrine affected the jurisdiction of the Iowa courts or was but an incident of the law of situs as expressed by him. If the latter, it has been answered by what we have already said. If the former, it cannot be sustained. It may have been error for the Iowa court to have ruled against the doctrine, but the error did not destroy jurisdiction. 134 Mo. 474.

But we do not assent to the proposition. Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum. Freeman, Executions, sec. 209, and cases cited; also [*Min-*
[718] *eral Point R. Co.* v. **Barron*], 83 Ill. 365; [*Carson* v. *Memphis & C. R. Co.*] 88 Tenn. 646 [8 L. R. A. 412]; [*Conley* v. *Chilcote*], 25 Ohio St. 320; *Albrecht* v. *Treitschke*, 17 Neb. 205; *O'Connor* v. *Walter*, 37 Neb. 267 [23 L. R. A. 650]; [*Chicago, B. & Q. R. Co.* v. *Moore*], 31 Neb. 629; *Moore* v. *Chicago, R. I. & P. R. Co.* 43 Iowa, 385; *Broadstreet* v. *Clark, D. & C. M. & St. Paul R. Co., Garnishee*, 65 Iowa, 670; *Stevens for Use, etc.*, v. *Brown*, 20 W. Va. 450. See also *Bank of United States* v. *Donnally*, 8 Pet. 361 [8: 974]; *Wilcox* v. *Hunt*, 13 Pet. 378 [10: 209]; *Townsend* v. *Jemison*, 9 How. 407 [13: 194]; *Walworth* v. *Harris*, 129 U. S. 355 [32: 712]; *Penfield* v. *Chesapeake, O. & S. W. R. Co.* 134 U. S. 351 [33: 940]. To the extent to which *lex fori* governs, see Conflict of Laws, 571 *et seq.*

There are cases for and cases against the proposition that it is the duty of a garnishee to notify the defendant, his creditor, of the pendency of the proceedings, and also to make the defense of exemption, or he will be precluded from claiming the proceedings in defense of an action against himself. We need not comment on the cases or reconcile them, as such notice was given and the defense was made. The plaintiff in error did all it could and submitted only to the demands of the law.

In *Broadstreet* v. *Clark et al.* 65 Iowa, 670, the supreme court of the state decided that exemption laws pertained to the remedy, and were not a defense in that state. This ruling is repeated in *Willard* v. *Sturm*, 96 Iowa, 555, and applied to the proceedings in garnishment now under review.

It follows from these views that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had there, and were hence entitled to in Kansas.

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

DAVID CAMPBELL.

(See S. C. Reporter's ed. 718, 719.)

Chicago, Rock Island & Pacific Railway Company v. *Sturm*, No. 236, *ante*, 1144, followed.

[No. 235.]

Submitted April 5, 1899. Decided May 22, 1899.

IN ERROR to the Supreme Court of the State of Kansas.

The facts are stated in the opinion.

Messrs. **W. F. Evans** and **M. A. Low** for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **McKenna:**

*The facts of this case are substantially [719] the same as in No. 236 [174 U. S. 710, *ante*, 1144] except as to the amount involved, and the court in which the proceedings in attachment were commenced, and—

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

LUCY T. DAVIS, Millard P. McCormick, and Virginia-Alabama Company, *Plffs. in Err.*,

v.

LOUIS COBLENS and Martin Lauer.

(See S. C. Reporter's ed. 719-727.)

Evidence of adverse possession—statute of limitations—joint action of ejectment—when both plaintiffs barred—cross-examination of witness—instruction to jury.

1. The continuation of the adverse possession of a part of a square used as a brick yard, after the removal of that business, is a question for the jury, where there is evidence that some old brick were left on the premises, and the entire square was advertised for rent or sale by the claimants by posting four signs thereon, one sign being on the part in dispute, and they actually leased the whole square and paid taxes thereon.
2. By the statute of limitations of the District of Columbia the cumulative disability of an heir of a woman who died during the disability of coverture cannot arrest the running of the statute of limitations.
3. If one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot.
4. When once the statute of limitations has run against one of two parties entitled to a joint action of ejectment, it operates as a bar to such joint action.
5. The extent and manner of the cross-examination of a witness, even though it extends to matters not connected with his examination in chief, is within the discretion of the court.
6. Where a requested instruction to the jury is based upon the testimony of an uncontradicted witness, and assumes his credibility, the modification of it by the court, that the weight of his testimony is a question for the jury, does not discriminate against him.

[No. 246.]

Argued April 18, 19, 1899. Decided May 22, 1899.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming a judgment of

the Supreme Court of that District in favor of defendants, Louis Coblens *et al.*, in an action of ejectment brought by Lucy T. Davis *et al.*, plaintiffs, for lands in the city of Washington, D. C. *Affirmed.*

See same case below, 12 App. D. C. 51.

The facts are stated in the opinion.

Messrs. **Franklin H. Mackey** and *W. Mosby Williams* for plaintiffs in error.

Messrs. **J. J. Darlington** and *W. H. Sholes* for defendants in error.

[720] *Mr. Justice **McKenna** delivered the opinion of the court:

This is an action of ejectment brought by the plaintiffs in error and one Charles M. N. Latimer against the defendants in error for ninety-nine one-hundredths ($\frac{99}{100}$) undivided part of original lot ten (10), in square 1031, in the city of Washington, D. C.

The declaration was in the usual form, and defendants pleaded not guilty, on which issue was joined.

The plaintiffs derive title from Richard Young as heirs at law or grantees of heirs at law. The defendants claim by adverse possession under claim of title under an execution sale upon a judgment recovered against said Richard Young some time in the year 1826.

The case was tried by a jury. Before the case was submitted leave was granted to amend the declaration by striking out plaintiffs Charles M. N. Latimer and William W. Boarman. The verdict was for defendants. And after a motion for new trial was made and denied, judgment was entered in accordance therewith. The plaintiffs appealed to the court of appeals, where the judgment was affirmed, and the case was brought here.

There are eleven assignments of error in plaintiff's brief. All but three relate to instructions given or refused or modified concerning adverse possession. The plaintiffs contended for or objected to instructions which submitted the question of adverse possession to the jury. The other assignments of error will be noted hereafter.

1. The evidence of adverse possession contained in the bill of exceptions is as follows:

"The defendants thereupon further offered evidence tending to prove that on March 8,
[721] 1875, Isaac P. Childs, and *grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22d day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiff as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October without the consent of the defendants, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'4, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the brick were removed when they left; that these brick were in process of removal along during the winter of 1893–'94, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine house was located on the north part of lot 1, in said square, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to *the jury, [722] and that the rollers and machinery were north of the machine house; and on cross examination in regard thereto the said Charles Childs testified as follows:

"'I don't know but what the rollers might have been on lot 10. The machine house stood right in here (indicating), and the rollers might have been on lot 10.'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old brick were left on the ground, which the witness thought Childs & Sons abandoned, but they did not charge defendants for them, which were suitable for use in building, and were still there; that defendants made no use of them, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base ball park, but did not use it for that purpose; that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool boxes, and railroad iron on the square, though none was attempted to be deposited on lot 10; that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of

some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid, until June, 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs & Sons left the square, which was in the winter of 1893-'4, perhaps along in November, December, January, and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; that said
[723] James D. Childs did *not claim the land said bricks were on; that Mrs. Schultz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, though she made no use of it herself.

"The defendants thereupon produced as a witness in their behalf Goff A. Hall, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiff in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

We think the evidence was sufficient to justify the action of the court in submitting the question to the jury, and the exceptions based on such action were not well taken.

2. Did the adverse possession apply to the title derived by the plaintiff Lucy T. Davis from her mother, Tracenia Latimer, and to the title of the plaintiff Millard P. McCormick, derived from his mother, Elizabeth McCormick?

It is one of the contentions of the plaintiffs that it did not apply to those titles, and error is based on a refusal of the court to so instruct the jury. The adverse possession began February 22, 1875; suit was brought May 17, 1895. There were therefore twenty years and a few months adverse possession. Richard Young, the common source of title, died in 1860, testate. His will in effect devised the property in controversy to Matilda, his wife, for life; remainder to Tracenia and Elizabeth and other children. Both were then married. Their mother, the life tenant, died October 7, 1874. Tracenia
[724] *died November 17, 1879, and her husband April 20, 1880. She left two children, one of whom is the plaintiff. Elizabeth died March 22, 1889. Her husband survived her, but died July 2, 1891. October 14, 1887, she and her husband conveyed their interests to their son, the plaintiff, Millard P. McCormick. From the death of Elizabeth and her husband, five and four years respectively elapsed before suit, and from the date of the conveyance to Millard over eight years. Assuming that Tracenia Latimer and Elizabeth McCormick were under disability when the adverse possession commenced, did that possession ever run against their interests, and if so, when did it commence to run?

The statute of limitations in force in the District is that of James I. chap. 16. Under that statute no suit for lands can be maintained, except "within twenty years next after the cause of action first descended or fallen, and at no time after the said twenty years." Additional time is given to those under disability, as follows: "That if any person . . . shall at the time of said right or title of entry be or shall be at the time of the said right or title first descended, accrued, come or fallen within the age of twenty-one years, *feme covert, non compos mentis,* imprisoned, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or death, take benefit of, and sue forth the same, and at no time after the said ten years." Sec. 2, p. 359, Compiled Stat. Dist. Columbia.

More than twenty years elapsed after Tracenia's right accrued, as we have seen, before suit was commenced, and more than ten years of that time accrued after her death and that of her husband. She died under disability, but that made no difference. By the terms of the statute the time of limitation of suit commenced to run upon her death against her heir, Lucy T. Davis, and expired in ten years. No disability *of [725]
Lucy T. Davis, if she was under any, arrested the running of the statute. Cumulative disabilities cannot be used to that effect. *Thorp* v. *Raymond,* 16 How. 247 [14: 923]; *Demarest* v. *Wynkoop,* 3 Johns. Ch. 129 [8 Am. Dec. 467]; *Smith* v. *Burtis,* 9 Johns. 174; *Jackson, Swartout,* v. *Johnson,* 5 Cow. 74 [15 Am. Dec. 433]; *Walden* v. *The Heirs of Gratz,* 1 Wheat. 292 [4: 94]; *Hogan* v. *Kurtz,* 94 U. S. 773 [24: 317]; *Mercer's Lessee* v. *Selden,* 1 How. 37 [11: 38]; *McDonald* v. *Hovey,* 110 U. S. 619 [28: 269].

The bar of the statute was therefore complete against her. But it was not complete against Millard McCormick. Ten years of the period of adverse possession had not run after the death of his parents or after the conveyance to him and before suit was commenced; and we are brought to the contention that a verdict should have been rendered for him. Passing on and disposing of the contention adversely, Mr. Justice Shepard, speaking for the court of appeals, said:

"The rule is old and well established, that if one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot. *Morris* v. *Wheat,* 8 App. D. C. 379, 385. Hard as this rule may seem to be, it was followed in that case in obedience to the decision of the Supreme Court of the United

States in *Marsteller* v. *McClean*, 7 Cranch, 156, 159 [3: 300, 301]. In that case Mr. Justice Story said: 'It seems to be a settled rule that all the complainants in a suit must be competent to sue, otherwise the action cannot be supported.' And again: 'When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.' See also *Shipp* v. *Miller*, 2 Wheat. 316, 324 [4: 248, 251]; *Dickey* v. *Armstrong*, 1 A. K. Marsh. 39, 40.

"There has been no legislation affecting the rule of practice in the District of Columbia, and we do not consider it within our province to make a change therein.

"The apparent hardship to this plaintiff might have been avoided by a separate suit on his behalf.

"The original rule at common law was that tenants in common could only sue separately because they were separately seised, and there was no privity of estate between
[726]them. **Mobley* v. *Brunner*, 59 Pa. 481 [98 Am. Dec. 360]; *Corbin* v. *Cannon*, 31 Miss. 570, 572; *May* v. *Slade*, 24 Tex. 205, 207; 4 Kent, Com. 368.

"The practice soon became general, however, in the United States to permit them to sue each other jointly or severally as they might elect. 7 Enc. Pl. & Pr. 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession."

These remarks express the rule correctly.

It was urged at the argument by defendants in error, though not claimed in their brief, that neither Tracenia Latimer nor Elizabeth McCormick were under disability at any time during the period of adverse possession. The argument was that by the married woman's act of April 10, 1869 (16 Stat. at L. 45, chap. 23), were given the same remedies in regard to their property that they would have had if unmarried.

The contention presents an interesting question, and maybe involves the further one whether their husbands ever became tenants by the curtesy. But we need not pass on them. Assuming the disability of Tracenia and Elizabeth and such tenancy, the errors assigned on the instructions given or refused were not well taken.

3. There was introduced in evidence as part of the chain of title of the plaintiff, Lucy T. Davis, a deed from her to John H. Walter and a reconveyance from him to her. From the latter was excepted "so much of all the lands and tenements above mentioned as had been conveyed to the party of the first part (Walter) to other persons prior to the filing of a bill in equity, cause 11,637, of the supreme court of the District of Columbia."

Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length, against the objection of plaintiffs, *regarding his[727] business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination-in-chief. In *Rea* v. *Missouri*, 17 Wall. 532 [21:707], it was said: "When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion and the exercise of that discretion is not reviewable on a writ of error."

It is also objected that Walker was subjected to discriminating remarks by the court. Plaintiff requested the following instruction:

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walker that he never conveyed lot 10 in controversy in this case to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis, *and others, and the jury would not be justified in finding to the contrary.*"

The court struck out the words in italics and inserted instead, "and the weight to be given his testimony is a proper question for the jury."

The instruction as requested assumed the credibility of the witness; as modified, that question was submitted to the jury, who were the judges of it, and we cannot suppose that the jury misunderstood the court or believed a discrimination was intended.

To the other assignments of error special consideration is not necessary to be given.

Judgment affirmed.

MARCUS A. SPURR, *Petitioner*, [728]

v.

UNITED STATES.

(See S. C. Reporter's ed. 728-739.)

Insufficient instruction to jury.

In answering a question of the jury in a prosecution under U. S. Rev. Stat. § 5208, for unlawful certification of a check, when they come in after consultation, and ask for the law as to certification when no money appears to the credit of the drawer, and the court assumes to answer it by reference to that section, its failure to explain the meaning of "wilful violation" as used in § 13 of the act of Congress of 1882, when defendant's counsel requests it, is error which is not cured by mere reference to the original charge.

[No. 448.]

Argued March 13, 14, 1899. Decided May 22, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Middle District of Tennessee convicting Marcus A. Spurr for the violation of U. S. Rev. Stat. § 5208, in regard to certification of checks by an officer of a national bank. Judgment of the Circuit Court of Appeals and of the Circuit Court *reversed*, and cause remanded to the latter court for a new trial.

See same case below, 59 U. S. App. 663, 87 Fed. Rep. 701, 31 C. C. A. 202.

Statement by Mr. Chief Justice **Fuller**:

[729] *Spurr was tried in the circuit court of the United States for the middle district of Tennessee on three indictments, each containing several counts, for the violation of section 5208 of the Revised Statutes, which provides:

"It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association at the time such check is certified an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

By section 13 of the act of Congress approved July 12, 1882 (22 Stat. at L. 162, chap. 290), it is provided:

"That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An Act in Reference to Certifying Checks by National Banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

The indictments charged that Spurr, being the president of the Commercial National Bank of Nashville, Tennessee, wilfully violated the provisions of section 5208 of the Revised Statutes by wilfully, unlawfully, and knowingly certifying certain checks drawn on
[730] said bank by Dobbins and Dazey, well *knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the checks were certified, respectively, an amount of money equal to the respective amounts specified therein. They were consolidated and tried together, and a verdict of guilty returned as follows: "Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment, and recommend him to the mercy of the court."

Motions for new trial and in arrest of judgment were made and overruled, and judgment entered on the verdict in these words:

"And thereupon the United States, by its district attorney, moved the court for sentence upon the verdict of the jury heretofore rendered, upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, counts Nos. 1 and 4 of indictment No. 7994, count No. 3 of indictment No. 8139, count No. 2 of indictment 8078 and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3d, 1893, and upon said verdict upon said count of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the state of New York, at Albany, New York, for two years and six months from this date."

The several counts of the consolidated indictments charged the certification by defendant of four checks drawn by Dobbins and Dazey between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial National Bank, aggregating $95,-641.95. The bank was organized in 1884, and *defendant was its president and one [731]
Porterfield its cashier from its organization to its failure, March 25, 1893. Dobbins and Dazey were engaged in the purchase, sale, and exportation of cotton, and their financial standing and credit were excellent. When the four checks in question were certified by defendant the accounts of Dobbins and Dazey were overdrawn, and the evidence was that their account was continuously and largely overdrawn during the period covered by these checks, except on one day, and that "this fact was known to Porterfield, the cashier, and all the employees of the bank under him in authority." But "there was also evidence tending to show that Porterfield misrepresented the real state of the Dobbins and Dazey account to the defendant and the committees and the directors of the bank, by statements made to them, and also in his sworn reports to the Comptroller of the Currency, wherein the overdrafts in the bank were very largely understated." There was also evidence on behalf of defendant to the

effect "that he had no knowledge of the fact that the account of Dobbins and Dazey was overdrawn on the books of the bank at the time of the certification of any of the checks upon which he is indicted, nor at any time during the period covered by the dates of the checks;" that when he certified these checks he inquired in every instance either of the cashier or of the exchange clerk, and in every instance received information that sufficient funds and credits of Dobbins and Dazey were then in the bank to cover the checks certified, and that he never at any time certified a check without receiving such information, and that he relied upon it as true; that if the cashier was in, he inquired of him; if not, he inquired of the exchange clerk; these being the appropriate sources of information. The evidence on this head is given in much detail in the bill of exceptions.

The bill of exceptions also stated—

"After the jury were charged and had retired from the courtroom to consider their verdict, and had been deliberating for some hours, they returned to the courtroom and asked the following question, which was written out in pencil and handed to the court:

[732] *" 'We want the law as to the certification of checks when no money appeared to the credit of the drawer.'

"The court then said: 'The jury state that they want the law as to the certification of a check where there is no money to the credit of the drawer.

'I cannot better answer this question which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject.'

"(Reads from sec. 5208, Rev. Stat.): 'It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.'

" 'Does this answer your question?'

"Foreman of the Jury: 'Yes, sir.'

"The Court: 'I read it again so that you may all understand it.' (The court read again that part of section 5208, Rev. Stat. quoted above, and added):

" 'Is that all, gentlemen? The $30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit of line of credit.

" 'I charge you in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.

*" 'You understand what I have said now [733]
is to be taken in connection with what I have before instructed you.'

"As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that.

"To this action of the court in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time beginning with the words 'The $30,000' and ending with the words 'to meet it,' the defendant then and there excepted."

Sentence having been pronounced as before stated, the case was taken on error to the circuit court of appeals for the sixth circuit, and the judgment was affirmed, 59 U. S. App. 663, whereupon the cause was brought to this court on certiorari.

Messrs. **John A. Pitts, Albert H. Horton,** and *Bailey P. Waggener* for petitioner.

Messrs. **Edward Baxter** and *John G. Tompson*, Assistant Attorney General, for respondent.

*Mr. Chief Justice **Fuller** delivered the [733]
opinion of the court:

It was not denied that defendant certified the checks, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the checks were certified and his intent in the certifications.

Section 5208 made it unlawful for any officer, clerk, or agent *of any national banking [734]
association to certify any check drawn upon it, unless the drawer of the check had on deposit at the time such check was certified an amount of money equal to the amount specified therein, and provided the consequences which should follow on a violation of the section. Then came section thirteen of the act of July 12, 1882, which made a wilful violation of section 5208 criminal, and denounced a penalty thereon.

These sections were under consideration in *Potter* v. *United States*, 155 U. S. 438, 445 [39: 214, 217], and the court said:

"The charge is of a wilful violation. That is the language of the statute. Section 5208 of the Revised Statutes makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against

the wrongdoing officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall wilfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act;' 'or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word 'wilful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'wilful' in criminal statutes has been considered by this court. In *Felton* v. *United States*, 96 U. S. 699, 702 [24: 875, 876], it was said: 'Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word "wilfully" says Chief Justice Shaw, in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' [*Com.* v. *Kneeland*] 20 Pick. 220.
[735] 'It is frequently understood,' *says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, § 428.

"And later, in the case of *Evans* v. *United States*, 153 U. S. 584, 594 [38: 830, 834], there was this reference to the words 'wilfully misapplied': 'In fact, the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words "wilfully," etc., and "with intent to defraud," would be clearly bad.' . . .

"While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offenses, and subjecting them to the severe punishments which may be imposed under those statutes."

The wrongful intent is the essence of the crime. If an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.

The defense was that defendant had no actual knowledge that Dobbins and Dazey had not sufficient funds in the bank to meet the checks, nor knowledge of facts putting him on inquiry; that, on the contrary, he believed that they had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance before he certified; that he honestly relied on that information, and that he had the right to do so. Defendant was entitled to the full benefit of this defense, and in order to that, it was vital that the meaning of "wilful violation," as used in section 13 of the act of 1882, should be clearly explained to the jury.

*It appears from this record that, after the [736]
case had been committed to the jury, and they had had it under consideration for some hours, they returned to the courtroom, and asked the following question, which was written out: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." The court then read to the jury the first part of section 5208 of the Revised Statutes, and inquired: "Does this answer your question?" To which the foreman replied: "Yes, sir." The court again read that part of the section, and made certain observations, among other things, that a false certification "is the certifying by an officer of a bank that a check is good when there are no funds to meet it."

The record shows that then, "as the jury were retiring, counsel for the defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that." Exception was taken to the reading twice of the part of section 5208, and the failure to read and explain the act of 1882, and to the additional instructions given by the court.

We think that the learned circuit judge clearly erred in declining the request of counsel in respect of section 13.

It is true that it was not part of the function of the jury to fix the penalty, and the remark of the court, "that the jury had nothing to do with that," undoubtedly referred to the penalty only, though, as the matter appears in the record, the jury may well enough have understood it differently. But it was the act of 1882 that made the certification of checks, if in "wilful violation" of section 5208, a criminal offense, and the word "wilful" "implies on the part of the officer knowledge and a purpose to do wrong," and plainly it was in relation to the point of "wilful violation" that counsel wished the court to read and expound that section.
It seems to us that it *was the duty of the [737]
court to do so, if the question put by the jury was answered at all, since "the law as to the certification of checks when no money appeared to the credit of the drawer" involves civil consequences under section 5208, and criminal consequences under section 13, unless it is to be held that every certification where funds are lacking constitutes a wilful

violation of section 5208. We cannot accept the view that because when the court asked the jury whether the first part of section 5208 answered their question, the foreman replied in the affirmative, therefore there was no error in the failure to call their attention to section 13. If the court was satisfied that the law applicable to the case was embodied in the first part of section 5208, the jury were bound to be satisfied also; but we are of opinion that that was an insufficient definition, and was therefore erroneous. However the court went further, and said:

"I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certified it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.

"You understand what I have said now is to be taken in connection with what I have before instructed you."

We fear that these instructions, following in direct connection with what had passed in reference to section 5208, may have led the jury to understand the law of the case to be that the false certification thus defined constituted a criminal offense under the statute, and that that impression was not rendered harmless by the admonition that what was then said was to be taken with what had been said before.

At all events, we think it would be going
[738] too far to hold *that that caution operated to obviate the error in failing to explain section 13 at this particular juncture. The jury had been considering their verdict for several hours, and had then in effect requested a more complete definition of the offense. This the court assumed to give, but it was incomplete, and what was omitted cannot properly be held to have been supplied, under the circumstances, by the reference to prior instructions. The court had indeed, in the original charge, used the words "wilfully" and "wilful" in the following instructions:

"If you find from the proof that the account of Dobbins and Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins and Dazey on the days upon which said checks were certified, was sufficient or more than sufficient to cover the amount of said checks, besides the overdraft already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions. In this connection, you will bear in mind what I have previously charged you, that if this was a general, and not a special, account of Dobbins and Dazey, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins and Dazey to respond to the checks."

"If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins and Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly, and in bad faith—these words mean substantially the same thing—shut his eyes to the fact and purposely refrained *from inquiry or investi- [739]
gation for the purpose of avoiding knowledge."

The court had also said that "in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins and Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty." And other passages of similar purport might be quoted.

But the jury desired further advice as to what constituted criminal certification, or wilful violation of section 5208, and preferred a request which required a comprehensive answer. The response was in the nature of a separate charge, and we are unable to conclude that the error in declining at that time to call attention to section 13 was cured by the bare reference to the original charge.

Many other errors were assigned and pressed in argument, but, as the particular points may not arise in the same way on another trial, we prefer to refrain from expressing any opinion upon them.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to set aside the verdict and grant a new trial.

Mr. Justice **Brown** and Mr. Justice **McKenna** dissented.

SAN DIEGO LAND & TOWN COMPANY, *Appt.*,

v.

CITY OF NATIONAL CITY and John G. Rontsan, George W. Deford, S. S. Johnston, J. H. Kincaid, and Fred H. Sanborn, Trustees of Said City.

(See S. C. Reporter's ed. 739-760.)

Formal notice of fixing water rates—opportunity to be heard—judicial interference—basis of calculation—losses from distribution.

1. Formal notice as to the precise day upon

which water rates will be fixed by ordinance need not be given to a company whose rates are thus fixed, under the California Constitution, which gives notice of the fact that ordinances will be passed annually in February to take effect on the 1st of July then next, and the statutes of the state requiring the company to make an annual statement of its rate-payers, revenue, and expenditures, at least thirty days prior to June 15th.

2. An opportunity to be heard upon the question of water rates fixed by ordinance is not denied where such rates are fully considered in conferences between the officers of the corporation, whose rates are fixed, and the municipal authorities, and such officers are heard, although they are not allowed to be present at the final meeting when the ordinance is passed.

3. Judicial interference should never occur with the collection of rates established under legislative sanction, unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.

4. The reasonable value of property, rather than its original cost, is to be taken as the basis of calculation in determining whether rates fixed under legislative authority constitute a fair compensation for the use of the property, so that the owners are not deprived of their property without due process of law.

5. The losses from distribution of water to consumers outside of the city are not to be considered in fixing by ordinance the rates for consumers within the city.

[No. 25.]

Submitted October 11, 1898. Decided May 22, 1899.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of California dismissing a suit brought by the San Diego Land & Town Company against the City of National City *et al.* to obtain a decree that the water rates fixed by the defendant city were void; that the Constitution and laws of California and the proceeding of the Trustees of the City were in violation of the Federal Constitution, and that the plaintiff should be entitled to reasonable water rates, etc. *Affirmed.*

See same case below, 74 Fed. Rep. 79.

Statement by Mr. Justice **Harlan:**

[740] *This appeal brings up for review a decree of the circuit court of the United States for the southern district of California dismissing a bill filed in that court by the San Diego Land & Town Company, a Kansas corporation, against the city of National City, a municipal corporation of California, and John G. Routsan and others, trustees of that city and citizens of California. 74 Fed. Rep. 79.

The nature of the cause of action set out in the bill is indicated by the following statement:

The Constitution of California declares—

That "no corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." Art. 12, § 15;

*That "the use of all water now appropriated, or that may hereafter be appropriated, [741]
for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city or county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this state, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use." Art. 14, § 1; and,

That "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority and in the manner prescribed by law." Art. 14, § 2.

By an act of the legislature of California passed March 7th, 1881, it was provided:

"§ 1. The board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association, or *corporation for water furnished to any [742]
such city and county, or city or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in force and effect for the term of one year and no longer.

"§ 2. The board of supervisors, town council, board of trustees or other legislative body of any county, city, or town, are hereby authorized, and it is made their duty, at least thirty days prior to the 15th day of January of each year, to require, by ordinance or otherwise, any corporation, company,

or persons supplying water to such county, city, or town, or to the inhabitants thereof, to furnish to such board or other governing body in the month of January of each year, a detailed statement, verified by the oath of the president and secretary of such corporation or company or of such person, as the case may be, showing the name of each water-rate payer, his or her place of residence, and the amount paid for water by each of such water payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time." Stats. of Cal. 1881, p. 54.

By an ordinance of the board of trustees of the defendant city approved February 21st, 1895, certain rates of compensation to be collected by persons, companies, or corporations for the use of water supplied to that city or its inhabitants, or to corporations, companies, or persons doing business or using water therein, were fixed for the year beginning July 1st, 1895.

For the purposes of that ordinance the uses of water were divided into four classes, namely, domestic purposes, public purposes, mechanical and manufacturing purposes, and purposes of irrigation; the rates for each class were prescribed; and it was provided that no person, company, or corporation should charge, collect, or receive water rates in the city except as thus established.

[743] *The bill in this case questioned the validity of the above ordinance upon the following grounds:

That no notice of the fixing of the water rates was given, nor opportunity presented hor a hearing upon the matter of rates; that no provision in the Constitution or laws of California, under and by virtue of which the board of trustees assumed to act, required or authorized such notice; that water rates were fixed by the board arbitrarily, without notice or evidence, and were unreasonable and unjust, in that under them the plaintiff could not realize therefrom, and from all other sources within and outside of the limits of the defendant city, a sufficient sum to pay its ordinary and necessary operating expenses, or any dividends whatever to stockholders, or any interest or profit on its investment; that so long as the ordinance remained in force the plaintiff would be required by the laws of California to supply water to all consumers within the city at the rates so fixed, which could only be done at a loss to the plaintiff; and that to compel the plaintiff to furnish water at those rates would be a practical confiscation and a taking of its property without due process of law.

The bill also alleged that the defendant city was composed in large part of a territory of farming lands devoted to the raising of fruits and other products, only a small part thereof being occupied by residences or business houses;

That prior to the adoption of the ordinance above set forth, the plaintiff, in order to meet in part the large outlay it had been compelled to make in and about its water system, had established a rate of one hundred dollars per acre for a perpetual water right for the purposes of irrigation, and required the purchase and payment for such water right before extending its distributing system to lands not yet supplied with water or furnishing such lands with water, which rate was made uniform and applicable alike to all lands to be furnished with water within and outside of the city, and such payment for a water right had ever since been charged as a condition upon which alone water would be supplied to consumers for the purposes of irrigation, and many consumers prior to the *adoption of the ordinance had purchased [744]
such water right and paid therefor;

That the rate charged for such water right was reasonable and just and was necessary to enable the plaintiff to keep up and extend its water system so as to supply water to consumers requiring and needing the same, and without which it could not operate and extend its plant so as to render it available and beneficial to all water consumers that could with the necessary expenditure be supplied from the system;

That the lands covered by plaintiff's system were arid and of but little value without water, and a water right such as it granted to consumers increased the land in value more than three times the amount charged for such right and was of great value to the landowner;

That the above ordinance fixed the total charge that might be made by the plaintiff for water furnished for purposes of irrigation at four dollars per acre per annum, and as construed by the city and consumers deprived the plaintiff of all right to make any charge for water rights, and the rate was fixed without taking into account or allowing in any way for such water right;

That the amount of four dollars per acre per annum was unreasonably low and required the plaintiff to furnish water to consumers within the limits of the city for purposes of irrigation for less than it furnished the same to consumers outside of the city for the same purpose, and so low that it could not furnish the same without positive loss to itself;

That large numbers of persons residing within the city owning land therein and desiring to irrigate the same were demanding that their lands be connected with the plaintiff's system and supplied with water at the rate of four dollars per acre per annum and without any payment for a water right, and under the laws of the state of California if water was once furnished to such parties they thereby obtained a perpetual right to the use of water on their lands without payment for such water rights; and,

That until the questions as to the validity of the ordinance and of the right of the plaintiff to charge for a water right *as a condi- [745]
tion upon which it would furnish water for purposes of irrigation were determined, the plaintiff could not safely charge for such water rights or collect fair and reasonable rates for water furnished by reason of which it

would be damaged in the sum of twenty thousand dollars.

The relief asked was a decree adjudging that the rates fixed by the defendant city were void; that the Constitution and laws of California and the proceedings of the defendant's board of trustees under them were in violation of the Constitution of the United States, and particularly of the first section of the Fourteenth Amendment; and that the taking of the plaintiff's water, without payment for the water right or the right to the use thereof, was in violation of the Bill of Rights of the Constitution of California.

The plaintiff also prayed that if the court determined that the state Constitution and laws relating to compensation for the use of water for public purposes were valid, then that it be declared by decree that the rates fixed in the ordinance were arbitrary, unreasonable, unjust, and void; that the board of trustees be ordered and required to adopt a new and reasonable rate of charges; and that the enforcement of the present ordinance be enjoined.

The plaintiff asked that it be further decreed that it was entitled to charge and collect for water rights at reasonable rates as a condition upon which it would furnish water for the purposes of irrigation, notwithstanding the rates fixed by the trustees for water sold and furnished.

It was denied that the rates fixed by the ordinance in question were unreasonable or unjust, or that the plaintiff could not realize within the city sufficient to pay the just proportion that the city and its inhabitants ought to contribute to the expenses of the plaintiff's system, and as much more as the city and its inhabitants should justly and reasonably pay toward interest and profit on plaintiff's investment as the same existed when the ordinance was enacted. It was alleged that under the annual rates fixed by the ordinance the income of the plaintiff in the city would be about the same as that derived and being derived by it under the or-
[746] dinance previously in force; *that it was not true that plaintiff could only supply consumers within the city at the rates so fixed at a loss; and that to compel the plaintiff to furnish water at said rates was not a practical confiscation of its property or a taking of it without due process of law.

The defendants admitted that the city was composed in considerable part of a territory of farming lands devoted to the raising of fruits and other products, and that a part thereof was occupied by residences and business houses. But it was averred that the population of the city when the ordinance was adopted was about 1,300 persons; that the area within its boundaries laid out in town lots was about 800 acres, divided into 6,644 lots, of which the plaintiff in January, 1887, owned 4,200; that the land within the boundaries of the city not laid off into town lots comprised about 3,500 acres of which the plaintiff in January, 1888, owned 1,289¾ acres; that when the ordinance was passed plaintiff continued to own about 3,688 of said lots and about 1,184 acres of land; and that the number of acres of farming land not under irrigation in the city at the time when the ordinance was passed was about 610.

It was further stated that since the plaintiff established the rate of $100 per acre for such "perpetual right for the purpose of irrigation" it had in no instance supplied water to any land not already under irrigation except on purchase of said "water right" and payment therefor; and that the rate charged for said "water right" was not reasonable or just nor necessary to enable plaintiff to keep up and extend its water system, so as to supply water to consumers who required and needed the same.

The defendants insisted that the laws of California did not confer upon the city or its board of trustees the power to prescribe by ordinance or otherwise that the purchase and payment of such "water rights" should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation as already stated or any water supply affected with the public use; that $4 per acre was not unreasonably low; and that such rate did not require the plaintiff to furnish water to consumers within the city for purposes *of irrigation for less than it fur- [747]
nished the same to consumers outside of the city for the same purposes, or that it could not furnish the same without positive loss to itself.

It was further averred that up to December, 1892, plaintiff by its public representations and continuous practice voluntarily conferred and annexed such perpetual rights to the use of the water on the lands of all persons who requested the same without the payment of any consideration therefor except the annual rate of $3.50 per acre adopted by it under its entire system within and without the city, in addition to charges made for tap connections with its pipe, ranging from $12 to $50 for each such connection; that in December, 1892, it changed its rule and practice, and from that time on until February, 1895, charged and exacted the payment as and for a so-called water right of $50 per acre, and from the latter date $100 per acre, for the privilege of connecting with its system any lands not then already under irrigation from it; and that since December, 1892, it had at all times declined and refused to connect and had not in fact connected any lands with its irrigating system except upon payment made to it of such rates of $50 and $100 per acre respectively for the "water right;" and that whether plaintiff could or could not safely charge for such water rights had been in no way by law committed to said board of trustees to determine.

The cause having been heard upon the pleadings and proofs, the bill was dismissed. 74 Fed. Rep. 79.

Messrs. **G. Wiley Wells**, *John D. Works*, *Bradner W. Lee*, and *Lewis R. Works* for appellant.

Messrs. **Irvine Dungan** and *Daniel M. Hammack* for appellees.

*Mr. Justice **Harlan**, after stating the case [747]
as above, delivered the opinion of the court:

While admitting that the power to limit

charges for water sold by a corporation like [748]itself has been too often upheld to *be now questioned, the appellant contends that the Constitution and statutes of California relating to rates or compensation to be collected for the use of water supplied to a municipality or its inhabitants are inconsistent with the Constitution of the United States. It is said that the state Constitution and laws authorized rates to be established without previous notice to the corporation or person immediately interested in the matter, and without hearing in any form, and therefore were repugnant to the clause of the Federal Constitution declaring that no state shall deprive any person of property without due process of law.

Upon the point just stated we are referred to the decision of this court in *Chicago, M. & St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 452, 456, 457 [33: 970, 977, 980, 981, 3 Inters. Com. Rep. 209]. That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The supreme court of the state held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. This court said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, *so construed*, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." "By the second section of the statute in question it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision the carrier has a right to make equal and reasonable charges for such trans- [749]portation. *In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the supreme court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the supreme court of that state.

What this court said about the Minnesota statute can have no application to the present case unless it be made to appear that the Constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the Constitution of the state. We are not at liberty so to interpret that instrument. What the supreme court of California said in *Spring Valley Water Works* v. *San Francisco*, 82 Cal. 286, 306, 307, 309, 315 [6 L. R. A. 756], upon this subject would seem to be a sufficient answer to the views expressed by the appellant. In that case it was contended that a board of supervisors had fixed rates arbitrarily, without investigating, without any exercise of judgment or discretion, without any reference to what they should *be, and without reference [750] either to the expense incurred in furnishing water or to what was fair compensation therefor. The court said: "The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the Constitution provides for the fixing of rates or compensation, it means *reasonable* rates and *just* compensation. To fix *such* rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." "The fact that the right to store and dispose of water is a public use subject to the control of the state, and that its regulation is provided for by the state Constitution, does not affect the question. Regulation as provided for in the Constitution does not mean confiscation or taking without just compensation. If it does, then our Constitution is clearly in violation of the Constitution of the United States, which provides that this shall not be

done. The ground taken by the appellant is that the fixing of rates is a *legislative* act; that by the terms of the Constitution the board of supervisors are made a part of the legislative department of the state government and exclusive power given them which cannot be encroached upon by the courts. . . . This court has held that the fixing of water rates is a *legislative* act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling *judicial* action. *Spring Valley Water Works* v. *Bryant*, 52 Cal. 132; *Spring Valley Water Works* v. *City and County of San Francisco*, 52 Cal. 111; *Spring Valley Water Works* v. *Bartlett*, 63
[751]Cal. 245. *There are other cases holding the act to be legislative, but whether it is judicial, legislative, or administrative is immaterial. Let it be which it may, it is not above the control of the courts in proper cases. . . . We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government and beyond judicial control. In the case of *Davis* v. *Mayor, etc. of New York, supra* [1 *Duer*, 451-497], it is further said: '. . . The doctrine, exactly as stated, may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government, representing and exercising, in its sphere, the sovereignty of the people, is, for political reasons, of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative, and even political, powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial.'" Again: "On the part of the respondent it is contended, in support of the decision of the court below, that notice to the plaintiff of an intention to fix the rates was necessary, and that without such notice being given, the action of the board was a taking of its property without due process of law. But the Constitution is self-executing, and as it does not require notice, we think no notice was necessary. It does not follow, however, that because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligibly and fairly in fixing the rates. This is its plain duty, and a failure to make the proper effort to procure all necessary information from whatever source may defeat its action."

In the more recent case of *San Diego Water Co.* v. *San Diego*, 118 Cal. 556, 566 [38 L. R. A. 460]], the state court, referring to
[752]*section 1 of the Constitution of California, said that the meaning of that section was that "the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works* v. *San Francisco*, 82 Cal. 286 [6 L. R. A. 756], 16 Am. St. Rep. 116, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations that perhaps require modification, we are satisfied with the correctness of the conclusion [construction] there given to this section of the Constitution."

Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The Constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the first day of July thereafter. It was made by statute the duty of the appellee at least thirty days prior to the 15th day of January in each year to obtain from the appellant a detailed statement, showing the names of water rate payers, the amount paid by each during the preceding year, and "all revenue derived from all sources," and the "expenditures made for supplying water during said time." It was the right and duty of appellant in January of each month to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance. Act of March 7th, 1881, § 2, above cited. Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to receive the statement referred to in the statute, or to have duly considered it and given it proper weight in determining rates. If the state by its constitution *or laws had forbidden the city or its [753]
board to receive and consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen. But no such case is now presented. In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 333 [29: 414, 417], it was said: "This return made by the corporation through its officers is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September of each year at the office of the auditor at the seat of government. . . . These meetings are public and not secret.

The time and place for holding them are fixed by law."

There is no ground to say that the appellant did not in fact have or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. Those officers may not have been present at the final meeting of the city board when the ordinance complained of was passed. They were not entitled, of right, to be present at that particular meeting. They were heard, and there is nothing to justify the conclusion that the case of the appellant was not fully considered before the ordinance was passed.

That it was competent for the state of California to declare that the use of all water appropriated for sale, rental, or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county, or town or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and
[754] supplied it for *general use; for the state cannot by any of its agencies, legislative, executive, or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law. *Chicago, Burlington, & Q. Railroad Co.* v. *Chicago*, 166 U. S. 226 [41: 979]; *Smyth* v. *Ames*, 169 U. S. 466, 524 [42: 819, 841]. But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use. *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 143 U. S. 339, 344 [36: 176, 179]; *Reagan* v. *Farmers' Loan & Trust Co.* 154 U. S. 362, 399 [38: 1014, 1024, 4 Inters. Com. Rep. 560]; *Smyth* v. *Ames*, above cited. See also *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614, 615 [*ante*, 823, 831].

In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law.

What elements are involved in the general inquiry as to the reasonableness of rates established by law for the use of property by the public? This question received much consideration in *Smyth* v. *Ames*, above cited.
That case, it is *true, related to rates estab [755]
lished by a statute of Nebraska for railroad companies doing business in that state. But the principles involved in such a case are applicable to the present case. It was there contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times, not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends would be a deprivation of property without due process of law, and a denial of the equal protection of the laws. After observing that this broad proposition involved a misconception of the relations between the public and a railroad corporation, that such a corporation was created for public purposes, and performed a function of the state, and that its right to exercise the power of eminent domain and to charge tolls was given primarily for the benefit of the public, this court said: "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged." 169 U. S. 544 [42: 848]. In the
same case it was also said that "the *basis [756]
of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And

in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." 169 U. S. 546 [42: 819].

This court had previously held in *Covington & Lexington Turnpike Road Company* v. *Sandford*, 164 U. S. 578, 596, 598 [41: 560, 566, 567],—which case involved the reasonableness of rates established by legislative enactment for a turnpike company,—that a corporation performing public services was not entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered: and that the rights of the public were not to be ignored. The court in that case further said: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all
[757] other *circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

These principles are recognized in recent decisions of the supreme court of California. *San Diego Water Co.* v. *City of San Diego* (1897) 118 Cal. 556 [38 L. R. A. 460]; *Redlands L. & C. Domestic Water Co.* v. *City of Redlands* (1898) [121 Cal. 365], 53 Pac. 843, 844.

The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as under all the circumstances will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that *it cannot be said that the [758] amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.

One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers *outside of the city* are to be considered in fixing the rates for consumers within the city. In our judgment the circuit court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point.

One of the questions pressed upon our consideration is whether the ordinance of the city should have expressly allowed the appellant to charge for what is called a "water right." That right, as defined by appellant's counsel, is one "to the continued and perpetual use of the water upon the land to which it has been once supplied upon payment of rates therefor established by the company." In the opinion of the circuit court it is said that "no authority can anywhere be found for any charge for the so-called water right." This view is controverted by appellant, and cases are cited which, it is contended, show that the broad declaration of the circuit court cannot be sustained. *Fresno Canal & Irrig. Co.* v. *Rowell*, 80 Cal. 114; *Fresno Canal & Irrig. Co.* v. *Dunbar*, 80 Cal. 530; *San Diego Flume Co.* v. *Chase*, 87 Cal. 561; *Clyne* v. *Benicia Water Co.* 100 Cal. 310; *San Diego Flume Co.* v. *Souther* (C. C. A.) 90 Fed. Rep. 164.

We are of opinion that it is not necessary to the determination of the present case that this question should be decided. We are dealing here with an ordinance fixing rates or compensation to be collected within a

given year for the use of water supplied to a city and its inhabitants or to any corporation, company, or person doing business or using water within the limits of that city. In our judgment, the defendant correctly says in its answer that the laws of the state [759]*have not conferred upon it or its board of trustees the power to prescribe by ordinance or otherwise that the purchase and payment for so-called "water rights" should be a condition to the exercise of the right of consumers to use any water appropriated for irrigation or affected with a public use.

The only issue properly to be determined by a final decree in this cause is whether the ordinance in question fixing rates for water supplied for use within the city is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the Constitution of the United States. If the ordinance, considered in itself, and as applicable to water used within the city, is not open to any such objection, that disposes of the case, so far as any rights of the appellant may be affected by the action of the defendant. The appellant asks, among other things, that it be decreed to be entitled to charge and collect for "water rights" at reasonable rates *as a condition* upon which it will furnish water for the purposes of irrigation, notwithstanding the rates fixed by the defendant's board of trustees for water sold and furnished within the city. That is a question wholly apart from the inquiry as to the validity under the Constitution of the United States of the ordinance of the defendant fixing annual rates in performance of the duty enjoined upon it by the Constitution and laws of the state. Counsel for appellant, while insisting that the circuit court erred in saying that there was no such thing as a "water right," says: "The Constitution of the state has nothing whatever to do with a water right or the price that shall be paid for it. It simply provides for fixing the *annual rental* to be paid for the water furnished and used. When one obtains his water right by purchase or otherwise, he has a right to demand that the water shall be furnished to his lands at the price fixed, as provided by law, and that the company shall exact no more. But he must first acquire the right to have the water on such terms. Whether in fixing the annual rates to be charged, the body authorized to fix them can take into account the amount that has been received by the company for water rights, is another question, and one that is not presented in this case. Nor is any question [760]raised *as to what would be a reasonable amount to exact for a water right, or whether the courts can interfere to determine what is a reasonable amount to charge therefor."

These reasons are sufficient to sustain the conclusion already announced, namely, that the present case does not require or admit of a decree declaring that the appellant may, in addition to the rates established by the ordinance, charge for what is called a "water right" as defined by it. It will be time enough to decide such a point when a case actually arises between the appellant and some person or corporation involving the question whether the former may require, as a condition of its furnishing water within the limits of the city on the terms prescribed by the defendant's ordinance, that it be also paid for what is called a "water right."

We will not extend this opinion by an analysis of all the evidence. It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety—and we cannot properly look at them in any other light—are such as amount to a taking of property without just compensation, and therefore to a deprivation of property without due process of law. There is evidence both ways. But we do not think that we are warranted in holding that the rules upon which the defendant's board proceeded were in disregard of the principles heretofore announced by this court in the cases cited. The case is not one for judicial interference with the action of the local authorities to whom the question of rates was committed by the state.

The decree dismissing the bill is affirmed.

CITY OF RICHMOND, *Appt.*, [761]

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *Appellee.*

(See S. C. Reporter's ed. 761-778.)

A telephone company not entitled to benefit of act of Congress for the use of post roads of July 24, 1866.

A telephone company whose business is the electrical transmission of articulate speech between different points is not entitled to the benefit of the act of Congress of July 24, 1866 (U. S. Rev. Stat. §§ 5263-5268), respecting the use of post roads by telegraph companies.

[No. 264.]

Argued April 24, 25, 1899. Decided May 22, 1899.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree of that court reversing the decree of the Circuit Court of the United States for the Eastern District of Virginia which overruled a demurrer to the complaint, and decreed that the Southern Bell Telephone Company has, under the act of Congress of July 24, 1866, the right to construct and maintain its lines over and along the streets of the city of Richmond, etc. The Circuit Court of Appeals held that while said company was entitled to the privileges of the said act of Congress, this right was to be enjoyed in subordination to public and private rights and to the power of the municipality to regulate the use of the highways, and therefore remanded the cause to the Circuit Court with instructions to modify the injunction. Decree of Circuit

Court of Appeals *affirmed* so far as it reverses the decree of the Circuit Court, and cause remanded, with directions for further proceedings in the latter court.

See same case below, 78 Fed. Rep. 858, and 42 U. S. App. 686, 697, 698, 85 Fed. Rep. 19, 28 C. C. A. 659.

The facts are stated in the opinion.

Messrs. **Henry R. Pollard** and **C. V. Meredith** for appellant.

Messrs. **Hill Carter, Addison L. Holladay,** and *George H. Fearons* for appellee.

[761] *Mr. Justice **Harlan** delivered the opinion of the court:

The principal question in this case is whether the circuit court and the circuit court of appeals erred in holding that the appellee was entitled to claim the benefit of the provisions of the act of Congress approved July 24th, 1866, entitled "An Act to Aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the Same for Postal, Military, and Other Purposes." 14 Stat. at L. 221, chap. 230.

By that act—the provisions of which are preserved in sections 5263 to 5268, inclusive, title LXV. of the Revised Statutes of the United States—it was provided:

"§ 1. That any *telegraph* company now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct,
[762] maintain, and *operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"§ 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General.

"§ 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected.

"§ 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster *General, of the restrictions and obliga- [763]
tions required by this act." 14 Stat. at L. 221, chap. 230.

Subsequently, by an act approved June 8th, 1872, all the waters of the United States during the time the mail was carried thereon; all railways and parts of railways which were then or might thereafter be put in operation; all canals and all plank roads; and all letter-carrier routes established in any city or town for the collection and delivery of mail matter by carriers,—were declared by Congress to be "post roads." 17 Stat. at L. 308, chap. 335. These provisions are preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1st, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes." 23 Stat. at L. 3, chap. 9.

Proceeding under an act of the legislature of New York of April 12th, 1848, and acts amendatory thereof, certain persons associated themselves on the 11th day of December, 1879, under the name of the Southern Bell Telephone & Telegraph Company. The articles of association stated that the general route of the line or lines of the company should be from its office in the city of New York, "by some convenient route through or across the states of New Jersey Pennsylvania, Delaware, Maryland, and Virginia, or otherwise, to the city of Wheeling or some other convenient point in the state of West Virginia, and thence to and between and throughout various cities, towns, points, and places within that part of the state of West Virginia lying south of the Baltimore & Ohio Railroad, and within the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points, and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling."

By an ordinance passed by the city of Richmond on the 26th day of June, 1884, it was provided: "1. Permission is hereby granted the Southern Bell Telephone & Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city *of [764]
Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and

upon the conditions and under the provisions of this ordinance. 2. On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the direction of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route. 3. The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station. 4. No shade trees shall be disturbed, cut, or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control. 5. The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law."

The Code of Virginia adopted in 1887, § 1287, provided that "every telegraph and every telephone company incorporated by this or any other state, or by the United States, may construct, maintain, and operate its line along any of the state or county roads or works, and over the waters of the state, and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof."

Under date of February 13th, 1889, the Southern Bell Telephone & Telegraph Company filed with the Postmaster General its written acceptance of the restrictions and obligations of the above act of July 24th, 1866.

[765] *The present suit was brought by that company in the circuit court of the United States against the city of Richmond.

The bill alleged that the plaintiff was engaged in the business of a "telephone" company, and of constructing, maintaining, and operating "telephone" lines in, through, and between the states of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida; that it had been so engaged for a period of about fifteen years, during which time it had continuously maintained at various places in said states and in Richmond, Virginia, an exchange, poles, wires, instruments, and all other apparatus and property necessary for the maintenance and operation of "telephones and telephone lines," and had erected and maintained through and along the certain streets and alleys of that city numerous poles and wires for conducting its business; that it had so conducted its business and erected and maintained its lines, wires, and poles under and by authority of the common council and board of aldermen of the city of Richmond, the legislature of Virginia, and acts of the Congress of the United States; that its "telephone" wires and poles were used by its subscribers in connection with the Western Union Telegraph Company under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages; that its business was in part interstate commerce by reason of its connections with the above telegraph company; and that its status was that of a telegraph company under the laws of the United States, and of the state of Virginia and of other states of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York.

The plaintiff also alleged that it had accepted the act of Congress of July 24th, 1866; that by virtue of such acceptance it became entitled to construct, maintain, and operate lines of telephones over and along any of the military roads and post roads of the United States, which had then been or might thereafter be declared such by law; that the streets, alleys, and highways of the city of Richmond are post roads of the United States; that the several departments of the *government of the United States lo- [766] cated in Richmond have used in that city the plaintiff's electrical conductors, and other facilities for the transmission of instructions, orders, and information to officers and persons in the administration of governmental affairs and on other business throughout the several states and the district of Columbia and in foreign countries; that under and by virtue of the Virginia Code, section 1287, the plaintiff was authorized and empowered to construct, maintain, and operate its lines of poles and wires, with necessary facilities, along and over the streets of any city or town in Virginia with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given by the above act of Congress, it maintained and operated its lines in the streets of the city of Richmond, and had in all respects complied with the legal obligations and requirements imposed; that relying upon its right to erect, maintain, and operate its lines along and over the streets and alleys of Richmond, it entered upon said streets and alleys and had conducted its business and executed its contracts, of which a large number were in force, to furnish and afford "telephonic" facilities to the residents of Richmond and to persons outside of the city of Richmond, and with the officers and agents of the Federal government; and that under the act of Congress of 1866 it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, "*without regard to the consent of the said city*, and it did in fact locate many of its poles and wires and begin the operation of its business *without applying to the said city for permission to do so.*"

The bill then referred to an ordinance of the city approved July 18th, 1891, and alleged that it was in conflict with the plaintiff's rights and void. It referred also to a subsequent ordinance of December 14th, 1894, repealing the ordinance of June 26th, 1884, granting the right of way through the city to the plaintiff, and providing "that in accordance with the fifth section of said ordinance all privileges and rights granted by said ordinance shall cease and be determined [767] at the expiration *of twelve months from the approval of this ordinance by the mayor."

Reference was also made in the bill to two ordinances passed September 10th, 1895, by one of which it was provided, among other things: "1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. 2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privileges of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the police justice of the city; each day's failure to be a separate offense."

By the other ordinance of September 10th, 1895, it was, among other things, provided: "The city council will grant permission to any company, corporation, partnership, or individual to place its wires and electrical conductors in conduit under the surface of said streets of the city; any such individual, partnership, corporation, or company desiring such permission shall petition to the council therefor; such petition shall name the streets, alleys, and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans, and details thereof to accompany such petition."

The bill contains additional allegations to the effect—

That the fifth section of the ordinance of [768] 1884 was null *and void; that the ordinances referred to were unreasonable, *ultra vires*, and unconstitutional; that the plaintff was entitled, "*independent of and superior to the consent of the city of Richmond,*" to "construct, maintain, and operate" its lines "over and along" the streets of that city; that telephone companies and their business were embraced by the terms of the act of Congress, and that, in fact, telephone and telegraph companies were, for the purposes embraced by that act, one and the same; that the post roads spoken of in the act were not limited to routes on the public domain, but embraced all post roads of the United States that had been or might hereafter be declared such by Congress; that the streets and alleys of the defendant being post roads, the plaintiff had the right under the act of Congress "to occupy the streets and alleys of the city of Richmond for its purposes, guaranteed to it by the Constitution and laws of the United States, *superior to any power in the said city to prevent it from so doing;*" and that it "claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys as its business and the business interests of the country and its patrons may require."

The city demurred to the bill of complaint, but the demurrer was overruled. 78 Fed. Rep. 858.

An answer was then filed which met the material allegations of the bill and the cause was heard upon the merits.

In the circuit court a final decree was entered in accordance with the prayer of the bill, as follows: "The court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion and doth adjudge, order, and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States approved July 24th, 1866 (which is an authority paramount and superior to any state law or city ordinance in conflict therewith), the right 'to construct, maintain, and operate its lines over and along' the streets and alleys of the city of Richmond, both those now *occupied by the [769] complainant company and those not now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys, as well as to maintain, construct, and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. And the court doth adjudge, order, and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

The city asked that the decree be modified by inserting therein after the words "construct and operate the same," the following words: "so far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the state of Virginia or to be sent beyond the said limits;" and by inserting therein after the words, "interfering with the exercise of the aforesaid rights by the complainant company," the following words: "so far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the state of Virginia, or to be sent beyond said limits." But counsel for complainant objected, and the court (using the language of its order), "intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character," refused to so modify the decree.

Upon appeal to the circuit court of appeals
[770]it was held *that the plaintiff came within the protection and was entitled to the privileges of the act of Congress of July 24, 1866; and that under that act it had the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, and "when an effort is made, or threatened, to deal with it as a trespasser, it can refer to that act."

The circuit court of appeals also held that the privileges so granted were to be enjoyed in subordination to public and private rights, and that the municipality could establish lawful provisions regulating the use of the highways mentioned in the act of Congress. "This being so," that court said, "the injunction granted by the circuit court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power." 42 U. S. App. 686, 697, 698.

The decree of the circuit court was reversed, and the cause was remanded to that court with instructions to modify the terms of the injunction therein granted so as to conform to the principles declared in the opinion of the circuit court of appeals. Judge Brawley concurred in the result, but was not inclined to assent to so much of the opinion as held that a telephone company, such as was described in this case, and whose business was local in character, was within the purview of the act of Congress of July 14th, 1866, relating to telegraph companies.

The case is now before this court upon writ of certiorari.

The plaintiff's bill, as we have seen, proceeded upon the broad ground that it is entitled, in virtue of the act of Congress of 1866, to occupy the streets of Richmond with its lines without the consent, indeed against the will, of the municipal authorities of that city. That, it would seem, is the ground upon which the decree of the circuit court rests; *for it was declared by that court that [771]
the plaintiff had the right, under the provisions and protection of that act, to construct, maintain, and operate its lines over and along the streets and alleys of Richmond, both those then occupied by the plaintiff company and those not then so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along such streets and alleys, and to maintain, construct, and operate the same, as well as to connect its lines with the new subscribers along the streets and alleys of the city.

The circuit court of appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866,—a question to be presently considered,—adjudged that the rights and privileges granted by that act were to be enjoyed in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866.

In *Western Union Telegraph Co.* v. [*Atty. Gen. of*] *Massachusetts*, 125 U. S. 530, 548, [31: 790, 793], it was held that the act of 1866 was a "permissive" statute, and that "it never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In *St. Louis* v. *Western Union Telegraph Co.* 148 U. S. 92, 100 [37: 380, 383], which involved the question whether a corporation proceeding under the act of 1866 could occupy the public streets of a city without making such compensation as was reasonably required, it was said to be a misconception to suppose that the franchise or privilege granted by the act of 1866 carried "with it the unrestricted right to appropriate the public property of a state. It is like any other franchise, to be exercised in subordination to public as to private rights. *While a grant [772]
from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant or franchise from the national government, a corporation assumes to enter

upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state, and it is not within the competency of the national government to dispossess the state of such control and use or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. While for the purposes of travel and common use they are open to the citizens of every state alike, and no state can by its legislation deprive a citizen of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local pub-
[773] lic, to *exact for its benefit compensation for this exclusive appropriation. It matters not for what the exclusive appropriation is taken, whether for steam railroads or for street railroads, telegraphs, or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

But independently of any question as to the extent of the authority granted to "telegraph" companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the Federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company in 1879, as "an instrument for electrically transmitting or receiving *articulate speech*."

Our attention is called to several adjudged cases in some of which it was said that communication by telephone was communication by telegraph. *Attorney General* v. *Edison Telephone Co.* L. R. 6 Q. B. Div. 244, 255; *Chesapeake & Potomac Telephone Co.* v. *Baltimore & O. Telegraph Co.* 66 Md. 399 [59 Am. Rep. 167]; *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wis. 32; [*State, ex rel.*] *Duke*, v. *Central New Jersey Telephone Co.* 53 N. J. L. 341 [11 L. R. A. 664]; *Cumberland Telephone & Telegraph Co.* v. *United Electric Railway Co.* 42 Fed. Rep. 273 [12 L. R. A. 544]. Upon the authority of those cases it is contended that the act of Congress should be construed as embracing both telephone and telegraph companies.

The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the Postmaster General by certain acts of Parliament as to the transmission of "telegrams." The court held that the Postmaster
*General was entitled, looking at the mani- [774]
fest objects of those acts and under a reasonable interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether telephone companies, although not specifically mentioned in a certain general law of that state, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in any way, "or for any lawful business or purpose whatever." The New Jersey case involved the question whether a company organized under the act of that state to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate, and maintain such telegraph, telephone, and other lines necessary for the speedy transmission of intelligence along and over the public ways and streets of the cities and towns of that state. It was held in that case that a telephone company under its right to construct and operate a telegraph was empowered by statute to establish a telephone service. None of those cases involved a construction of the act of Congress; and the general language employed in some of them cannot be regarded as decisive in respect of the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

It may be that the public policy intended to be promoted by the act of Congress of 1866
would suggest the granting to *telephone com- [775]
panies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in

1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When, therefore, the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887 the Postmaster General submitted to the Attorney General the question whether a telephone company or line, offering to accept the conditions prescribed in title LXV of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Attorney General Garland replied: "The subject of title LXV of Revised Statutes is telegraphs. In all its sections the words 'telegraph,' 'telegraph company' and 'telegram,' define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed
[776] with the Postmaster General, *who has charge of the mail service. Under the several sections embraced in the title, in consideration of the right of way and the grant of the right to pre-empt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the government. Governmental communications to all distant points are almost all, if not all, in writing. The useful government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies therefore are not within the 'category of the grantees of the privileges conferred by the statute.' If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." 19 Ops. Atty. Gen. 37.

It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the states, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as *the owner or occupant may desire, or may [777]
the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to everyone indicate the confusion that may arise if the act of Congress, relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the state. But even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of Congress relating in terms only to "telegraph" companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions. If Congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech—that is, to companies popularly known as telephone companies, and never otherwise designated in common speech—let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

Something was said in argument as to the power of Congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary

to express any opinion. We now adjudge only that the act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no application *to telephone companies whose business is that of electrically transmitting articulate speech between different points.

What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the circuit court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction.

The decree of the Circuit Court of Appeals so far as it reverses the decree of the Circuit Court is affirmed, and the cause is remanded with directions for such further proceedings in the Circuit Court as may be in conformity with the principles of this opinion and consistent with law.

It is so ordered.

SARAH A. OAKES, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 778-798)

Capture of vessel by naval forces of United States—act of August 6, 1861—when vessel is not recaptured from the enemy—Confederate archives, when evidence—claim for compensation for vessel captured by the insurgents.

1. The capture of a vessel while dismantled and lying by the bank of a river, when made by the naval forces of the United States, although under the general control of the War Department, is not deemed to have been made by the Army, instead of the Navy.
2. A libel alleging that the seizure of a vessel "was made for the reason that said steamer was used, by and with the knowledge and consent of the owner, in aiding the present rebellion against the United States, contrary to the act of August 6, 1861," sufficiently alleges that she was so used with the knowledge and consent of her owner, as well as that she was seized for that reason.
3. A vessel purchased by the Confederate government from an agent of the owner, although without the owner's authority, consent, or knowledge, is not, when captured by the United States, within the provisions of the act of Congress of March 3, 1800, providing for the restoration to the owners of private vessels recaptured from the enemy, as there can be no recapture where there has been no capture.
4. Certified copies from the Confederate Archives Office, of official communications between high civil and military officers of the Confederate States are competent evidence to show that the Confederate authorities obtained possession of a vessel by purchase, and not by capture or by other forcible and compulsory appropriation.
5. The claim of the heir at law of a part owner, for compensation for his interest in a vessel alleged to have been captured by the insurgents and recaptured by the United States during the War of the Rebellion, cannot be sustained where the claimant wholly fails to support his allegation that the vessel was captured by the insurgents

[No. 19.]

Argued April 20, 1898. Decided May 22, 1899.

APPEAL from a judgment of the Court of Claims deciding that Sarah A. Oakes, heir at law of Hugh Worthington, was not entitled to recover compensation for his interest in a steamboat claimed to have been captured by the insurgents and recaptured by the United States during the War of the Rebellion. *Affirmed.*

See same case below, 30 Ct. Cl. 378.

Statement by Mr. Justice **Gray:**

*This was a petition under the act of Con- **[779]**
gress of July 28, 1892, chap. 313 (copied
in the margin†), filed in the court *of claims **[780]**
January 9, 1895, by Sarah A. Oakes, the heir at law and next of kin of Hugh Worthington, to recover compensation for his interest in the steamboat Eastport, alleged in the petition to have been captured by the in-

†An Act to Confer Jurisdiction on the Court of Claims to Hear and Determine the Claim of the Heir of Hugh Worthington for His Interest in the Steamer Eastport.

Whereas it is claimed the steamer Eastport was taken by the United States, Anno Domini eighteen hundred and sixty-two, and converted into a gunboat; and

Whereas it is claimed at the time of such taking one Hugh Worthington, then of Metropolis, Massac county, Illinois, but since deceased, was the owner of three-fifths interest in said steamer, and no compensation has been paid to said Hugh Worthington or his heirs; and

Whereas his daughter, Mrs. Sarah A. Oakes, of Metropolis, Illinois, claims that Hugh Worthington was a loyal citizen, that she is his only heir at law, and is justly entitled to receive from the United States compensation for the value of her father's interest in said steamer: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the court of claims to hear and determine what are the just rights in law of the said Sarah A. Oakes, as heir of Hugh Worthington, deceased, and that from any judgment so entered by said court of claims either party may appeal to the Supreme Court of the United States, for compensation for the value of said Worthington's interest in said steamer Eastport. That upon proper petition being presented by said Sarah A. Oakes, her heirs, executors, or administrators, to said court, said court is authorized and directed to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just, the court shall enter judgment in favor of the claimant and against the United States for whatever sum shall be found to be due.

Sec. 2. That in case judgment shall be rendered against the United States, the Secretary of the Treasury shall be, and he is hereby, authorized and directed to pay the claimant, her heirs, executors, or administrators, whatever sum shall be adjudged by the court to be due out of any money in the treasury not otherwise appropriated. 27 Stat. at L. 320.

surgents, and recaptured by the United States, during the war of the rebellion.

The facts of the case, as found by the court of claims, were in substance as follows:

At the outbreak of the War of the Rebellion, the steamboat Eastport, of 570$\frac{34}{95}$ tons burthen, duly enrolled at Paducah, Kentucky, and commanded by Captain Elijah Wood, was plying between the ports of Nashville, Tennessee, and New Orleans, Louisiana, engaged in the cotton trade. After the beginning of the war, she continued, under Wood's command, to ply between points on the Ohio river until May, 1861, when, in consequence of the blockade of the Mississippi river by the United States forces at Cairo, Illinois, she was tied up at Paducah, and there remained until August, 1861, undergoing extensive repairs under the orders of Captain Wood, and of Hugh Worthington, who was the owner of three fifths of her, the remaining two fifths being owned by two other persons.

About the last of August, or early in Sep-
[781] tember, 1861, when *the United States forces were about to take possession of Paducah, and while the Eastport was in the possession and under the control of Captain Wood, he took her, with a small crew, without Worthington's knowledge or consent, from Paducah up the Tennessee river to a place near the mouth of the Sandy river, a few miles above Fort Henry, within the lines of the Confederate forces. Captain Wood returned to Paducah a few months afterwards, and continued to reside there until his death, about the close of the war. What disposition he made of the Eastport does not appear, although papers in the Confederate Archives Office show what is stated in the certificate copied in the margin.† Nor does it appear whether the sum of money stated therein was paid to Captain Wood, nor whether he ever rendered an account thereof to the other owners, nor whether they received any part of that sum, nor where they are, nor what has become of their interests in the Eastport, nor why they are not seeking payment for the value thereof.

Some time between September, 1861, and
[782] February 7, 1862, *the Eastport was in the possession of the Confederate forces, but whether by reason of capture, or of purchase from Captain Wood, does not appear; and before the latter date she was taken by those forces to Cerro Gordo, Tennessee, and work was there begun to transform her into a gunboat for use in the Confederate service.

On February 7, 1862, while she was lying under the bank of the Tennessee river near Cerro Gordo, and being converted into a gunboat for use in the Confederate service, with the iron and other materials therefor on board, and having been dismantled, and her upper works, cabin and pilothouse cut away, but before she had been completed, or had been used, or was in condition for use, in any hostile demonstration against the United States, she was boarded under the fire of the enemy (whether that fire was from the vessel or from the land does not appear) and captured by detachments of men in small boats from three United States gunboats, commanded by a lieutenant in the Navy, and part of the naval forces on the western waters, then under the control of the War Department, and commanded by Captain Andrew H. Foote, who was serving under a commission from the President of August 5, 1861, appointing him a captain in the Navy and under an order from the Secretary of the Navy of August 30, 1861, directing him "to take command of the naval operations upon the western waters, now organizing under the direction of the War Department," and to proceed at once to St. Louis, to place himself in communication with Major General Fremont, commanding the army of the West, and to co-operate fully and freely with him as to his own movements, and to make requisitions upon the War Department through him. Immediately after the capture, Captain Foote reported his operations, together with the report of the lieutenant commanding the gunboats, to the Secretary of the Navy, who communicated them to Congress. At the time of the capture, no land forces were near the scene thereof, or took any active part therein.

The Eastport was brought by her captors to Mound City, Illinois, on the Ohio river, arriving there about February 26, 1862; and was there, on the recommendation of Captain *Foote, converted by the United States into a [783] gunboat; and about August, 1862, went into commission as such with a full complement of officers and men of the Navy; and continued in the service as part of the Mississippi squadron until April, 1864, when she was sunk by running upon a torpedo, and was blown up by her commander to prevent her capture by the Confederate forces. The

†Under date of October 31, 1861, General L. Polk, C. S. Army, telegraphed from Columbus, Ky., to the Secretary of the Navy, C. S., that "the price of the steamer Eastport is $12,000;" and on the same date J. P. Benjamin, acting Secretary of War, C. S., telegraphed to General L. Polk directions to "buy the steamer Eastport if thought worth $12,000 demanded."

Under date of November 28, 1861, General L. Polk, in a letter from Columbus, Ky., addressed to General A. S. Johnston, C. S. A., stated that he bought the steamer Eastport by authority of the Secretary of the Navy.

Under date of January 5, 1862, General L. Polk wrote to J. P. Benjamin, Secretary of War, C. S., as follows: "By virtue of the authority from the War Department of October 31, I bought the steamer Eastport, and she is now undergoing the necessary alterations to convert her into a gunboat."

Under date of January 16, 1862, J. P. Benjamin, Secretary of War, C. S., wrote to General L. Polk as follows: "I shall order the necessary funds forwarded at once for the Eastport."

Under date of February 2, 1863, General Polk, in a statement to the C. S. Secretary of War of the disbursement of certain moneys, gives as one item, "Am't expended in purchase of steamer Eastport as per receipt of Major Peters, A. Q. M., $9,688.92."

No further information on the subject of the within inquiry has been found in said archives.

By authority of the Secretary of War:

F. C. Ainsworth,
Colonel U. S. Army, Chief of Office.

Eastport and all other vessels of the Navy performing services on the western waters were under the control of the War Department until October 1, 1862, when they were turned over to the Navy Department, pursuant to the act of Congress of July 16, 1862, chap. 185, 12 Stat. at L. 587.

On July 17, 1862, in the district court of the United States for the southern district of Illinois, the district attorney of the United States filed a libel in admiralty against the Eastport, alleging "that on or about the 20th day of June, A. D. 1862, in the Mississippi river near Columbus, Kentucky, there was seized by George D. Wise, captain and assistant quartermaster, with gunboat flotilla (and which he hereby reports for condemnation), the steamer Eastport, and which was brought into said district. Said seizure was made for the reason that said steamer was used by and with the knowledge and consent of the owner in aiding the present rebellion against the United States, contrary to the act of August 6, 1861. The said attorney therefore asks that process of attachment may issue against said steamer, and the monition of this honorable court, and that all persons having an interest in the same may be made parties herein, and that on a final hearing of this case your honor will adjudge and decree condemnation of said boat and order that the same may be sold." Thereupon the court issued a monition, reciting that the libel had been filed by the district attorney and Captain Wise; and commanding the marshal to attach the Eastport and detain her in his custody until the further order of the court; and to give notice by publication in a certain newspaper published at Springfield in that district for fourteen days before the day of trial, "and by notice posted up in the most public manner for the space of fourteen days at or near the place of trial, of such seizure and libel, to all

[784] persons claiming the said steamer *Eastport, boats, tackle, apparel, and furniture, or knowing or having anything to say why this court should not pronounce against the same, according to the prayer of the said libel," to appear before the court at Springfield on September 2, 1862. The marshal's return on the monition stated that by virtue thereof he had "attached the within-named boat, and made proclamation of the same;" and notice was published as ordered. And on that day the court entered a decree, reciting the attachment and notice, and that, notwithstanding proclamation made, no one had appeared or interposed a claim; and adjudging "that the default of all persons be, and the same are, accordingly hereby entered, and that the allegations of the libel in this cause be taken as true against said property, and that the same be condemned as forfeited to the United States," and be sold by the marshal. Pursuant to that decree the Eastport was sold October 4, 1862, by the marshal to the United States for the sum of $10,000, which, after deducting allowances to the clerk, to the marshal, and to the district attorney, was ordered by the court to be "equally divided between the United States and George D. Wise, the informer herein."

Of those proceedings, Hugh Worthington had no notice or knowledge until after the sale of the vessel under them; but whether her other owners or Captain Wood had any does not appear.

Before and throughout the war, Worthington was a citizen and resident of Metropolis, Illinois, about ten miles above Paducah, and was loyal to the United States, and gave no aid or comfort to the rebellion. He died in March, 1876, intestate and without property, and having received no compensation from the United States for the use or value of the Eastport. The claimant, Sarah A. Oakes, is his daughter, and his sole surviving heir at law and next of kin.

When Captain Wood ran the Eastport up the Tennessee river, she was worth $40,000. When she was captured by the United States forces, she was worth $30,000. During the time she was used by the United States, a fair and reasonable rental for her was $150 a day.

*The court of claims decided that the claimant was not entitled to recover against the United States, and dismissed the petition. 30 Ct. Cl. 378. The claimant appealed to this court. [785]

Mr. **John C. Fay** for appellant.

Messrs. **Louis A. Pradt,** Assistant Attorney General, and *John G. Capers* for appellee.

*Mr. Justice **Gray,** after stating the case as above, delivered the opinion of the court: [785]

The special act of Congress of July 28, 1892, chap. 313, under which the petition in this case was filed, confers jurisdiction upon the court of claims "to hear and determine what are the just rights in law" of the claimant, as the daughter and heir at law of Hugh Worthington, to compensation for the value of his interest in the steamboat Eastport, alleged to have been taken by the United States in 1862, and converted into a gunboat; and authorizes and directs that court, upon her petition, "to inquire into the merits of said claim, and if on a full hearing the court shall find that said claim is just," to render judgment in her favor and against the United States for whatever sum shall be found due. 27 Stat. at L. 320.

Under this act, the question whether "said claim is just" is the same as the question "what are the just rights in law" of the claimant as Worthington's daughter and heir; and this necessarily depends upon the question what had been his legal right to compensation from the United States for the value of his interest in the vessel.

The act neither recognizes the claim as a valid one, nor undertakes to pass upon its validity; but simply empowers the court of claims to hear and determine whether the claim is valid or invalid; and the determination of that issue embraces not only the questions whether the claimant was the daughter and heir at law of Worthington, whether he was a loyal citizen of the United States, whether he was the *owner of three

fifths of the Eastport, and whether the vessel was taken and applied to the use of the United States, but all other questions, of law or of fact, affecting the merits of the claim. *United States* v. *Cumming,* 130 U. S. 452 [32: 1029].

The leading facts of the case, as found by the court of claims, are as follows: Worthington was a loyal citizen of the United States, residing at Metropolis in the state of Illinois; and the claimant was his daughter and only heir at law. Early in the war of the rebellion, in consequence of the blockade of the Mississippi river by the forces of the United States, the Eastport was tied up at Paducah in the state of Kentucky, her home port, undergoing extensive repairs under the orders of her master, Captain Wood, and of Worthington, who owned three fifths of her. She was afterwards taken by Wood, without Worthington's knowledge or consent, up the Tennessee river within the lines of the Confederate forces, and came into their possession; and while in their possession, and being transformed into a gunboat for use in the Confederate service, having on board the iron and other materials therefor, and having been dismantled, and her upper works, cabin, and pilot-house cut away, but before she had been completed or used, or was in condition for use, in any hostile demonstration against the United States, she was captured by part of the naval forces of the United States on the western waters, then under the control of the War Department. No land forces took part in the capture, or were in the neighborhood at the time. The Eastport was immediately brought by her captors to Mound City, Illinois, and was afterwards converted by the United States into a gunboat, and put in commission in the Navy as such.

The questions of law presented by the record are not free from difficulty.

By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judi-
[787]cial *decree of condemnation is usually necessary to complete the title of the captors. 1 Kent, Com. 102, 110; Halleck's International Law, chap. 19, § 7, chap. 30, § 4; *Kirk* v. *Lynd,* 106 U. S. 315, 317 [27: 193, 194].

The Eastport, at the time of her capture by the forces of the United States, was in the hands of the Confederate forces, and was being transformed into a gunboat for use in the Confederate service, with the iron and other materials therefor on board. Although not yet in condition for hostile use, she was clearly intended for that use. Consequently if, as the court of claims held, her capture was made by the Army of the United States, it cannot be doubted that the capture was at once complete upon her being taken into the possession of the national forces, and brought by them to Mound City, Illinois, in February, 1862.

The grounds on which the decision of the court of claims proceeded were that by the Army appropriation act of July 17, 1861 (12 Stat. at L. 263, chap. 6), there was appropriated for "gunboats on the western rivers, one million dollars;" that, at the time of the capture of the Eastport, the gunboats and the naval forces of the United States on those rivers were under the control of the War Department; that she was on inland waters, and could not be regarded as maritime prize; that she was lying dismantled by the bank of a river, where the seizure might as well have been made by a detachment from the Army, as by one from the Navy; and that, in view of these facts, the Eastport must be considered as having been captured by the Army.

In support of that conclusion, reference was made to *United States* v. *269 1-2 Bales of Cotton,* Woolw. 236. But that case was wholly different from the case at bar. In that case, a battalion of cavalry, commanded by an officer of the Army of the United States, went in vessels in the service of the United States up the Mississippi river, and landed in the state of Mississippi, and penetrated into country in the control of the Confederate forces, and, after a conflict with them, took from their possession a quantity of cotton, and brought it by the river to the state of Arkansas; and Mr. Justice *Miller, [788]
sitting in the circuit court, held that the cotton so captured was not within the jurisdiction of a prize court. The grounds of his decision are sufficiently shown by the following extract from his opinion:

"It is not supposed or alleged that any of these vessels were officered by government officers. They were not even armed vessels, and could not take part in any action, or contribute in any manner by belligerent force to the capture. It is not shown that they remained after they landed the forces; and the fair inference is that they did not. It is averred that the cotton was conveyed by the soldiers to the river, and that it was taken thence to the state of Arkansas; but it is not alleged that it was so taken by the vessels. In short, the entire statement is consistent with the fact that the vessels and crews were in the employment of the War Department, and were used merely as transports to carry the troops; and it is consistent with no other supposition. It is also evident that the capture was not made on the banks of the river, but some distance inland, where the vessels could render no other assistance than to land the forces, and receive them again. I cannot conceive that the employment by the government of unarmed steamboats, for the mere purpose of transporting troops from one point to another on the Mississippi river, can render every capture made by the troops or detachments so transported prize of war, and let in the crews and officers of those vessels to a share of the prize money. Such vessels are in no sense war vessels, and are neither expected nor fitted to take part in engagements." Woolw. 256, 257.

In the case at bar, on the other hand, it appears, by the facts found by the court of claims, that the Eastport, while water-

borne, was boarded and taken by detachments of men in small boats from three United States gunboats, armed vessels, commanded by a lieutenant in the Navy, and part of the naval forces on the western waters, commanded by a captain in the Navy, who reported the capture to the Secretary of the Navy; and that, at the time of the capture, no land forces were near the scene thereof, or took any active part therein. Under these circumstances, we are not pre-
[789]pared *to hold that the capture was made by the Army, and not by the naval forces of the United States, although the latter, at the time and place, were under the general control of the War Department.

If it was not a capture by the Army, it was clearly a capture by the naval forces; and the United States rely upon the proceedings for the condemnation and sale of the Eastport in the district court of the United States for the southern district of Illinois, which are stated in the record.

Those proceedings, as appears on the face of the libel, were instituted under the act of Congress of August 6, 1861, chap. 60, the material provisions of which are as follows:

Section 1 enacts that, if the owner of any property, of whatsoever kind or description, "shall purchase or acquire, sell or give," with "intent to use or employ the same, or suffer the same to be used or employed," or "shall knowingly use or employ, or consent to the use and employment of the same," in aiding, abetting, or promoting the then existing insurrection, "all such property is hereby declared to be lawful subject of prize and capture, wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned."

Section 2 gives jurisdiction of the proceedings for condemnation of such property to "the district or circuit court of the United States having jurisdiction of the amount, or in admiralty, in any district in which the same may be seized, or into which they may be taken and proceedings first instituted."

Section 3 provides that "the Attorney General, or any district attorney of the United States [in the district] in which said property may at the time be, may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States; or any person may file an information with such attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts." 12 Stat. at L. 319.

In the proceedings for the condemnation of the Eastport, the libel alleged that she
[790]had been seized, in June, 1862, by *an assistant quartermaster, "with gunboat flotilla," and that "said seizure was made for the reason that said steamer was used by and with the knowledge and consent of the owner in aiding the present rebellion against the United States, contrary to the act of August 6, 1861." This is a sufficient allegation that she was so used with the knowledge and consent of her owner, as well as that she was seized for that reason, and brings the case within the first section of that act. The proceedings were in conformity with the practice in admiralty, and were not governed by the strict rules that prevail in regard to indictments or criminal informations at common law. *Union Ins. Co.* v. *United States*, 6 Wall. 759, 763 [18: 879, 881]; *The Confiscation Cases*, 20 Wall. 92, 104-107 [22: 320, 322, 323].

The libel was filed, as required by the second and third sections of that act, by the district attorney of the United States, in the district court of the United States, in a district into which the Eastport had been brought. The libel seems to have been filed by the district attorney on the information of the assistant quartermaster; but this was unimportant for any purpose, except for the distribution of the proceeds of the sale after condemnation.

The expressions in the opinions in *The Confiscation Cases*, 20 Wall. 92, 109 [22: 320, 324], and in *United States* v. *Winchester*, 99 U. S. 372, 376 [25: 479, 480], cited by the appellant as tending to show that the proceedings for condemnation were void, for want of a preliminary order of the President of the United States directing the seizure of the Eastport and the institution of the proceedings, were delivered in cases in which proceedings for the confiscation of land, or of cotton captured on land, were sought to be maintained under the act of July 17, 1862, chap. 195 (12 Stat. at L. 589), and are not easily to be reconciled with earlier judgments of this court under the same act. See *Pelham* v. *Rose*, 9 Wall. 103 [19: 602]; *Miller* v. *United States*, 11 Wall. 268 [20: 135].

But the act of 1861 differed materially, in its object, and in its provisions, from the act of 1862. As was observed by Chief Justice Waite, speaking for the court, in *Kirk* v. *Lynd*, 106 U. S. 315 [27: 193] the act of 1861 was passed by Congress in the exercise of its power under the Constitution "to make rules *concerning captures on land and [791]
water," and was aimed exclusively at the seizure and confiscation of property used in aid of the rebellion, "not to punish the owner for any crime, but to weaken the insurrection"; but the act of 1862 proceeded upon the entirely different principle of confiscating property, without regard to its use, by way of punishing the owner for being engaged in rebellion and not returning to his allegiance. The act of 1861 did not require (as the act of 1862 did) that proceedings for condemnation of the property in question should be instituted "after the same shall have been seized;" and the act of 1861 expressly authorized (as the act of 1862 did not) such proceedings to be instituted by "the Attorney General or any district attorney of the United States [in the district] in which said property may at the time be." The case at bar presents no question of the construction of the act of 1862.

The Eastport having been captured by the United States forces, and taken into the firm possession of the United States, before the institution of the proceedings for condemnation; those proceedings having been instituted by the district attorney, under the au-

thority expressly given him by the act of 1861, in a proper court of the United States in a district into which she had been taken; and thereupon, according to the usual course of proceedings *in rem* in admiralty, the vessel having been taken into the custody of the marshal under a writ of attachment from the court, and notice published to all persons interested to appear and show cause against her condemnation, and no one having appeared or interposed a claim at the time and place appointed for the hearing; we find it difficult to resist the conclusion that the decree of condemnation thereupon entered was valid, as against her former owners and all other persons, under the act of 1861; that the proceedings cannot be collaterally impeached; and that the sale under that decree passed an absolute title to the United States.

But, apart from the question whether the record shows a complete title in the Eastport to have vested in the United States, the claimant has wholly failed to show that
[792] Worthington *had any legal right to compensation from the United States for his interest in the vessel.

The counsel for the claimant contends that, the capture having been made on navigable waters by vessels of the United States, the claimant is entitled to compensation for the value of Worthington's interest in the Eastport, under the act of Congress of March 3, 1800, chap. 14, § 1, which was as follows:

"When any vessel other than a vessel of war or privateer, or when any goods, which shall hereafter he taken as prize by any vessel acting under authority from the government of the United States, shall appear to have before belonged to any person or persons resident within or under the protection of the United States, and to have been taken by an enemy of the United States, or under authority, or pretense of authority, from any prince, government, or state against which the United States have authorized, or shall authorize, defense or reprisals, such vessel or goods not having been condemned as prize by competent authority before the recapture thereof, the same shall be restored to the former owner or owners thereof, he or they paying, for and in lieu of salvage, if retaken by a public vessel of United States, one-eighth part, and if retaken by a private vessel of the United States, one-sixth part, of the true value of the goods so to be restored, allowing and excepting all imposts and public duties to which the same may be liable. And if the vessel so retaken shall appear to have been set forth and armed as a vessel of war, before such capture or afterwards, and before the retaking thereof, as aforesaid, the former owner or owners, on the restoration thereof, shall be adjudged to pay, for and in lieu of salvage, one moiety of the true value of such vessel of war, or as privateer." 2 Stat. at L. 16.

That act was a regulation of the *jus postliminii*, by which things taken by the enemy were restored to their former owner upon coming again under power of the nation of which he was a citizen or subject. The *jus postliminii*, derived from the Roman law, and regulated in modern times by statute or treaty, or by the usage of civilized nations, has been *rested by eminent jurists up- [793]
on the duty of the sovereign to protect his citizens and subjects and their property against warlike or violent acts of the enemy. Vattel's Law of Nations, lib. 3, chap. 14, § 204; Halleck's International Law, chap. 35, §§ 1, 2. He is under no such obligation to protect them against unwise bargains, or against sales made for inadequate consideration, or by an agent or custodian in excess of his real authority. The *jus postliminii* attaches to property taken by the enemy with the strong hand against the will of its owner or custodian, and not to property obtained by the enemy by negotiation or purchase.

The act of 1800 is entitled "An Act Providing for Salvage in Cases of Recapture," and applies only to recaptures from an enemy. In order to come within its purpose, and its very words, the property in question must "have been taken by an enemy of the United States," and "retaken" by a public or private vessel of the United States. Where there has been no capture, there can be no recapture. That enactment has been substantially embodied in later statutes. Act of June 30, 1864, chap. 174, § 29; 13 Stat. at L. 314; Rev. Stat. § 4652. The similar provision of the English prize acts was held by Sir William Scott to be inapplicable to a British ship captured from the French during a war between the two countries, which before the war had been seized, condemned, and sold under the revenue laws of France, although the French seizure was alleged to have been violent and unjust. *The Jeune Voyageur*, 5 C. Rob. 1. Neither the English statutes nor our own have ever been held to apply to property which had come into the enemy's possession, by purchase or otherwise, with the consent of the owner or of his agent.

In the present case, the only facts found by the court of claims (other than may be ascertained from the papers in the Confederate Archives Office) which can be supposed to have any bearing on the question whether the Eastport came into the possession of the Confederate forces by capture, or by purchase, are these: Before and throughout the war of the rebellion, Worthington, being the owner of three fifths of the Eastport, was a citizen and resident of Illinois, was loyal to *the United States, and gave no aid or com- [794]
fort to the rebellion, and neither knew of, nor consented to, the Eastport being taken by her captain, Wood, within the lines of the Confederate forces. This precludes any inference that Worthington himself participated in, or consented to, a transfer of the Eastport to the Confederate authorities; but it does not negative the supposition that she was sold to those authorities by Wood, or by the owners of the other two fifths of her. That Wood's possession and control of her was by Worthington's authority and consent is evident from the facts that Worthington owned more than one half of her, and that she was being extensively repaired, under the orders of both Wood and Worthington,

shortly before Wood took her within the Confederate lines. At that time she was an unarmed vessel, and fit for commercial purposes only.

It is stated in the finding of facts that it did not appear what disposition Wood made of the Eastport, nor whether he was paid purchase money for her, nor whether he ever accounted for such money to the other owners, nor whether they had received any part of it, nor whether she came into the possession of the Confederate forces by capture, or by purchase from Wood.

If the matter rested here, there would be nothing to warrant the court in concluding that the Eastport came into the possession of the Confederate forces by capture or other forcible appropriation. But it does not rest here.

Upon the question whether the so-called Confederate States acquired possession of the Eastport by capture or by purchase, the extracts from the Confederate archives, made part of the facts found by the court of claims, appear to this court to have an important bearing, and to be competent, though not conclusive, evidence.

The government of the Confederate States, although in no sense a government *de jure*, and never recognized by the United States as in all respects a government *de facto*, yet was an organized and actual government, maintained by military power, throughout the limits of the states that adhered to it, except to those portions of them protected
[795]*from its control by the presence of the armed forces of the United States; and the United States, from motives of humanity and expediency, had conceded to that government some of the rights and obligations of a belligerent. *Prize Cases*, 2 Black, 635, 673, 674 [17: 459, 478]; *Thorington* v. *Smith*, 8 Wall. 1, 7, 9, 10 [19: 361, 363, 364]; *Ford* v. *Surget*, 97 U. S. 594, 604, 605; [24: 1018, 1021]; *The Lilla*, 2 Sprague, 177, and 2 Cliff. 169.

No better evidence of the doings of that organization assuming to act as a government can be found than in papers contemporaneously drawn up by its officers in the performance of their supposed duties to that government.

For the collection and preservation of such papers, a bureau, office, or division in the War Department (now known as the Confederate Archives Office) was created by the Executive authority of the United States soon after the close of the war of the rebellion, and has been maintained ever since, and has been recognized by many acts of Congress.

For instance, Congress, beginning in 1872, has made frequent appropriations "to enable the Secretary of War to have the rebel archives examined and copies furnished from time to time, for the use of the Government." Acts of May 8, 1872, chap. 140, and March 3, 1873, chap. 226, 17 Stat. at L. 79, 500; August 15, 1876, chap. 287, March 3, 1877, chap. 102, 19 Stat. at L. 160, 310; June 19, 1878, chap. 329, 20 Stat. at L. 195; June 21, 1879, chap. 34, June 15, 1880, chap. 225, March 3, 1881, chap. 130, 21 Stat. at L. 23, 226, 402. And the appropriations for the War Department in 1882 included one "for traveling expenses in connection with the collection of Confederate records placed by gift at the disposal of the government." Act of August 5, 1882, chap. 389, 22 Stat. at L. 241. Congress has also occasionally made appropriations "to enable the Secretary of the Treasury to have the rebel archives and records of captured property examined, and information furnished therefrom for the use of the government." Acts of March 3, 1875, chap. 130, 18 Stat. at L. 376; March 3, 1879, chap. 182, 20 Stat. at L. 384; June 16, 1880, chap. 235, 21 Stat. at L. 266. It has once, at least, made an appropriation "for collecting, compiling, and arranging the naval records of the war of the rebellion, including Confederate *naval records." Act of July [796]
7, 1884, chap. 331, 23 Stat. at L. 185. And it has made appropriations "for the preparation of a general card index of the books, muster rolls, orders, and other official papers preserved in the Confederate Archives Office." Acts of May 13, 1892, chap. 72, and March 3, 1893, chap. 208, 27 Stat. at L. 36, 600.

It would be an anomalous condition of things if records of this kind, collected and preserved by the government of the United States in a public office at great expense, were wholly inadmissible in a court of justice to show facts of which they afford the most distinct and appropriate evidence, and which, in the nature of things, can hardly be satisfactorily proved in any other manner.

The act of March 3, 1871, chap. 116, § 2, provided for the appointment of a board of commissioners, "to receive, examine, and consider the justice and validity of such claims as shall be brought before them, of those citizens who remained loyal adherents to the cause and the government of the United States during the war, for stores or supplies taken or furnished during the rebellion for the use of the Army of the United States in states proclaimed as in insurrection against the United States, including the use and loss of vessels or boats while employed in the military service of the United States." 16 Stat. at L. 524. By the act of April 20, 1871, chap. 21, § 1, it was enacted that "all books, records, papers, and documents relative to transactions of or with the late so-called government of the Confederate States, or the government of any state lately in insurrection, now in the possession, or which may at any time come into the possession, of the government of the United States, or of any department thereof, may be resorted to for information by the board of commissioners of claims created by act approved March 3, 1871; and copies thereof, duly certified by the officer having custody of the same, shall be treated with like force and effect as the original." 17 Stat. at L. 6. The latter act thus not only allowed a particular board of commissioners, appointed to pass upon certain claims against the United States for property taken for the use of the Army during the war of the rebellion, *to [797]
have access to such archives for information

as to transactions of or with the so-called government of the Confederate States; but it declared the records and papers in such archives, or duly certified copies thereof, to be competent evidence of such transactions.

Section 882 of the Revised Statutes, also, re-enacting earlier acts of Congress, provides that "copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments respectively, shall be admitted in evidence equally with the originals thereof." And, by section 1076, the court of claims has "power to call upon any of the Departments for any information or papers it may deem necessary:" "but the head of any Department may refuse and omit to comply with any call for information or papers, when, in his opinion, such compliance would be injurious to the public interest."

The certificate of the officer of the United States in charge of the Confederate Archives Office, embodied in the findings of fact, would appear to have been furnished upon a call from the court of claims; and it is not open, at this stage of the case, to objection for not being under the seal of the War Department, since that court has found that the papers in that office show the facts stated in that certificate. Those facts consist of official communications, between high civil and military officers of the Confederate States, including a despatch from one of their generals in Kentucky, October 31, 1861, to the secretary of the navy, that the price of the Eastport was $12,000, a reply of the secretary of war of the same date, giving authority to the general to buy her if thought worth that sum; a letter of January 5, 1862, from the general to the secretary of war informing him that, by virtue of that authority, he had bought her, and she was being converted into a gunboat; a letter of January 16, 1862, from the secretary of war to the general, saying that he would at once order to be forwarded the necessary funds for the Eastport; and a statement of disbursements, dated February 2, 1863, by the general to the secretary of war, in which one item was a sum of $9,688.82, "expended in purchase of Steamer Eastport."

*Not going beyond what is required for the [798]
purposes of this case, we are of opinion that the originals of these communications, and consequently the certified copies thereof from the Confederate Archives Office, are competent and persuasive evidence that the Confederate authorities did not obtain possession of the Eastport by capture or by other forcible and compulsory appropriation.

The claimant therefore wholly fails to support the allegation of her petition that the Eastport was captured by the insurgents.

Judgment affirmed.

FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1898,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

TENTH RULE.

SOPORI LAND & MINING COMPANY, *Appellant*, v. UNITED STATES *et al.* [No. 38.]

Appeal from the Court of Private Land Claims.

Mr. George Lines for appellant. *The Attorney General* for appellees.

October 11, 1898. Dismissed, pursuant to the 10th Rule.

JAMES T. STARK, *Plaintiff in Error*, v. UNITED STATES. [No. 87.]

In Error to the District Court of the United States for the Northern District of Alabama.

Mr. John T. Morgan for plaintiff in error. *The Attorney General* for defendant in error.

December 6, 1898. Dismissed, pursuant to the 10th Rule.

SARAH WILLIAMS, *Plaintiff in Error*, v. STATE OF GEORGIA. [No. 101.]

In Error to the Supreme Court of the State of Georgia.

Mr. John R. Cooper for plaintiff in error. *Mr. J. M. Terrell* for defendant in error.

December 9, 1898. Dismissed with costs, pursuant to the 10th Rule.

MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, v. CROWELL LUMBER & GRAIN COMPANY. [No. 135.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. John F. Dillon and *W. S. Pierce* for plaintiff in error. No counsel for defendant in error.

January 12, 1899. Dismissed with costs, pursuant to the 10th Rule.

WASHINGTON & GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error*, v. LEONIDAS W. GRANT. [No. 141.]

In Error to the Court of Appeals of the District of Columbia.

Messrs. Enoch Totten and *R. Ross Perry* for plaintiff in error. No counsel for defendant in error.

January 13, 1899. Dismissed with costs, pursuant to the 10th Rule.

JULIAN MARTINEZ *et al.*, *Appellants*, v. UNITED STATES. [No. 156.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellants. *The Attorney General* for appellee.

January 17, 1899. Dismissed, pursuant to the 10th Rule.

MARIANO S. OTERO, *Appellant*, v. UNITED STATES. [No. 158.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellant. *The Attorney General* for appellee.

January 18, 1899. Dismissed, pursuant to the 10th Rule.

UNION PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, v. DAVID GOCHENAUER *et al.* [No. 204.]

In Error to the Supreme Court of the State of Kansas.

Mr. John F. Dillon for plaintiff in error. No counsel for defendants in error.

January 24, 1899. Dismissed with costs, pursuant to the 10th Rule.

FRANCIS G. POSEY *et al.*, *Plaintiffs in Error*, v. JULIA HANSON. [No. 205.]

In Error to the Court of Appeals of the District of Columbia.

Mr. F. H. Mackey for plaintiffs in error. *Messrs. H. Randall Webb* and *John Sidney Webb* for defendant in error.

January 24, 1899. Dismissed with costs, pursuant to the 10th Rule.

JOSEPH RAYMOND, *Appellant*, v. CITY OF NEW ORLEANS. [No. 234.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. Samuel T. Fisher for appellant. No counsel for appellee.

April 3, 1899. Dismissed with costs, pursuant to the 10th Rule.

JOHN W. SCHOFIELD *et al.*, *Appellants*, v. HORSE SPRINGS CATTLE COMPANY. [No. 251.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. W. B. Childers for appellants. *Messrs. J. H. McGowan* and *H. L. Warren* for appellee.

April 14, 1899. Dismissed with costs, pursuant to the 10th Rule.

ALCINDA M. CHAPPELL *et al.*, *Plaintiffs in Error*, v. EDMONDSON AVENUE, CATONSVILLE, & ELLICOTT CITY ELECTRIC RAILWAY COMPANY. [No. 258.]

In Error to the Circuit Court of Baltimore County, State of Maryland.

Mr. Thomas C. Chappell for plaintiffs in error. *Messrs. John N. Steele* and *William H. Buckler* for defendant in error.

April 18, 1899. Dismissed with costs, pursuant to the 10th Rule.

TWENTY-EIGHTH RULE.

THE UNITED STATES, *Appellant*, *v.* THE MIGUEL JOVER & CARGO. [No. 378.]

Appeal from District Court of the United States for the Southern District of Florida.

The Attorney General for appellant. *Wilhelmus Mynderse* for appellee.

August 24, 1898. Dismissed pursuant to 28th Rule.

THE UNITED STATES, *Appellant*, *v.* THE CATALINA, EDUARDO FANO, *Claimant.* [379].

Appeal from District Court of the United States for the Southern District of Florida.

The Attorney General for appellant. *Wilhelmus Mynderse* for appellee.

August 24, 1898. Dismissed pursuant to 28th Rule.

MISCELLANEOUS.

CHARLES J. MEADOWCROFT, *et al.*, *Plaintiffs in Error*, *v.* PEOPLE OF THE STATE OF ILLINOIS. [No. 33.]

In Error to the Supreme Court of the State of Illinois.

Messrs. Edwin Walker and *Arthur J. Eddy* for plaintiffs in error. No counsel for defendant in error.

October 10, 1898. Dismissed with costs, on motion of counsel for plaintiffs in error.

DURANGO LAND AND COAL COMPANY, *Appellant*, *v.* ROGER C. EVANS *et al.* [No. 131.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. David C. Beaman and *Lucius M. Cuthbert* for appellant. *Mr. John R. Smith* for appellees.

October 10, 1898. Dismissed per stipulation.

COVINGTON & CINCINNATI ELEVATED RAILROAD & TRANSFER & BRIDGE COMPANY, *Plaintiff in Error*, *v.* WILLIAM F. WILSON. [No. 173.]

In Error to the Circuit Court of the United States for the District of Kentucky.

Mr. C. B. Simrall for plaintiff in error. No counsel for defendant in error.

October 10, 1898. Dismissed with costs, on authority of counsel for plaintiff in error.

MARIANO S. OTERO, *Appellant*, *v.* UNITED STATES. [No. 179.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellant. *The Attorney General* for appellee.

October 11, 1898. Dismissed, on authority of counsel for appellant.

HENDERSON NATIONAL BANK, *Plaintiff in Error*, *v.* CITY OF HENDERSON. [No. 201.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. Malcolm Yeaman for plaintiff in error. *Mr. J. F. Clay* for defendant in error.

October 11, 1898. Dismissed, per stipulation.

FRANCIS I. GOWEN, Sole Receiver, etc., *Plaintiff in Error*, *v.* LAURA B. BUSH, Administratrix, etc. [No. 42.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Samuel Dickson and *John W. McLoud* for plaintiff in error. *Mr. W. H. H. Clayton* and *Jos. M. Hill* for defendant in error.

October 14, 1898. Dismissed with costs, per stipulation.

UNITED STATES, *Appellant*, *v.* CITY OF ALBUQUERQUE. [No. 40.]

Appeal from the Court of Private Land Claims.

The Attorney General, the Solicitor General, and *Mr. Matt. G. Reynolds* for appellant. *Mr. Frank W. Clancy* for appellee.

October 17, 1898. Decrees reversed on the authority of *United States* v. *Santa Fé* 165 U. S. 681 [41: 877] and cause remanded with directions to proceed therein in the matter of amendments, new parties, and otherwise as justice and equity may require.

KATE MCDONNELL, Surviving Partner, *et al.*, *Petitioners*, *v.* MERCANTILE TRUST COMPANY *et al.* [No. 311.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Gregory L. and *Harry T. Smith* for petitioners. *Messrs. W. A. Blount, D. P. Bestor*, and *Leopold Wallach* for respondents.

October 17, 1898. Denied.

MUTUAL RESERVE FUND LIFE ASSOCIATION, *Petitioner*, *v.* J. K. DUBOIS, Administrator. [No. 330.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. J. B. Foraker for petitioner. *Mr. R. E. McFarland* for respondent.

October 17, 1898. Denied.

THIRD NATIONAL BANK OF PHILADELPHIA, *Petitioner*, *v.* NATIONAL BANK OF CHESTER VALLEY. [No. 337.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Henry B. Tompkins for petitioner. *Mr. W. D. Ellis* for respondent.

October 17, 1898. Denied.

FRED. J. KIESEL & COMPANY, *Petitioner, v.* SUN INSURANCE OFFICE OF LONDON. [No. 391.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Abbot R. Heywood for petitioner. *Mr. T. C. Van Ness* for respondent.

October 17, 1898. Denied.

JOHN B. RUSSELL, *Petitioner, v.* FREDERICK STEARNS & CO. [No. 410.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Henry M. Campbell, Ephraim Banning, and *Thomas A. Banning* for petitioner. *Messrs. R. A. Parker* and *C. F. Burton* for respondent.

October 17, 1898. Denied.

JESSE L. MACDANIEL, Petitioner, *v.* UNITED STATES. [No. 416.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Tracy L. Jeffords for petitioner. *The Attorney General* and *Assistant Attorney General Boyd* for respondent.

October 17, 1898. Denied.

KATIE MCK. IRVINE, *Appellant, v.* UNITED STATES. [No. 441.]

Appeal from the Court of Private Land Claims.

October 17, 1898. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for appellee.

JACOB GOLD *et al., Appellants, v.* UNITED STATES. [No. 442.]

Appeal from the Court of Private Land Claims.

October 17, 1898. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for appellee.

TOLLESTON CLUB, OF CHICAGO, *Plaintiff in Error, v.* JOHN H. CLOUGH. [No. 219.]

In Error to the Supreme Court of the State of Illinois.

Mr. Frederic Ullman for plaintiff in error. *Messrs. Frank J. Smith, Addison L. Garden,* and *Randall W. Burns* for defendant in error.

October 17, 1898. Dismissed, per stipulation.

CITY OF NEW ORLEANS, *Appellant, v.* JOHN S. WARNER. [No. 336.]

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Samuel L. Gilmore and *Branch K. Miller* for appellant. *Messrs. Richard De Gray, J. D. Rouse, Wm. Grant,* and *Wheeler H. Peckham* for appellee.

October 24, 1898. Dismissed on the authority of *Tennessee* v. *Union & P. Bank,* 152 U. S. 454 [38: 511]; *Sawyer* v. *Kochersperger,* 170 U. S. 303 [42: 1046]. (Mr. Justice **White** took no part in the consideration and disposition of this motion.)

MICHAEL JESKE *et al., Plaintiffs in Error, v.* NETTIE L. COX *et al.* [No. 217.]

In Error to the Superior Court of Milwaukee County, State of Wisconsin.

Mr. Rublee A. Cole for plaintiffs in error. *Mr. Howard Morris* for defendants in error.

October 24, 1898. Dismissed on the authority of *Missouri P. R. Co.* v. *Fitzgerald,* 160 U. S. 582 [40: 542]; *Meyer* v. *Cox,* 169 U. S. 735 [42: 1207]; *McLish* v. *Roff,* 141 U. S. 661 [35: 893]; *Union Mut. L. Ins. Co.* v. *Kirchoff,* 160 U. S. 374 [40: 461].

AARON H. ZECKENDORF *et al., Appellants, v.* LOUIS ZECKENDORF, Guardian, etc. [No. 46.]

Appeal from the Supreme Court of the Territory of Arizona.

Messrs. Francis J. Heney and *Duane E. Fox* for appellants. *Mr. E. M. Marble* for appellee.

October 24, 1898. Decree affirmed, with costs, on the authority of *Gray* v. *Howe,* 108 U. S. 12 [27: 634]; *Salina Stock Co.* v. *Salina Creek Irrig. Co.* 163 U. S. 117 [41: 93].

HENRY GARDES, *Petitioner, v.* UNITED STATES. [No. 426.]

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Mr. J. R. Beckwith for petitioner. *The Attorney General and The Solicitor General* for respondent.

October 24, 1898. Denied.

LOUIS GALLOT, *Petitioner, v.* UNITED STATES. [No. 427.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. J. R. Beckwith for petitioner. *The Attorney General* and *The Solicitor General* for respondent.

October 24, 1898. Denied.

CITY OF ATTICA, HARPER COUNTY, KANSAS, *Petitioner, v.* SPRINGFIELD SAFE DEPOSIT & TRUST COMPANY. [No. 346.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Wm. T. S. Curtis for petitioner. *Mr. Henry A. King* for respondent.

October 24, 1898. Denied.

P. LORILLARD COMPANY, *Petitioner, v.* CHRISTIAN PEPER. [No. 418.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. M. B. Philipp and *Frederic D. McKenney* for petitioner. *Mr. Smith P. Galt* for respondent.

October 31, 1898. Denied.

J. HENRY JURGENS, Sheriff, etc., *Appellant*, *v.* YOT SANG. [No. 50.]

Appeal from the District Court of the United States for the District of Montana.

Mr. C. B. Nolan for appellant. *Mr. A. C. Botkin* for appellee.

October 31, 1898. Final order reversed with costs, and cause remanded with direction to discharge the writ and dismiss the petition, on the authority of *Washington* v. *Coovert*, 164 U. S. 702 [41: 1182], and cases cited.

CONTINENTAL NATIONAL BANK OF NEW YORK CITY, *Petitioner*, *v.* MARY JENNESS HEILMAN *et al.* [No. 419.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. John L. Cadwalader and *Addison C. Harris* for petitioner. *Messrs. Charles W. Smith, John S. Duncan, Alexander Gilchrist,* and *C. A. De Bruler* for respondents.

October 31, 1898. Denied.

KNIGHTS TEMPLARS & MASONS' LIFE INDEMNITY COMPANY, *Petitioner*, *v.* CARRIE E. CONVERSE. [No. 443.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Charles H. Aldrich for petitioner. *Mr. James H. Hopkins* for respondent.

October 31, 1898. Denied.

NELSON MORRIS *et al.*, *Petitioners*, *v.* ROBERT B. STEWART *et al.* [No. 463.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Charles H. Aldrich for petitioners. *Messrs. Samuel P. McConnell, H. M. Pollard,* and *Horace K. Tenny* for respondents.

November 7, 1898. Denied.

FARMERS' BANK OF NORBORNE, *et al.*, *Plaintiffs in Error*, *v.* JOHN E. ROSELLE. [No. 157.]

In Error to the Supreme Court of the State of Missouri.

Mr. Morton Jourdan for plaintiffs in error. *Messrs. William B. King* and *William E. Harvey* for defendant in error.

November 7, 1898. Writ of error dismissed, on the authority of *Meyer* v. *Cox*, 169 U. S. 735 [42: 1207]; *McLish* v. *Roff*, 141 U. S. 661 [35: 893]; *Missouri* v. *Andriano*, 138 U. S. 496 [34: 1012]; *Dower* v. *Richards*, 151 U. S. 666 [38: 308]; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374 [40: 461].

EUGENIA A. WEBSTER ROSS, *Plaintiff in Error*, *v.* GEORGE GORDON KING, *et al.* [No. 400.]

In Error to the Supreme Court of the State of Rhode Island.

Messrs. Heber J. May and *J. M. Wilson* for plaintiff in error. *Messrs. John H. Glover* and *Stephen H. Olin* for defendants in error.

November 7, 1889. Writ of error dismissed, on the authority of *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149]; *Pim* v. *St. Louis*, 165 U. S. 273 [41: 714]; *Zadig* v. *Baldwin*, 166 U. S. 485 [41: 1087]; *Kipley* v. *Illinois*, 170 U. S. 182 [42: 998].

PETER McCARTNEY *et al.*, *Appellants*, *v.* SUSAN FLETCHER *et al.* [No. 184]; and ANNIE C. McCARTNEY *et al.*, *Appellants*, *v.* SUSAN FLETCHER *et al.* [No. 185.]

Appeals from the Court of Appeals of the District of Columbia.

Messrs. A. S. Worthington and *Hugh T. Taggart* for appellants. *Messrs. W. L. Cole* and *Edmund Burke* for appellees.

November 7, 1898. Dismissed with costs, on motion of *Mr. A. S. Worthington* for appellants.

JOHN F. KUMLER, *Petitioner*, *v.* WILLIAM E. HALE. [No. 352.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Orville S. Brumback for petitioner. *Messrs. Barton Smith, Rufus H. Baker,* and *John P. Wilson* for respondent.

November 14, 1898. Denied.

SIOUX CITY, O'NEILL, & WESTERN RAILWAY COMPANY, *Appellant*, *v.* MANHATTAN TRUST COMPANY [No. 62], and SIOUX CITY, O'NEILL, & WESTERN RAILWAY COMPANY *et al.*, *Appellants*, *v.* MANHATTAN TRUST COMPANY. [No. 63.]

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. John C. Coombs and *Henry J. Taylor* for appellants. *Messrs G. W. Wickersham, John L. Cadwalader,* and *John L. Webster* for appellee.

November 14, 1898. Certificate dismissed, on the authority of *United States* v. *Union P. R. Co.* 168 U. S. 512 [42: 561], and cases cited; *Cross* v. *Evans*, 167 U. S. 60 [42: 77]; *Warner* v. *New Orleans*, 167 U. S. 467 [42: 239]; *Packer* v. *Nixon*, 10 Pet. 408 [9: 473]; *Wiggins* v. *Gray*, 24 How. 303 [16: 688]; *Enfield* v. *Jordan*, 119 U. S. 680 [30: 523].

ATLAS STEAMSHIP COMPANY, *Petitioner*, *v.* LA BOURGOGNE, ETC. [No. 434.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Everett P. Wheeler for petitioner. *Mr. Edward K. Jones* for respondent.

November 14, 1898. Denied.

CHARLES B. WHEELER, *Petitioner, v.* LA BOURGOGNE, ETC. [No. 603.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Everett P. Wheeler for petitioner. *Mr. Edward K. Jones* for respondent.

November 14, 1898. Denied.

EDWARD CLIFFORD, *Appellant, v.* WILLIAM HELLER, Sheriff, etc. [No. 304.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. William D. Daly for appellant. *Mr. James S. Erwin* for appellee.

November 14, 1898. Order affirmed, with costs.

UNITED STATES and the Comanche Indians, *Appellants, v.* SAMUEL W. HOOD. [No. 266.]

Appeal from the Court of Claims.

The Attorney General, Assistant Attorney General Thompson, and *Charles W. Russell* for appellants. *Messrs. Silas Hare* and *John Wharton Clark* for appellee.

November 14, 1898. Judgment affirmed by a divided court.

MICHIGAN STOVE COMPANY, *Petitioner, v.* FULLER WARREN COMPANY. [No. 597.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Ephraim and *Thomas A. Banning* for petitioner. *Messrs. Edward P. Vilas* and *Elias H. Bottum* for respondent.

November 28, 1898. Denied.

CHARLES ADOLPHE LOW *et al., Petitioners, v.* FARMERS' LOAN & TRUST COMPANY, William H. Blackford, *et al.* [No. 300.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Charles Steele and *William D. Guthrie* for petitioners. *Messrs. John K. Cowen, E. J. D. Cross, Hugh L. Bond, Jr., Herbert B. Turner, George Rountree,* and *Robert O. Burton* for respondents.

November 29, 1898. Dismissed, per stipulation.

JOHNS HOPKINS UNIVERSITY, *Appellant, v.* BALTIMORE & OHIO RAILROAD COMPANY *et al.* [No. 320.]

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Bernard Carter, Arthur George Brown, and *John J. Donaldson* for appellant. *Messrs. Hugh L. Bond, Jr.,* and *E. J. D. Cross* for appellees.

December 2, 1898. Dismissed, per stipulation, on motion of *Mr. W. H. Buckler* for appellees.

UNITED STATES, *Appellant, v.* DANIEL VAN IDERSTINE. [No. 56.]

Appeal from the Court of Claims.

The Attorney General, Assistant Attorney General Pradt, and *Mr. George H. Gorman* for appellant. *Messrs. Russell Duane* and *Harvey Spalding* for appellee.

December 5, 1898. Judgment affirmed by a divided court.

DEAN LINSEED OIL COMPANY, *Petitioner, v.* UNITED STATES. [No. 468.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Elihu Root and *S. B. Clarke* for petitioner. *The Attorney General* and *the Solicitor General* for respondent.

December 5, 1898. Denied.

LAKE STREET RAILROAD COMPANY, *Petitioner, v.* WILLIAM ZIEGLER *et al.* [No. 595.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Charles H. Aldrich for petitioner. *Mr. John J. Herrick* for respondents.

December 5, 1898. Denied.

HOWARD M. HOLDEN, *Plaintiff in Error, v.* A. E. WATSON *et al.* [No. 233.]

In Error to the Supreme Court of the State of Kansas.

Mr. O. H. Dean for plaintiff in error. *Mr. Silas Porter* for defendants in error.

December 5, 1898. Dismissed with costs, on motion of counsel for plaintiff in error.

SEIGLE BECKNER, *Appellant, v.* WALTER SCOTT. [No. 93.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Arthur Brown for appellant. No counsel for appellee.

December 9, 1898. Dismissed with costs, on authority of counsel for appellant.

CITIZENS' BANK OF TINA, *Petitioner, v.* GEORGE ADAMS *et al.* [No. 622.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Francis A. Riddle for petitioner. *Mr. Mason B. Loomis for* respondents.

December 12, 1898. Denied.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plaintiff in Error, v.* W. N. BARKER. [No. 70.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. L. F. Parker, A. T. Britton, and *A. B. Browne* for plaintiff in error. *Messrs. William M. Cravens* and *George E. Nelson* for defendant in error.

December 12, 1898. Judgment affirmed with costs, and cause remanded to the United States court in the Indian territory, central district.

CLARA WHEELER, *Appellant*, *v.* CHARLES RIDGELY MCBLAIR *et al.* [No. 77.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Alphonso Hart and *C. A. Keigwin* for appellant. *Mr. J. J. Darlington* for appellees.

December 12, 1898. Decree affirmed, with costs.

MARY S. CHAPLIN, *Appellant*, *v.* UNITED STATES. [No. 68.]

Appeal from the Court of Claims.

Mr. James Lowndes for appellant. *The Attorney General* and *Assistant Attorney General Pradt* for appellee.

December 12, 1898. Judgment reversed and cause remanded with a direction to enter judgment for the claimant, on the authority of *United States* v. *Elliott*, 164 U. S. 373 [41: 474].

HENRIETTA FULLER *et al.*, *Appellants*, *v.* UNITED STATES. [No. 69.]

Appeal from the Court of Claims.

Mr. James Lowndes for appellants. *The Attorney General* and *Assistant Attorney General Pradt* for appellee.

December 12, 1898. Judgment reversed, and cause remanded with a direction to enter judgment for the claimants, on the authority of *United States* v. *Elliott*, 164 U. S. 373 [41: 474].

UNITED STATES, *Appellant*, *v.* MARY W. KIDDER *et al.* [No. 78.]

Appeal from the Court of Claims.

The Attorney General and *Assistant Attorney General Pradt* for appellant. *Mr. James Lowndes* for appellees.

December 12, 1898. Judgment affirmed, on the authority of *United States* v. *Elliott*, 164 U. S. 373 [41: 474].

JAMES B. DAVIS, *Appellant*, *v.* UNITED STATES. [No. 633.]

Appeal from the Court of Claims.

December 12, 1898. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for appellee.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, *Petitioner*, *v.* EDWIN MCNEILL, Receiver, etc. [No. 613.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. William Allen Butler and *John Notman* for petitioner. *Mr. L. B. Cox* for respondent.

December 19, 1898. Denied.

SALMEN BRICK & LUMBER COMPANY, Limited, *Appellant*, *v.* HENRY DIECK *et al.* [No. 660.]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

January 3, 1899. Docketed and dismissed with costs, on motion of *Mr. Frederic D. McKenney* for appellees.

ROBERT L. TAYLOR, Governor, *et al.*, *Petitioners*, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. George W. Pickle, *William L. Granbery*, and *A. D. Marks* for petitioners. *Mr. J. M. Dickinson* for respondent.

December 19, 1898. This is an application for a writ of certiorari to review a decree of the circuit court of appeals for the sixth circuit on appeal from an interlocutory order, and is denied, on the authority of *Chicago & N. W. R. Co.* v. *Osborne*, 146 U. S 354 [36: 1002]; *Forsyth* v. *Hammond*, 166 U. S. 506 [41: 1095].

INTERNATIONAL BANK OF ST. LOUIS, *Petitioner*, *v.* EBERHARD FABER. [No. 638.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Robert D. Murray for petitioner. *Mr. Francis Forbes* for respondent.

January 9, 1899. Denied.

WILLIAM T. DONNELL, *Petitioner*, *v.* BOSTON TOWBOAT COMPANY. [No. 655.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Eugene P. Carver and *E. E. Blodgett* for petitioner. *Messrs. Lewis S. Dabney* and *Frederic Cunningham* for respondent.

January 9, 1899. Denied.

LEO C. HARMON, as Receiver, *Plaintiff in Error*, *v.* NATIONAL PARK BANK OF THE CITY OF NEW YORK. [No. 111.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Frederic J. Swift for plaintiff in error. *Mr. Louis F. Doyle* for defendant in error.

January 9, 1899. Judgment affirmed with costs, on the authority of *Pauly* v. *State Loan & T. Co.* 165 U. S. 606 [41: 844] and cause remanded to the circuit court of the United States for the southern district of New York, with a direction to render judgment in accordance with the mandate of the United States court of appeals.

GEORGE KINNEAR, *Plaintiff in Error*, *v.* FREDERICK BAUSMAN, as Receiver, etc. [No. 104.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. George Turner for plaintiff in error. *Mr. Frederick Bausman* for defendant in error.

January 9, 1899. Dismissed for want of jurisdiction, on the authority of *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374 [40: 461], and cases cited.

BLYTHE COMPANY, *Appellant*, *v.* JOHN W. BLYTHE *et al.* [No. 256.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. George W. Towle, Jr., E. S. Pillsbury and *John F. Dillon* for appellant. *Messrs. W. H. H. Hart, Frederic D. McKenney, John Garber,* and *Robert Y. Hayne* for appellees.

January 9, 1899. Dismissed for want of jurisdiction, on the authority of *Smith* v. *McKay,* 161 U. S. 355 [40: 731]; *Black* v. *Black,* mem. 163 U. S. 678 [41: 318]; *Tucker* v. *McKay,* 164 U. S. 701 [41: 1180]; *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170 [37: 1041]; 161 U. S. 115 [40: 638]; *Ex parte South & North Ala. R. Co.* 95 U. S. 221 [24: 355]; *Cross* v. *Del Valle,* 1 Wall. 5 [17: 515]; *Rouse* v. *Letcher,* 156 U. S. 47 [39: 341].

SANTA FÉ, PRESCOTT, & PHŒNIX RAILWAY COMPANY, *Plaintiff in Error*, *v.* JOSEPH HURLEY. [No. 100.]

In Error to the Supreme Court of the Territory of Arizona.

Mr. G. W. Kretzinger for plaintiff in error. *Mr. William H. Barnes* for defendant in error.

January 16, 1899. Judgment affirmed, with costs and interest, by a divided court.

MARY C. DELAFIELD, *Petitioner*, *v.* HOSPITAL OF THE PROTESTANT EPISCOPAL CHURCH IN PHILADELPHIA *et al.* [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. D. T. Watson and *A. P. Burgwin* for petitioner. No counsel for respondents.

January 16, 1899. Denied.

W. VANCE BROWN *et al.*, *Petitioners*, *v.* CRANBERRY IRON & COAL COMPANY. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. Theodore F. Davidson and *Charles A. Moore* for petitioners. No counsel for respondent.

January 16, 1899. Denied.

JOHN J. MCCOOK *et al.*, Receivers, etc., *Plaintiffs in Error*, *v.* GEORGE R. WOOD, Administrator, etc. [Nos. 115, 116, and 117.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs L. F. Parker, A. T. Britton, and *A. B. Browne* for plaintiffs in error. *Mr. Oscar L. Miles* for defendant in error.

January 16, 1899. Judgments affirmed, with costs, and causes remanded to the circuit court of the United States for the western district of Arkansas.

UNITED STATES, *Appellant*, *v.* THOMAS R. MORGAN. [No. 126.]

Appeal from the Court of Claims.

The Attorney General and *Assistant Attorney General Pradt* for appellant. *Mr. C. C. Lancaster* for appellee.

January 16, 1899. Judgment affirmed, on the authority of *United States* v. *Jones,* 134 U. S. 483 [33: 1007]; *United States* v. *Barber,* 140 U. S. 164 [35: 396].

PHILIP T. WOODFIN, *Appellant*, *v.* HAMPTON & OLD POINT RAILWAY COMPANY *et al.* [No. 167.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Messrs. R. M. Hughes and *William H. White* for appellant. No counsel for appellees.

January 19, 1899. Dismissed, with costs, on authority of counsel for appellant.

WALTER H. WILLS, *Petitioner*, *v.* NORMAN W. JONES. [No. 668.]

Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. D. W. Baker for petitioner. *Mr. Chapin Brown* for respondent.

January 23, 1899. Denied.

D. G. SAYERS *et al.*, *Petitioners*, *v.* WILLIAM H. BURKHARDT *et al.* [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Holmes Conrad for petitioners. *Mr. J. R. Sypher* for respondents.

January 23, 1899. Denied.

GEORGE H. SCOTT, *Petitioner*, *v.* W. A. LATIMER, Receiver, etc. [No. 672.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. H. F. Stevens for petitioner. No counsel for respondent.

January 23, 1899. Denied.

HENRY C. KING, *Petitioner*, *v.* JULIUS C. WILLIAMSON *et al.* [No. 110.]

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Maynard F. Stiles for petitioner. No counsel for respondents.

January 23, 1899. Decree affirmed, with costs, and cause remanded to the circuit court of the United States for the district of West Virginia.

LOUIS ROESEL, *Appellant*, *v.* WILLIAM T. KIRK, Sheriff, etc. [No. 605.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Mr. Frank Bergen for appellant. *Mr. N. C. J. English* for appellee.

January 23, 1899. Final order affirmed, with costs, on the authority of *Kohl* v. *Lehlback,* 160 U. S. 293 [40: 432]; *Bergemann* v. *Backer,* 157 U. S. 655 [39: 845]; *Lambert* v. *Barrett,* 157 U. S. 697 [39: 865]; *Lambert* v. *Barrett,* 159 U. S. 661 [40: 296]; *Andrews* v. *Swartz,* 156 U. S. 272 [39: 422].

ROBERT B. F. PIERCE, Receiver, etc., *Plaintiff in Error, v.* EDWARD VAN DUSEN. [No. 220.]
In Error to the United States Circuit Court of Appeals for the Sixth Circuit.
Mr. Clarence Brown for plaintiff in error. *Mr. O. S. Brumback* for defendant in error.
January 26, 1899. Dismissed, per stipulation.

HENRY L. NELSON, *Plaintiff in Error, v.* WILLIAM BLANDING *et al.* [No. 695.]
In Error to the Circuit Court of the United States for the Northern District of California.
January 27, 1899. Docketed and dismissed with costs, on motion of *Mr. L. E. Payson* for defendants in error.

WILLIAM HENRY SAVILLE, Claimant, etc., *Petitioner, v.* AMERICAN SUGAR REFINING COMPANY. [No. 687.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Mr. J. Parker Kirlin for petitioner. *Mr. Harrington Putnam* for respondent.
January 30, 1899. Denied.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, *Petitioner, v.* ST. JOSEPH UNION DEPOT COMPANY. [No. 681.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Mr. L. C. Krauthoff for petitioner. *Messrs. C. A. Mosman* and *William P. Hall* for respondent.
January 30, 1899. Denied.

AMERICAN NATIONAL BANK OF DENVER, *Petitioner, v.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY. [No. 691.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Messrs. T. J. O'Donnell and *Milton Smith* for petitioner. *Mr. John H. Denison* for respondent.
January 30, 1899. Denied.

UNITED STATES, *Appellant, v.* HENRY I. HAYDEN. [No. 654.]
Appeal from the Court of Claims.
The Attorney General for appellant. *Mr.* C. C. Lancaster for appellee.
January 30, 1899. Dismissed, on motion of *Mr. Solicitor General Richards* for appellant.

JACK AMOS *et al., Appellants, v.* CHOCTAW NATION. [No. 467.]
Appeal from the United States Court in the Indian Territory.
Mr. W. T. Hutchings for appellants. No counsel for appellee.
February 20, 1899. Dismissed with costs, on motion of *Mr. W. T. Hutchings* for appellants.

STANDARD ELEVATOR COMPANY *et al., Appellants, v.* CRANE ELEVATOR COMPANY *et al.* [No. 44.]
On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Mr. Frank T. Brown for appellants. *Messrs. Edwin H. Brown* and *James H. Raymond* for appellees.
February 20, 1899. Dismissed with costs, on motion of counsel for appellants.

HENRY R. EAGLE, *Petitioner, v.* PILLSBURY-WASHBURN FLOUR MILLS COMPANY, Limited, *et al.* [No. 671.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Mr. Edward O. Brown for petitioner. *Mr. Frank F. Reed* for respondent.
February 27, 1899. Denied.

D. ALBERT HILLER *et al., Petitioners, v.* CAROLINE A. LADD, *et al.* [No. 673.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Messrs. A. T. Britton, A. B. Browne, and *P. G. Galpin* for petitioners. *Mr. C. E. S. Wood* for respondents.
February 27, 1899. Denied.

ROBERT R. RHODES *et al., Petitioners, v.* LUCIUS P. MASON *et al.* [No. 676.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Messrs. Harvey D. Goulder and *T. H. Canfield* for petitioners. *Mr. C. E. Kremer* for respondents.
February 27, 1899. Denied.

INTERLAKE TRANSPORTATION COMPANY *et al., Petitioners, v.* LUCIUS P. MASON *et al.* [No. 693.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Mr. James H. Hoyt for petitioner. *Mr. C. E. Kremer* for respondents.
February 27, 1899. Denied.

GEORGE HEBBERD *et al., Petitioners, v.* BALTIMORE BUILDING & LOAN ASSOCIATION. [No. 694.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Mr. Henry M. Russell for petitioners. *Mr. Fielder C. Slingluff* for respondent.
February 27, 1899. Denied.

CARNEGIE STEEL COMPANY, Limited, *Petitioner, v.* CHESAPEAKE, OHIO, & SOUTHWESTERN RAILROAD COMPANY, *et al.* [No. 699.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Mr. Alex. Pope Humphrey and *George M. Davie* for petitioner. *Mr. Edmund F. Trabue* for respondents.
February 27, 1899. Denied.

CLARENCE H. VENNER, *Petitioner, v.* FARMERS' LOAN & TRUST COMPANY. [No. 684.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Alfred Russell for petitioner. Mr. *Frederick B. Van Vorst* for respondent.

February 27, 1899. Denied.

ADRIAN WATERWORKS COMPANY, *Petitioner, v.* FARMERS' LOAN & TRUST COMPANY. [No. 685.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Andrew Howell for petitioner. *Mr. Frederick B. Van Vorst* for respondent.

February 27, 1899. Denied.

MILBURN GIN & MACHINE COMPANY *et al., Plaintiffs in Error, v.* GERMAN BANK [No. 342.]

In Error to the Supreme Court of the State of Tennessee.

Mr. William M. Randolph for plaintiffs in error. *Mr. C. W. Metcalf* for defendant in error.

February 27, 1899. Dismissed, on the authority of *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556 [40: 536]; *Egan* v. *Hart*, 165 U. S. 188 [41: 680], and other cases.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error, v.* NEPTUNE LYNCH, SR. [No. 121.]

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. William Wallace, Jr., for plaintiff in error. *Mr. John B. Clayberg* for defendant in error.

February 27, 1899. Judgment affirmed, with costs, and cause remanded to the circuit court of the United States for the district of Montana.

UNITED STATES, *ex rel.* JOHN H. ADRIAANO, *Petitioner, v.* RICHARD H. ALVEY, Chief Justice, etc., *et al.* [No. 627.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. William A. Meloy and *William A. Cook* for petitioner. *The Attorney General* and *the Solicitor General* for respondents.

March 6, 1899. Denied.

WILLIAM T. GILBERT, Receiver, etc., *Appellant, v.* WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION *et al.* [No. 90.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. Thomas M. Fields and *Henry D. Hotchkiss* for appellant. *Messrs. A. A. Lipscomb, Samuel F. Phillips, Frederic D. McKenney, James E. Padgett*, and *Edwin Forrest* for appellees.

March 6, 1899. Dismissed, on the authority of *Lodge* v. *Twell*. 135 U. S. 232 [34: 1 31]; *McGourkey* v. *Toledo & O. C. R. Co.* 1 U. S. 536 [36: 1079], and cases cited.

GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, *Plaintiff in Error, v.* FIRST NATIONAL BANK OF BOONVILLE, NEW YORK. [No. 159.]

In Error to the Supreme Court of the State of Kansas.

Mr. A. P. Jetmore for plaintiff in error. *Messrs. W. H. Rossington* and *Charles Blood Smith* for defendant in error.

March 6, 1899. Dismissed, on the authority of *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149]; *Louisville & N. R. Co.* v. *Louisville*, 166 U. S. 709 [41: 1173], and other cases.

KEOKUK & HAMILTON BRIDGE COMPANY, *Plaintiff in Error, v.* PEOPLE OF THE STATE OF ILLINOIS. [No. 23.]

In Error to the Supreme Court of the State of Illinois.

Mr. F. T. Hughes for plaintiff in error. *Mr. E. C. Akin* for defendant in error.

March 13, 1899. Dismissed, on the authority of *Ross* v. *King*, 172 U. S. 641 [*ante*, 1180], and cases cited.

PLATT ROGERS, as Mayor, etc., *et al., Plaintiffs in Error, v.* ELLEN THERESA MORGAN *et al.* [No. 228.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. George Q. Richmond and *Platt Rogers* for plaintiff in error. *Messrs. Willard Teller* and *H. M. Orahood* for defendants in error.

March 13, 1899. Dismissed, on the authority of *Clark* v. *Kansas City*, 172 U. S. 334 [*ante*, 467]; *Kinnear* v. *Bausman*, 172 U. S. 644 [*ante*, 1182], and cases cited.

STATE BANK OF AMBIA, *Petitioner, v.* CHICAGO TITLE & TRUST COMPANY, as Trustee, *et al.* [No. 719.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Otto Gresham and *Daniel Fraser* for petitioner. *Messrs. Samuel O. Pickens* and *Smiley N. Chambers* for respondents.

March 13, 1899. Denied.

F. E. JORDAN *et al., Plaintiffs in Error, v.* JOHN DUKE *et al.* [No. 738].

In Error to the Supreme Court of the Territory of Arizona.

Mr. John B. Clayberg for plaintiffs in error. No counsel for defendants in error.

March 16, 1899. Dismissed, with costs, on the authority of counsel for plaintiff in error.

F. E. JORDAN *et al. Plaintiffs in Error, v.* GEORGE H. SCHUERMAN. [No. 739.]

In Error to the Supreme Court of the Territory of Arizona.

Mr. John B. Clayberg for plaintiffs in error. No counsel for defendant in error.

March 16, 1899. Dismissed, with costs, on the authority of counsel for plaintiffs in error.

WILLIAM V. MARMION, *Appellant, v.* JOHN McCLELLAN, Executor, etc. [No. 245.]
Appeal from the Court of Appeals of the District of Columbia.
Messrs. George E. Hamilton and *M. J. Colbert* for appellant. *Mr. William G. Johnson* for appellee.
March 17, 1899. Dismissed, with costs, on motion of *Mr. M. J. Colbert* for appellant.

CONSOLIDATED WATER COMPANY *et al., Appellants, v.* E. S. BABCOCK *et al.* [No. 231].
Appeal from the Circuit Court of the United States for the Southern District of California.
Messrs Horace S. Oakley, C. K. Davis, Frank B. Kellogg, and *C. A. Severance* for appellants. *Messrs. H. E. Doolittle, William J. Hunsaker, A. T. Britton,* and *A. B. Browne* for appellees.
March 20, 1899. Dismissed, on the authority of *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]; *Van Wagenen* v. *Sewall*, 160 U. S 369 [40: 460]; *Davis* v. *Geissler*, 162 U. S. 290 [40: 972]; *Cornell* v. *Green*, 163 U. S. 75 [41: 76], and cases cited.

GEORGE W. CHILDS DREXEL *et al.*, Executors, etc., *Plaintiffs in Error, v.* UNITED STATES. [No. 47.]
In Error to the United States Circuit Court of Appeals for the Third Circuit.
Messrs. R. C. Dale, G. S. Graham, and *Clayton E. Emig* for plaintiffs in error. *The Attorney General* for defendant in error.
March 20, 1899. Dismissed, per stipulation, on motion of *Mr. Solicitor General Richards* for defendant in error.

PHŒNIX ASSURANCE COMPANY OF LONDON, *Plaintiff in Error, v.* FIRE DEPARTMENT OF THE CITY OF MONTGOMERY *et al.* [No. 763.]
April 3, 1899. Docketed and dismissed, with costs, on motion of *Mr. A. E. Browne,* in behalf of *Mr. John T. Morgan* for defendants in error.

HENRY LOCKHART, *Plaintiff in Error* and *Appellant, v.* J. A. JOHNSON *et al.* [No. 762.]
In Error to and Appeal from the Supreme Court of the Territory of New Mexico.
April 3, 1899. Docketed and dismissed, with costs, on motion of *Mr. A. B. Browne,* for defendants in error and appellees.

ANDERSON GRATZ, Trustee, *et al., Petitioners, v.* LAND & RIVER IMPROVEMENT COMPANY *et al.* [No. 270.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Mr. Henry S. Wilcox for petitioners. *Messrs. John C. Spooner, A. L. Sanborn* and *Maxwell Evarts* for respondents.
April 11, 1899. Denied.

MEXICAN CENTRAL RAILWAY COMPANY, *Petitioner, v.* A. M. MARSHALL. [No. 730.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Messrs. A. T. Britton and *A. B. Browne* for petitioner. No counsel for respondent.
April 11, 1899. Denied.

OLIVER C. BOSBYSHELL, *Plaintiff in Error, v.* UNITED STATES. [No. 58.]
In Error to the United States Circuit Court of Appeals for the Third Circuit.
Messrs. F. Carroll Brewster and *Clayton E. Ewig* for plaintiff in error. *The Attorney General* for defendant in error.
April 11, 1899. Dismissed per stipulation on motion of *Mr. Solicitor General Richards* for the defendant in error.

UNITED STATES *et al., Appellants, v.* MOSES FALLOWELL. [No. 321], and
UNITED STATES *et al., Appellants, v.* EMILINE MACKEY. [No. 322], and
UNITED STATES *et al., Appellants, v.* DANIEL S. LEATHERWOOD. [No. 323], and
UNITED STATES *et al., Appellants, v.* ROBERT CARTER. [No. 324], and
UNITED STATES *et al., Appellants, v.* CHARLES H. HITTSON. [No. 325], and
UNITED STATES *et al., Appellants, v.* MARY SCROGGINS. [No. 326], and
UNITED STATES *et al., Appellants, v.* FLEMING P. JENNINGS. [No. 327], and
UNITED STATES *et al., Appellants, v.* DAVID P. McCRACKEN. [No. 328], and
UNITED STATES *et al., Appellants, v.* BRICE WOODY. [No. 329.]
Appeals from the Court of Claims.
The Attorney General for appellants. *Mr. John Wharton Clarke* for appellees.
April 11, 1899. Dismissed, on motion of *Mr. Assistant Attorney General Thompson* for appellants.

S. F. CHAPMAN, *Petitioner, v.* YELLOW POPLAR LUMBER COMPANY. [No. 754.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Messrs. J. F. Bullitt and *R. A. Ayers* for petitioner. *Mr. John N. Baldwin* for respondent.
April 17, 1899. Denied.

MARVIN F. SCAIFE, *Petitioner, v.* WESTERN NORTH CAROLINA LAND COMPANY *et al.* [No. 748.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
Mr. A. C. Avery for petitioner. No counsel for respondents.
April 17, 1899. Denied.

ANTON GLAW, *Petitioner*, *v.* PENNSYLVANIA COMPANY. [No. 717.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
Messrs. Charles Dick and *Frederick C. Bryan* for petitioner. *Mr. William B. Sanders* for respondent.
April 17, 1899. Denied.

WILLIAM J. BRYAN *et al.*, *Plaintiffs in Error*, *v.* UNITED STATES. [No. 682.]
In Error to the United States Circuit Court of Appeals for the Ninth Circuit.
Mr. John T. Carey for plaintiff in error. *The Attorney General* for defendant in error.
April 17, 1899. Dismissed, per stipulation, on motion of *Mr. Solicitor General Richards* for appellee.

CHARLES STORROW *et al.*, *Petitioners*, *v.* TEXAS CONSOLIDATED COMPRESS & MANUFACTURING COMPANY. [No. 761.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Mr. W. S. Herndon for petitioners. *Mr. J. M. McCormick* for respondent.
April 24, 1899. Denied.

BOARD OF COUNTY COMMISSIONERS OF PRATT COUNTY, KANSAS, *Petitioner*, *v.* SOCIETY FOR SAVINGS. [No. 777.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Mr. S. S. Ashbaugh for petitioner. No counsel for respondent.
April 24, 1899. Denied.

FLORIDA MORTGAGE & INVESTMENT COMPANY, Limited, *Petitioner*, *v.* DANIEL A. FINLAYSON. [No. 786.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Messrs. N. B. K. Pettingill and *T. M. Shackleford* for petitioner. *Mr. W. B. Lamar* for respondent.
April 24, 1899. Denied.

TRAVIS COUNTY, *Petitioner*, *v.* KING IRON BRIDGE & MANUFACTURING COMPANY. [No. 781.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Mr. Clarence H. Miller for petitioner. *Mr. M. W. Garnett* for respondent.
May 1, 1899. Denied.

CŒUR D'ALENE RAILWAY & NAVIGATION COMPANY *et al.*, *Petitioners*, *v.* WILLIAM L. SPALDING. [No. 747.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
Messrs. C. W. Bunn, A. T. Britton, and *A. B. Browne* for petitioners. *Messrs. John Goode* and *Willis Sweet* for respondent.
May 1, 1899. Denied.

SIOUX CITY, O'NEILL, & WESTERN RAILWAY COMPANY *et al.*, *Petitioners*, *v.* MANHATTAN TRUST COMPANY. [No. 779.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
Messrs. John C. Coombs and *Henry J. Taylor* for petitioners. *Messrs. John L. Webster* and *G. W. Wickersham* for respondents.
May 1, 1899. Denied.

JULIUS STEINWENDER *et al.*, *Petitioners*, *v.* THE MEXICAN PRINCE, ETC. [No. 793.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Messrs. Lawrence Kneeland, Harrington Putnam, and *Lewis Cass Ledyard* for petitioners. *Mr. J. Parker Kirlin* for respondent.
May 1, 1899. Denied.

BOARD OF COUNTY COMMISSIONERS OF SCOTT COUNTY, KANSAS, *Plaintiff in Error*, *v.* STATE OF KANSAS. [No. 261.]
In Error to the Supreme Court of the State of Kansas.
Mr. S. S. Ashbaugh for plaintiff in error. *Mr. A. A. Godard* for defendant in error.
May 1, 1899. Dismissed, on the authority of *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374 [40: 461].

SAMUEL H. STONE, Auditor, etc., *et al.*, *Appellants*, *v.* PRESIDENT, ETC., OF THE BANK OF KENTUCKY [No. 356], and
CITY OF LOUISVILLE, *Appellant*, *v.* PRESIDENT, ETC., OF THE BANK OF KENTUCKY [No. 357], and
SAMUEL H. STONE, Auditor, etc., *et al.*, *Appellants*, *v.* LOUISVILLE BANKING COMPANY [No. 360], and
CITY OF LOUISVILLE, *Appellant*, *v.* LOUISVILLE BANKING COMPANY [No. 361], and
SAMUEL H. STONE, Auditor, etc., *et al.*, *Appellants*, *v.* DEPOSIT BANK OF FRANKFORT [No. 387.]
Appeals from the Circuit Court of the United States for the District of Kentucky.
Messrs. H. L. Stone, W. S. Taylor, and *Ira Julian* for appellants. *Messrs. Alex. Pope Humphrey, George M. Davie, James P. Helm, Helm Bruce*, and *Frank Chinn* for appellees.
May 15, 1899. Affirmed with costs, by a divided court.

ALBERT R. WHITTIER, *Petitioner*, *v.* ELISHA A. PACKER. [No. 734.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
Messrs. Arthur D. Hill and *Chapin Brown* for petitioner. *Mr. James J. Storrow* for respondent.
May 15, 1899. Denied.

OVERWEIGHT COUNTERBALANCE ELEVATOR COMPANY, *Petitioner*, *v.* IMPROVED ORDER OF RED MEN'S HALL ASSOCIATION. [No. 796.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Frederic D. McKenney and *W. H. H. Hart* for petitioner. *Mr. M. A. Wheaton* for respondent.

May 15, 1899. Denied.

UNITED STATES, *Petitioner*, *v.* ROESSLER & HASSLACHER CHEMICAL COMPANY. [No. 102.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General for petitioner. *Mr. Albert Comstock* for respondent.

May 15, 1899. Dismissed per stipulation, on motion of *Mr. Solicitor General Richards* for petitioner.

PITTSBURG, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error*, *v.* WILLIAM J. MONTGOMERY. [No. 727.]

In Error to the Supreme Court of the State of Indiana.

Mr. Nathan O. Ross for plaintiff in error. No counsel for defendant in error.

May 15, 1899. Dismissed with costs, on authority of counsel for plaintiff in error.

CITY OF MILWAUKEE, *Petitioner*, *v.* SHAILER & SCHNIGLAU CO. [No. 804.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. C. H. Hamilton for petitioner. *Mr. James G. Flanders* for respondent.

May 22, 1899. Denied.

CENTRAL TRUST COMPANY OF NEW YORK, Trustee, *Petitioner*, *v.* STATE OF MINNESOTA, Intervener. [No. 820.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Louis Marshall and *Jed L. Washburn* for petitioner. *Mr. J. B. Richards* for respondent.

May 22, 1899. Denied.

ATLANTIC LUMBER CO., *Petitioner*, *v.* L. BUCKI & SOUTHERN LUMBER CO. [No. 821.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. R. H. Liggett and *T. F. McGarry* for petitioner. *Mr. H. Bisbee* for respondent.

May 22, 1899. Denied.

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*, *v.* THE PRUSSIA, ETC. [No. 823.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Lawrence Kneeland for petitioner. *Mr. Everett P. Wheeler* for respondent.

May 22, 1899. Denied.

UNITED STATES, *Petitioner*, *v.* H. BACHARACH & CO. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and *The Solicitor General* for petitioner. *Mr. Stephen G. Clarke* for respondent.

May 22, 1899. Denied.

THOMAS M. ADAMS *et al.*, Administrator, etc., *Petitioners*, *v.* BENJAMIN R. COWAN *et al.*, Trustees. [No. 113.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Lawrence Maxwell, Jr., John F. Hager and *J. L. Anderson* for petitioners. *Messrs. Judson Harmon, John J. Glidden,* and *John Little* for respondents.

May 22, 1899. Decree affirmed, with costs, by a divided court, and cause remanded to the circuit court of the United States for the district of Kentucky.

UNITED STATES *et al.*, *Appellants*, *v.* ALASKA PACKERS' ASSO. *et al.* [No. 768.]

Appeal from the Circuit Court of the United States for the District of Washington.

The Attorney General and *The Solicitor General* for appellants. *Messrs. C. W. Dorr, A. F. Burleigh, A. T. Britton,* and *A. B. Browne* for appellees.

May 22, 1899. Dismissed, per stipulation, on motion of *Mr. Solicitor General Richards* for appellants.

JOHN G. SCHMIDT, *Appellant*, *v.* JOHN H. WILLIAMS, Administrator etc., *et al.* [No. 347.]

Appeal from the District Court of the United States for the District of New Jersey.

Mr. J. Warren Coulston for appellant. *Mr. C. C. Burlingham* for appellees.

May 22, 1899. Dismissed, per stipulation.

APPENDIX I.

Supreme Court of the United States.

October Term, 1898.

GENERAL ORDERS IN BANKRUPTCY.

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the 2d day of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good; subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

1.

DOCKET.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

2.

FILING OF PAPERS.

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

3.

PROCESS.

All process, summons, and subpœnas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

4.

CONDUCT OF PROCEEDINGS.

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practise in the circuit or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

5.

FRAME OF PETITIONS.

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

6.

PETITIONS IN DIFFERENT DISTRICTS.

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his dom-

ial, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

7.

PRIORITY OF PETITIONS.

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

8.

PROCEEDINGS IN PARTNERSHIP CASES.

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

9.

SCHEDULE IN INVOLUNTARY BANKRUPTCY.

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

10.

INDEMNITY FOR EXPENSES.

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

11.

AMENDMENTS.

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

12.

DUTIES OF REFEREE.

1. The order referring a case to a referee shall name a day upon which the bankrupt

shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

13.

APPOINTMENT AND REMOVAL OF TRUSTEE.

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

14.

NO OFFICIAL OR GENERAL TRUSTEE.

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

15.

TRUSTEE NOT APPOINTED IN CERTAIN CASES.

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

16.

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

17.

DUTIES OF TRUSTEE.

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a specified time in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

18.

SALE OF PROPERTY.

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

19.

ACCOUNTS OF MARSHAL.

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to

him, and for custody of property, and other services, and other actual and necessary expenses paid by him with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

20.

PAPERS FILED AFTER REFERENCE.

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

21.

PROOF OF DEBTS.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the postoffice box or street number, as he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

22.

TAKING OF TESTIMONY.

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

23.

ORDERS OF REFEREE.

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

24.

TRANSMISSION OF PROVED CLAIMS TO CLERK.

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

25.

SPECIAL MEETING OF CREDITORS.

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court may call such a meeting, specifying in the notice the purpose for which it is called.

26.

ACCOUNTS OF REFEREE.

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or other officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

27.

REVIEW BY JUDGE.

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

28.

REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

29.

PAYMENT OF MONEYS DEPOSITED.

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an oath made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

30.

IMPRISONED DEBTOR.

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

31.

PETITION FOR DISCHARGE.

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

32.

OPPOSITION TO DISCHARGE OR COMPOSITION.

A creditor opposing the application of a bankrupt for his discharge, or for the con-

firmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

33.

ARBITRATION.

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

34.

COSTS IN CONTESTED ADJUDICATIONS.

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

35.

COMPENSATION OF CLERKS, REFEREES, AND TRUSTEES.

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act, and allowed by special order of the judge.

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

36.

APPEALS.

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a territory, or from the supreme court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States in such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

37.

GENERAL PROVISIONS.

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

38.

FORMS.

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

FORMS IN BANKRUPTCY.

[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the state where the same are to be taken. Bankrupt act of 1898, chap. 4, § 20.]

[FORM No. 1.]

DEBTOR'S PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States for the ——District of ———:

The petition of —— ——, of ——, in the county of ——, and district and State of ——, —— [*state occupation*], respectfully represents:

That he has had his principal place of business [*or* has resided, *or* has had his domicil] for the greater portion of six months next immediately preceding the filing of this petition at ———, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———.

——— ———, *Attorney.*

United States of America, District of ——— ———, ss:

I, ——— ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

——— ———, *Petitioner.*

Subscribed and sworn to before me this —— day of ———, A. D. 18—.

——— ———,

——— ———.

[*Official character.*]

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.

SCHEDULE A. (1)

Statement of all creditors who are to be paid in full, or to whom priority is secured by law.

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and, if so, with whom.	Amount.	
(1.) Taxes and debts due and owing to the United States.						$	c.
(2.) Taxes due and owing to the state of ———, or to any county, district, or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding $300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.					Total		

——— ——— *Petitioner.*

SCHEDULE A. (2)

Creditors holding securities.

[N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by acts of Congress relating to bankruptcy, and whether contracted as partner or joint contractor with any other person; and, if so, with whom.]

Reference to ledger or voucher.	Names of creditors.	Residences (if unknown, that fact must be stated).	Description of securities.	When and where debts were contracted.	Value of securities.		Amount of debts.	
					$	c.	$	c.
				Total				

——— ———, *Petitioner.*

SCHEDULE A. (3)

Creditors whose claims are unsecured.

[N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.]

Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (4)

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors, thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.]

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
					$	c.
				Total		

——— ———, *Petitioner.*

SCHEDULE A. (5)

Accommodation paper.

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, **are to be set forth** under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. **If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence.** Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown, that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.	
						$	c.
					Total		

——— ———, *Petitioner.*

OATH TO SCHEDULE A.

United States of America, District of ——— ss:

On this ——— day of ————, A. D. 18—, before me personally came ———— ————, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this ——— day of ————, A. D. 18—.

——— ———,
[Official character.]

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.

SCHEDULE B. (1)

Real estate.

Location and description of all real estate owned by debtor, or held by him.	Encumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			$	c.
		Total.		

——— ———, *Petitioner.*

SCHEDULE B. (2)

Personal property.

		$	c.
a.—**Cash on hand**........................			
b.—Bills of exchange, promissory notes, or securities of any description (each to be set out separately)........................			
c.—Stock in trade, in — business of —— ——, at ——, of the value of ——........................			
d.—Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz........................			
e.—Books, prints, and pictures, viz........................			
f.—Horses, cows, sheep, and other animals (with number of each), viz.....			
g.—Carriages and other vehicles, viz........................			
h.—Farming stock and implements of husbandry, viz........................			
i.—Shipping, and shares in vessels, viz........................			
k.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz........................			
l.—**Patents, copyrights, and trademarks**, viz........................			
m.—**Goods or** personal property of any other description, with the place where each is situated, viz........................			
	Total........................		

—— ——, *Petitioner.*

SCHEDULE B. (3)

Choses in action.

		$	c.
a.—Debts due petitioner on open account..........			
b.—Stocks in incorporated companies, interest in joint stock companies, and negotiable bonds................			
c.—Policies of insurance............................			
d.—Unliquidated claims of every nature, with their estimated value....			
e.—Deposits of money in banking institutions and elsewhere......			
	Total...........		

——— ———, *Petitioner.*

SCHEDULE B. (4)

Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest. $	c.
Interest in land...		$	c.
Personal property...			
Property in money, stock, shares, bonds, annuities, etc............			
Rights and powers, legacies and bequests.......................			
	Total............		
Property heretofore conveyed for benefit of creditors.		Amount realized from proceeds of property conveyed.	
What portion of debtor's property has been conveyed by deed of assignment, or otherwise, for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor..		$	c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy....			
	Total............		

——— ———, *Petitioner.*

SCHEDULE B. (5)

A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.

		Valuation. $	c.
Military uniform, arms, and equipments..............................			
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the state creating the exemption..			
	Total...........		

——— ———, Petitioner.

90

SCHEDULE B. (6)

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.	
Deeds.	
Papers.	

——— ———, *Petitioner.*

OATH TO SCHEDULE B.

United States of America, District of ———, ss:

On this —— day of ———, A. D. 18—, before me personally came ——— ———, the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

——— ———,

——— ———.

[*Official character.*]

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A....	1 (1)	Taxes and debts due United States			
" ".....	1 (2)	Taxes due States, counties, districts, and municipalities.			
" ".....	1 (3)	Wages			
" ".....	1 (4)	Other debts preferred by law			
Schedule A....	2	Secured claims			
Schedule A....	3	Unsecured claims			
Schedule A....	4	Notes and bills which ought to be paid by other parties thereto.			
Schedule A....	5	Accommodation paper			
		Schedule A, total			
Schedule B....	1	Real estate			
Schedule B....	2–a	Cash on hand			
" ".....	2–b	Bills, promissory notes, and securities			
" ".....	2–c	Stock in trade			
" ".....	2–d	Household goods, &c.			
" ".....	2–e	Books, prints, and pictures			
" ".....	2–f	Horses, cows, and other animals			
" ".....	2–g	Carriages and other vehicles			
" ".....	2–h	Farming stock and implements			
" ".....	2–i	Shipping and shares in vessels			
" ".....	2–k	Machinery, tools, &c.			
" ".....	2–l	Patents, copyrights, and trade-marks			
" ".....	2–m	Other personal property			
Schedule B....	3–a	Debts due on open accounts			
" ".....	3–b	Stocks, negotiable bonds, &c.			
" ".....	3–c	Policies of insurance			
" ".....	3–d	Unliquidated claims			
" ".....	3–e	Deposits of money in banks and elsewhere			
Schedule B....	4	Property in reversion, remainder, trust, &c. ..			
Schedule B....	5	Property claimed to be excepted			
Schedule B....	6	Books, deeds, and papers			
		Schedule B, total			

[FORM No. 2.]

PARTNERSHIP PETITION.

To the Honorable ——— ———,
Judge of the District Court of the United States for the —— District of ———:

The petition of ——— ——— respectfully represents:

That your petitioners and ——— ——— have been partners under the firm name of ——— ———, having their principal place of business at ———, in the county of ——, and district and State of ———, for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full: that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by —— oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by —— oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate in-

ventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ——— ——— further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

——— ———, *Attorney.*

——— ———, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

——— ———,
——— ———,
——— ———,
Petitioners.

Subscribed and sworn to before me this — day of ———, A. D. 18—.

——— ———,
——— ———.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

[FORM No. 3.]

CREDITORS' PETITION.

To the Honorable ——— ———, judge of the District Court of the United States for the —— district of ———:

The petition of ——— ———, of ———, and ——— ———, of ———, and ——— ———, of ———, respectfully shows:

That ——— ———, of ———, has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or* resided, *or* had his domicil] at ———, in the county of——— and State and district aforesaid, and owes debts to the amount of $1,000.

That your petitioners are creditors of said ——— ———, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500. That the nature and amount of your petitioners' claims are as follows:

And your petitioners further represent that said ——— ——— is insolvent, and that within four months next preceding the date of this petition the said ——— ——— committed an act of bankruptcy, in that he did heretofore, to wit, on the —— day of

---

Wherefore your petitioners pray that service of this petition, with a subpœna, may be made upon —— ——, as provided in the acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

——— ———,
——— ———,
——— ———,
Petitioners.

—— ——, *Attorney.*

United States of America, District of ——, ss:

—— ——, —— ——, —— ——, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me, —— ——, this —— day of ——, 189—,

——— ———,
——— ———.
[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1]

[FORM No. 4.]

ORDER TO SHOW CAUSE UPON CREDITORS' PETITION.

In the District Court of the United States for the —— District of ——.

In the matter of ——————	In Bankruptcy.

Upon consideration of the petition of —— —— that —— —— be declared a bankrupt, it is ordered that the said —— —— do appear at this court, as a court of bankruptcy, to be holden at ——, in the district aforesaid, on the —— day of ———, at — o'clock in the —— noon, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpœna, be served on said —— ——, by delivering the same to him personally or by leaving the same at his last usual place of abode in said district, at least five days before the day aforesaid.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{Seal of the court.} ——— ———,
Clerk.

[FORM No. 5.]

SUBPŒNA TO ALLEGED BANKRUPT.

United States of America, —— District of ——.

To —— ——, in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the —— district of ——, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at ——, in said district, on the ——day of ——, A. D. 189—, —— —— to answer to a petition filed by —— —— in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, this ——day of ——, A. D. 189—.

{Seal of the court.} ——— ———,
Clerk.

[FORM No. 6.]

DENIAL OF BANKRUPTCY.

In the District Court of the United States for the —— District of ——.

In the matter of ——————	In Bankruptcy.

At ——, in said district, on the ——day of ——, A. D. 18—.

And now the said —— —— appears, and denies that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court [*or*, he demands that the same may be inquired of by a jury].

——— ———,

Subscribed and sworn to before me this — day of ——, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 7.]

ORDER FOR JURY TRIAL.

In the District Court of the United States for the —— District of ——.

In the matter of ——————	In Bankruptcy.

At ——, in said district, on the —day of ——, 18—.

Upon the demand in writing filed by —— ——, alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.

{Seal of the court.} ——— ———,
Clerk.

[FORM No. 8.]

SPECIAL WARRANT TO MARSHAL.

In the District Court of the United States for the —— District of ——.

In the matter of ——————	In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the —day of ——, A. D. 18 —, filed against —— ——, of the county of —— and State of ——, in said district, and said petition is still pending; and whereas it satisfactorily appears that said —— has committed an act of bankruptcy [*or* has neglected, *or* is neglecting, *or* is about to so neglect his property that it has thereby deteriorated *or* is thereby deteriorating *or* is about thereby to deteriorate in value], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said —— ——, and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the ——of ——, A. D. 189—.

{Seal of the court.} —— ——,
Clerk.

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named —— ——, and of all his deeds, books of account, and papers which have come to my knowledge.

—— ——,
Marshal [or *Deputy Marshal*].

Fees and expenses.

1. Service of warrant		
2. Necessary travel, at the rate of six cents a mile each way.........		
3. Actual expenses in custody of property and other services as follows.		
[Here state the particulars.]		
	——	——

—— ——,
Marshal [or *Deputy Marshal*].

District of ——, A. D. 18—.

Personally appeared before me the said —— ——, and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

—— ——,
Referee in Bankruptcy.

[FORM No. 9.]

BOND OF PETITIONING CREDITOR.

Know all men by these presents: That we, —— ——, as principal, and —— ——, as sureties, are held and firmly bound unto —— ——, in the full and just sum of —— dollars, to be paid to the said —— ——, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ——day of —— A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the —— district of —— against the said ——, and the said —— has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said —— ——, subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said —— —— shall indemnify the said —— —— for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

—— —— [SEAL.]
—— —— —— —— [SEAL.]
—— —— —— —— [SEAL.]

Approved this —— day of ——, A. D. 189—.

—— ——,
District Judge.

[FORM No. 10.]

BOND TO MARSHAL.

Know all men by these presents: That we, —— ——, as principal, and —— ——, as sureties, are held and firmly bound unto —— ——, marshal of the United States for the —— district of ——, in the full and just sum of —— dollars, to be paid to the said —— ——, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this —— day of A. D. 189—.

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the ——district of ——, against the said —— ——, and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said —— ——, subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court upon a petition of said —— —— has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said —— ——, and the said —— ——, being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the presence of—

—— —— [SEAL.]
—— ——, —— —— [SEAL.]
—— ——, —— —— [SEAL.]

Approved this —— day of ——, A. D. 189—.

—— ——,
District Judge.

[FORM No. 11.]

ADJUDICATION THAT DEBTOR IS NOT BANKRUPT.

In the District Court of the United States for the —— District of ——.

In the matter of ——	In Bankruptcy.

At ——, in said district, on ——day of ——, A. D. 18—, before the Honorable —— ——, judge of the —— district of ——.

This cause came on to be heard at ——, in said court, upon the petition of —— that —— be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and [*Here state the proceedings, whether there was no opposition, or, if opposed, state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause [*and the arguments of counsel thereon, if any*], it was found that the facts set forth in said petition were not proved; and it is therefore adjudged that said —— was not a bankrupt, and that said petition be dismissed, with costs.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, in said district, on the day of ——, A. D. 18—.

{Seal of the court.} —— ——,
Clerk.

[FORM No. 12.]

ADJUDICATION OF BANKRUPTCY.

In the District Court of the United States for the —— District of ——.

In the matter of —— *Bankrupt*.	In Bankruptcy.

At ——, in said district, on the ——day of ——, A. D. 18—, before the Honorable —— ——, judge of said court in bankruptcy, the petition of —— —— that —— —— be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said —— —— is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable —— ——, judge of said court, and the seal thereof, at ——, in said district on the —— day of ——, A. D. 18—.

{Seal of the court.} —— ——,
Clerk.

[FORM No. 13.]

APPOINTMENT, OATH, AND REPORT OF APPRAISERS.

In the District Court of the United States for the —— District of ——.

In the matter of —— *Bankrupt*.	In Bankruptcy.

It is ordered that —— ——, of ——, —— ——, of ——, and —— ——, of ——, three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this —— day of ——, A. D. 18—.

—— ——,
Referee in Bankruptcy.

—— District of ——, ss:

Personally appeared the within named —— —— and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

—— ——,
—— ——,
—— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 189—.

—— ——,
[*Official character.*]

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

	Dolls.	Cts.

In witness whereof we hereunto set our hands, at ——, this ——day of ——, A. D. 18—.

—— ——,
—— ——,
—— ——.

[FORM No. 14.]

ORDER OF REFERENCE.

In the District Court of the United States for the —— District of ——.

In the matter of
——
Bankrupt.
} In Bankruptcy.

Whereas —— ——, of ——, in the county of —— and district aforesaid, on the —— day of ——, A. D. 18—, was duly adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the ——day of ——, A. D. 189—, according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to —— ——, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the —— day of —— at ——, and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ——bankruptcy.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the ——day of ——, A. D. 18—.

{Seal of the court.} —— ——,
Clerk.

[FORM No. 15.]

ORDER OF REFERENCE IN JUDGE'S ABSENCE.

In the District Court of the United States for the —— District of ——.

In the matter of
——
} In Bankruptcy.

Whereas on the —— day of ——, A. D. 18—, a petition was filed to have —— ——, of ——, in the county of —— and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to —— ——, one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said —— —— shall attend before said referee on the —— day of ——, A. D. 189—, at ——.

Witness my hand and the seal of the said court, at ——, in said district, on the — day of ——, A. D. 189—.

{Seal of the court.} —— ——,
Clerk.

[FORM No. 16.]

REFEREE'S OATH OF OFFICE.

I, —— ——, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 18—.

—— ——,
District Judge.

[FORM No. 17.]

BOND OF REFEREE.

Know all men by these presents: That we —— —— of —— —— as principal, and —— —— of —— —— and —— —— of —— ——, as sureties are held and firmly bound to the United States of America in the sum of —— dollars, lawful money of the

United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — day of ——, A. D. 189—.

The condition of this obligation is such that whereas the said —— ——, has been on the — day of ——, A. D. 18—, appointed by the Honorable —— ——, judge of the district court of the United States for the —— district of ——, a referee in bankruptcy, in and for the county of ——, in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said —— —— shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed
in the presence of

—— ——, [L. S.]
—— ——, [L. S.]
—— ——, [L. S.]

Approved this — day of —— A. D. 189—.

—— ——,
District Judge.

[FORM No. 18.]

NOTICE OF FIRST MEETING OF CREDITORS.

In the District Court of the United States for the — District of ——. In Bankruptcy.

In the matter of —— *Bankrupt* .	In Bankruptcy.

To the creditors of —— ——, of ——, in the county of ——, and district aforesaid, a bankrupt.

Notice is hereby given that on the —— day of ——, A. D. 18—, the said —— —— was duly adjudicated bankrupt; and that the first meeting of his creditors will be held at —— in ——, on the — day of ——, A. D. 18—, at —— o'clock in the —— noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

—— ——,
Referee in Bankruptcy.

—— —, 18—.

[FORM No. 19.]

LIST OF DEBTS PROVED AT FIRST MEETING.

In the District Court of the United States for the —— District of ——.

In the matter of —— *Bankrupt* .	In Bankruptcy.

At ——, in said district, on the — day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

—— ——,
Referee in Bankruptcy.

[FORM No. 20.]

GENERAL LETTER OF ATTORNEY IN FACT WHEN CREDITOR IS NOT REPRESENTED BY ATTORNEY AT LAW.

In the District Court of the United States for the —— District of ——.

In the matter of —— *Bankrupt*	In Bankruptcy.

To —— ——:
—— ——.

I, —— ——, of ——, in the county of —— and State of ——, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meet-

ing or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the — day of ——, A. D. 189—.

——— ——— [L. S.]

Signed, sealed, and delivered in presence of —

——— ———.

Acknowledged before me this — day of ——, A. D. 189—.

——— ———.

[*Official character.*]

[Form No. 21.]

Special Letter of Attorney in Fact.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

To —— ——,

—— ——:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ——, on the — day of ——, before ——, or any adjournment thereof, and then and there —— for —— and in —— name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and in the choice of trustee or trustees of the estate of the said bankrupt.

——— ———. [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the — day of ——, A. D. 189—.

Signed, sealed, and delivered in presence of —

——— ———.

Acknowledged before me this — day of ——, A. D. 18—.

——— ———.

[*Official character.*]

[Form No. 22.]

Appointment of Trustee by Creditors.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district, on the — day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint —— ——, of ——, in the county of —— and State of ——, to be the trustee —of the said bankrupt's estate and effects.

Signatures of creditors.	Residences of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered that the above appointment of trustee— be, and the same is hereby approved.

——— ———,

Referee in Bankruptcy.

[Form No. 23.]

Appointment of Trustee by Referee.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district, on the — day of ——, A. D. 18—, before —— ——, referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the

said bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint —— ——, of ——, in the county of —— and State of ——, as trustee of the same.

—— ——,
Referee in Bankruptcy.

[FORM No. 24.]

NOTICE TO TRUSTEE OF HIS APPOINTMENT.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt* .	In Bankruptcy.

To —— ——, of ——, in the county of ——, and district aforesaid:

I hereby notify you that you were duly appointed trustee [*or* one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the — day of ——, A. D. 18—, and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at —— dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at —— the —— day of ——, A. D. 18—.

—— ——,
Referee in Bankruptcy.

[FORM No. 25.]

BOND OF TRUSTEE.

Know all men by these presents: That we, —— ——, of ——, as principal, and —— ——, of ——, and —— ——, of ——, as sureties, are held and firmly bound unto the United States of America in the sum of —— dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this — day of ——, A. D. 189—.

The condition of this obligation is such, that whereas the above-named —— —— was, on the — day of ——, A. D. 189—, appointed trustee in the case pending in bankruptcy in said court, wherein —— —— is the bankrupt, and he, the said —— ——, has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said —— ——, trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in the presence of—

—— ——	—— ——, [SEAL.]
—— ——.	—— ——, [SEAL.]
	—— ——, [SEAL.]

[FORM No. 26.]

ORDER APPROVING TRUSTEE'S BOND.

At a court of bankruptcy, held in and for the District of ——, at ——, ——, this — day of ——, 189—.

Before —— ——, referee in bankruptcy, in the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt* .	In Bankruptcy.

It appearing to the Court —— ——, of ——, and in said district, has been duly appointed trustee of the estate of the above-named bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors [*or* by order of the court], to wit, in the sum of —— dollars, it is ordered that the said bond be, and the same is hereby, approved.

—— ——,
Referee in Bankruptcy.

[FORM No. 27.]

ORDER THAT NO TRUSTEE BE APPOINTED.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

It appearing that the schedule of the bankrupt discloses no assets, and that no creditor has appeared at the first meeting, and that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

—— ——,

Referee in Bankruptcy.

[FORM No. 28.]

ORDER FOR EXAMINATION OF BANKRUPT.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, on the — day of ——, A. D. 18—.

Upon the application of —— ——, trustee of said bankrupt [*or* creditor of said bankrupt], it is ordered that said bankrupt attend before —— ——, one of the referees in bankruptcy of this court, at —— on the —— day of ——, at — o'clock in the —— noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

—— ——,

Referee in Bankruptcy.

[FORM No. 29.]

EXAMINATION OF BANKRUPT OR WITNESS.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—, before —— ——, one of the referees in bankruptcy of said court.

—— ——, of ——, in the county of ——, and State of ——, being duly sworn and examined at the time and place above mentioned, upon his oath says. [*Here insert substance of examination of party.*]

—— ——, *Referee in Bankruptcy.*

[FORM No. 30.]

SUMMONS TO WITNESS.

To —— ——:

Whereas —— ——, of ——, in the county of ——, and State of ——, has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the —— District of ——.

These are to require you, to whom this summons is directed, personally to be and appear before —— ——, one of the referees in bankruptcy of the said court, at ——, on the —— day of ——, at — o'clock in the —— noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ——, Judge of said court, and the seal thereof at ——, this ——day of ——, A. D. 189—.

—— ——, *Clerk.*

RETURN OF SUMMONS TO WITNESS.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

On this —— day of ——, A. D. 18—, before me came —— ——, of ——, in the county of —— and State of ——, and makes oath, and says that he did, on ——, the —— day of ——, A. D. 189—, personally serve —— ——, of ——, in the county of —— and State of ——, with a true copy of the summons hereto annexed, by delivering the same to him: and he further makes oath, and says that he is not interested in the proceeding in bankruptcy named in said summons.

—— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——

[FORM No. 31.]

PROOF OF UNSECURED DEBT.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came —— ——, of ——, in the county of ——, in said district of ——, and made oath, and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of —— dollars; that the consideration of said debt is as follows:——————

——————

——————

that no part of said debt has been paid [except —————— ——————]; that there are no set-offs or counterclaims to the same [except —————— ——————]; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

—— ——,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——.
[*Official character.*]

[FORM No. 32.]

PROOF OF SECURED DEBT.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came ——, of ——, in the county of ——, in said district of ——, and made oath, and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of —— dollars; that the consideration of said debt is as follows ——————; that no part of said debt has been paid [except ——————]; that there are no set-offs or counterclaims to the same [except ——————]; and that the only securities held by this deponent for said debt are the following: ——————

——————

——————

—— ——,
Creditor.

Subscribed and sworn to before me this —— day of —— A. D. —.

—— ——.
[*Official character.*]

[FORM No. 33.]

PROOF OF DEBT DUE CORPORATION.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came —— ——, of ——, in the county of —— and State of ——, and made oath and says that he is —— of the ——, a corporation incorporated by and under the laws of the State of ——, and carrying on business at ——, in the county of —— and State of ——, and that he is duly authorized to make this proof, and says that the said —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of —— dollars; that the consideration of said debt is as follows:——————

—————— ——————

—————— ——————;

that no part of said debt has been paid [except ——————]; that there are no set-offs or counterclaims to the same [except——————]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

—— ——,
—— *of said Corporation.*

Subscribed and sworn to before me this —— day of——, A. D. 18—.

—— ——.
[*Official character.*]

[FORM No. 34.]

PROOF OF DEBT BY PARTNERSHIP.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district of ——, on the ——day of ——, A. D. 189—, came —— ——, of ——, in the county of ——, in said district of ——, and made oath and says that he is one of the firm of —— ——, consisting of himself and —— ——, of —— in the county of —— and State of ——; that the said —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to this deponent's said firm in the sum of ——dollars; that the consideration of said debt is as follows:——

—————— ——————;

that no part of said debt has been paid [except ——————]; that there are no set-offs or counterclaims to the same [except——————]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

—— ——,
Creditor.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——.
[*Official character.*]

[FORM No. 35.]

PROOF OF DEBT BY AGENT OR ATTORNEY.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At —— in said district of ——on the —— day of ——, A. D. 189—, came —— ——, of ——, in the county of ——, and State of ——, attorney [*or* authorized agent] of ——, in the county of ——, and State of ——, and made oath and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said —— ——, in the sum of —— dollars; that the consideration of said debt is as follows:

—————— ——————;

that no part of said debt has been paid [except ——————]; and that this deponent has not, nor has any person by his order, or to this deponent's knowledge or belief, for his use had or received any manner of security for said debt whatever. And this deponent further says, that this deposition cannot be made by the claimant in person because ——————

——————

and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

—— ——,

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

—— ——.
[*Official character.*]

[FORM No. 36.]

PROOF OF SECURED DEBT BY AGENT.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, in said district of ——, on the —— day of ——, A. D. 189—, came —— ——, of ——, in the county of ——, and State of ——, attorney [*or*, authorized agent] of ——, in the county of ——, and State of ——, and made oath, and says that —— ——, the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said —— —— in the sum of —— dollars; that the consideration of said debt is as follows: ——————

—————— ——————;

that no part of said debt has been paid [except——————]; that there are no set-offs or counterclaims to the same [except ——————

——————];

and that the only securities held by said —— for said debt are the following ——

—————— ——————;

and this deponent further says that this deposition cannot be made by the claimant in person because ———————————

——————— ———————;

and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

——— ———.

Subscribed and sworn to before me this — day of ———, A. D. 18—.

——— ———.

[*Official character.*]

[Form No. 37.]

Affidavit of Lost Bill, or Note.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

On this —— day of ——, A. D. 18—, at ——, came —— ——, of ——, in the county of ——, and State of ——, and makes oath and says that the bill of exchange [*or* note], the particulars whereof are underwritten, has been lost under the following circumstances, to wit, ———————————

———————————

———————————

and that he, this deponent, has not been able to find the same; and this deponent further says that he has not, nor has the said —— ——, or any person or persons to their use, to this deponent's knowledge or belief, negotiated the said bill [*or* note] nor in any manner parted with or assigned the legal or beneficial interest therein, or any part thereof; and that he, this deponent, is the person now legally and beneficially interested in the same.

Bill or note above referred to.

Date.	Drawer or maker.	Acceptor.	Sum.

——— ———.

Subscribed and sworn to before me this —— day of ——, A. D. 18—.

——— ———.

[*Official character.*]

[Form No. 38.]

Order Reducing Claim.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to this court upon the claim of —— against said estate [and, *if the fact be so,* upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ——, as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ——, and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest,* with interest thereon from the —— day of ——, A. D. 18—].

——— ———,

Referee in Bankruptcy.

[Form No. 39.]

Order Expunging Claim.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

Upon the evidence submitted to the court upon the claim of —— against said estate [and, *if the fact be so,* upon hearing counsel thereon], it is ordered, that said claim be disallowed and expunged from the list of claims upon the trustee's record in said case.

——— ———,

Referee in Bankruptcy.

[FORM No. 40.]

LIST OF CLAIMS AND DIVIDENDS TO BE RECORDED BY REFEREE AND BY HIM DELIVERED TO TRUSTEE.

In the District Court of the United States for the ——— District of ———.

——— In the matter of ——— *Bankrupt* . ———	In Bankruptcy.

At ———, in said district, on the ——— day of ———, A. D. 18—.

A list of debts proved and claimed under the bankruptcy of ——— ———, with ——— dividend at the rate of ——— per cent this day declared thereon by ——— ———, a referee in bankruptcy.

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

———, *Referee in Bankruptcy.*

[FORM No. 41.]

NOTICE OF DIVIDEND.

In the District Court of the United States for the —— District of ——.

In the matter of ——— Bankrupt.	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To —— ——,
Creditor of —— ——, bankrupt:
I herehy inform you that you may, on application at my office, ——, on the —— day of ——, or on any day thereafter, between the hours of ——, receive a warrant for the —— dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

—— ——, *Trustee.*

CREDITOR'S LETTER TO TRUSTEE.

To —— ——,
Trustee in bankruptcy of the estate of —— ——, bankrupt:
Please deliver to —— —— the warrant for dividend payable out of the said estate to me.

—— ——, *Creditor.*

[FORM No. 42.]

PETITION AND ORDER FOR SALE BY AUCTION OF REAL ESTATE.

In the District Court of the United States for the —— District of ——.

In the matter of ——— Bankrupt.	In Bankruptcy.

Respectfully represents ——, trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*Here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows:————————————

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.
Dated this —— day of ——, A. D. 18—.

—— ——, *Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the foregoing petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.
Witness my hand this —— day of ——, A. D. 189—.

—— ——,
Referee in Bankruptcy.

[FORM No. 43.]

PETITION AND ORDER FOR REDEMPTION OF PROPERTY FROM LIEN.

In the District Court of the United States for the —— District of ——.

In the matter of ——— Bankrupt.	In Bankruptcy.

Respectfully represents —— ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [*or if the property be personal property,* has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ——, being the amount of said lien, in order to redeem said property therefrom.
Dated this —— day of ——, A. D. 18—.

—— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's

estate specified in the foregoing petition the sum of ——, being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this —— day of ——, A. D. 189—.

—— ——,
Referee in Bankruptcy.

[FORM No. 44.]

PETITION AND ORDER FOR SALE SUBJECT TO LIEN.

In the District Court of the United States for the —— District of ——.

In the matter of
——————
Bankrupt.
} In Bankruptcy.

Respectfully represents —— ——, trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other encumbrance. Wherefore he prays that he may be authorized to make sale of said property, subject to the encumbrance thereon.

Dated this —— day of ——, A. D. 189—.

—— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or* at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189—.

—— ——,
Referee in Bankruptcy.

[FORM No. 45.]

PETITION AND ORDER FOR PRIVATE SALE.

In the District Court of the United States for the —— District of ——.

In the matter of
——————
Bankrupt.
} In Bankruptcy.

Respectfully represents —— ——, duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit,—

——————————

——————————

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:——————

——————————

——————————

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this —— day of ——, A. D. 189—.

—— ——, *Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing —— —— in favor of said petition and —— —— in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this —— day of ——, A. D. 189—.

—— ——,
Referee in Bankruptcy

[FORM No. 46.]

PETITION AND ORDER FOR SALE OF PERISHABLE PROPERTY.

In the District Court of the United States for the —— District of ——.

In the matter of
——————
Bankrupt.
} In Bankruptcy.

Respectfully represents —— —— the said bankrupt [*or* a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

That a part of the said estate, to wit,——

———————————————

———————————————

now in ——, is perishable, and that there will be loss if the same is not sold immediately.

Wherefore, he prays the court to order that the same be sold immediately as aforesaid.

Dated this —— day of ——, A. D. 189—.

——— ———.

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to the creditors of the said bankrupt [*or* without notice to the creditors], now, after due hearing, no adverse interest being represented thereat [*or* after hearing, —— —— in favor of said petition and —— —— in opposition thereto], I find that the facts are as above stated, and that the same is required in the interest of the estate, and it is therefore ordered that the same be sold forthwith and the proceeds thereof deposited in court.

Witness my hand this —— day of ——, A. D. 189—.

——— ———,
Referee in Bankruptcy.

[Form No. 47.]

Trustee's Report of Exempted Property.

In the District Court of the United States for the —— District of ——.

In the matter of ———— Bankrupt.	In Bankruptcy.

At ——, on the —— day of ——, 18—.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
		Dolls.	Cts.
Military uniform, arms, and equipments.			
Property exempted by State laws......			

——— ———,
Trustee.

[Form No. 48.]

Trustee's Return of No Assets.

In the District Court of the United States for the —— District of ——.

In the matter of ———— Bankrupt.	In Bankruptcy.

At ——, in said district, on the —— day of ——, A. D. 18—.

On the day aforesaid, before me comes —— ——, of ——, in the county of —— and State of ——, and makes oath, and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ——, this —— day of ——, A. D. 18—.

——— ———,
Referee in Bankruptcy.

[Form No. 49.]

Account of Trustee.

Dr. *The estate of* ——— ———, *bankrupt*, *in account with* ——— ———, *trustee.* **Cr.**

		Dolls.	Cts.	Dolls.	Cts.			Dolls.	Cts.	Dolls.	Cts.

[FORM No. 50.]

OATH TO FINAL ACCOUNT OF TRUSTEE.

In the District Court of the United States for the ——— District of ———.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

On this —— day of ———, A. D. 18—, before me comes ——— ———, of ———, in the county of ——— and State of ———, and makes oath, and says that he was, on the ——— day of ———, A. D. 18—, appointed trustee of the estate and effects of the above-named bankrupt, and that as such trustee he has conducted the settlement of the said estate. That the account hereto annexed containing ——— sheets of paper, the first sheet whereof is marked with the letter ——— [*reference may here also be made to any prior account filed by said trustee*], is true, and such account contains entries of every sum of money received by said trustee on account of the estate and effects of the above-named bankrupt, and that the payments purporting in such account to have been made by said trustee have been so made by him. And he asks to be allowed for said payments and for commissions and expenses as charged in said accounts.

——— ———, *Trustee.*

Subscribed and sworn to before me at ———, in said ——— district of ———, this —— day of ———, A. D. 18—.

——— ———,
[*Official character.*]

[FORM No. 51.]

ORDER ALLOWING ACCOUNT AND DISCHARGING TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered, that the same be allowed, and that the said trustee be discharged of his trust.

——— ———,
Referee in Bankruptcy.

[FORM No. 52.]

PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

To the Honorable —— ——,
Judge of the District Court for the —— District of ——:

The petition of —— ——, one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate of said bankrupt that ——, heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore —— —— pray that notice may be served upon said ——, trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

——— ———.

[FORM No. 53.]

NOTICE OF PETITION FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of ——— *Bankrupt* .	In Bankruptcy.

At ——, on the —— day of ——, A. D. 18—.

To —— ——,
Trustee of the estate of —— ——, bankrupt:

You are hereby notified to appear before this court, at ——, on the —— day of ——, A. D. 18—, at — o'clock —. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of —— ——, one of the creditors of said bankrupt, filed in this court on the —— day of ——, A. D. 18—, in which it is alleged [*here insert the allegation of the petition*].

——— ———, *Clerk.*

[FORM No. 54.]

ORDER FOR REMOVAL OF TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

Whereas —— ——, of ——, did, on the —— day of ——, A. D. 18—, present his petition to this court, praying that for the reasons therein set forth, —— ——, the trustee of the estate of said —— ——, bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said —— —— and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said —— —— be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said —— ——, trustee [*or*, out of the estate of the said —— ——, subject to prior charges].

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——, in said district, on the —— day of ——, A. D. 18—.

{Seal of the court.} —— ——,
Clerk.

[FORM No. 55.]

ORDER FOR CHOICE OF NEW TRUSTEE.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

At ——, on the ——day of ——, A. D. 18—.

Whereas by reason of the removal [*or* the death *or* resignation] of —— ——, heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered, that a meeting of the creditors of said bankrupt be held at ——, in ——, in said district, on the —— day of ——, A. D. 18—, for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

—— ——, *Referee in Bankruptcy.*

[FORM No. 56.]

CERTIFICATE BY REFEREE TO JUDGE.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

I, —— ——, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ——, the —— day of ——, A. D. 18—.

—— ——,
Referee in Bankruptcy.

[FORM No. 57.]

BANKRUPT'S PETITION FOR DISCHARGE.

In the matter of —————— *Bankrupt*.	In Bankruptcy.

To the Honorable —— ——,
Judge of the District Court of the United States for the District of ———.

—— ——, of ——, in the county of —— and State of ——, in said district, respectfully represents that on the —— day of ——, last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this —— day of ——, A. D. 189—.

—— ——, *Bankrupt.*

Order of Notice Thereon.

District of ——, ss:

On this —— day of ——, A. D. 189—, on reading the foregoing petition, it is—

Ordered by the court that a hearing be had upon the same on the —— day of ——, A. D. 189—, before said court, at ——, in said district, at —— o'clock in the —— noon; and that notice thereof be published in —— ——, a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable —— ——, judge of the said court, and the seal thereof, at ——in said district, on the —— day of ——, A. D. 189—.

{Seal of the court.} —— ——, *Clerk.*

——hereby depose, on oath, that the foregoing order was published in the —— —— on the following —— days, *viz.:*

On the ——day of —— and on the —— day of ——, in the year 189—.

—— ——.

District of ——.

—— ——, 189—.

Personally appeared —— ——, and made oath that the foregoing statement by him subscribed is true.

Before me,

—— ——.

[*Official character.*]

I hereby certify that I have on this —— day of ——, A. D. 189—, sent by mail copies of the above order, as therein directed.

—— ——, *Clerk.*

[Form No. 58.]

Specification of Grounds of Opposition to Bankrupt's Discharge.

In the District Court of the United States for the —— District of ——.

In the matter of —————— *Bankrupt* .	In Bankruptcy.

—— ——, of ——, in the county of —— and State of ——, a party interested in the estate of said —— ——, bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

—— ——, *Creditor.*

[Form No. 59.]

Discharge of Bankrupt.

District Court of the United States, —— District of ——.

Whereas, —— —— of —— in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said —— —— be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the —— day of ——, A. D. 189—, on which day the petition for adjudication was filed —— him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable —— ——, judge of said district court, and the seal thereof this —— day of ——, A. D. 189—.

{Seal of the court.} —— ——, *Clerk.*

[Form No. 60.]

Petition for Meeting to Consider Composition.

District Court of the United States for the —— District of ——.

—————— —————— *Bankrupt* .	In Bankruptcy.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——:

The above-named bankrupt respectfully represent that a composition of —— per cent upon all unsecured debts, not entitled to a priority —— —— in satisfaction of —— debts has been proposed by —— to —— creditors, as provided by the acts of Congress relating to bankruptcy, and —— verily believe that the said composition will be accepted by a majority in number and in value of —— creditors whose claims are allowed.

Wherefore, he pray that a meeting of —— creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

—— ——, *Bankrupt.*

[FORM No. 61.]

APPLICATION FOR CONFIRMATION OF COMPOSITION.

In the District Court of the United States for the —— District of ——.

In the matter of
——
Bankrupt. } In Bankruptcy.

To the Honorable —— ——, Judge of the District Court of the United States for the —— District of ——.

At ——, in said district, on the —— day of ——, A. D. 189—, now comes —— ——, the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ——dollars, has been deposited, subject to the order of the judge, in the —— National Bank, of ——, a designated depository of money in bankruptcy cases.

Wherefore the said —— —— respectfully asks that the said composition may be confirmed by the court.

—— ——, *Bankrupt.*

[FORM No. 62.]

ORDER CONFIRMING COMPOSITION.

In the District Court of the United States for the —— District of ——.

In the matter of
——
} In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interests of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable —— ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 189—.

{Seal of the court.} —— ——, *Clerk.*

[FORM No. 63.]

ORDER OF DISTRIBUTION ON COMPOSITION.

UNITED STATES OF AMERICA:

In the District Court of the United States for the —— District of ——.

In the matter of
——
Bankrupt. } In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case, which list is made a part of this order.

Witness the Honorable —— ——, judge of said court, and the seal thereof, this —— day of ——, A. D. 189—.

{Seal of the court.} —— ——, *Clerk.*

INDEX TO GENERAL ORDERS.

TABLE OF FORMS.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1898.

IN MEMORIAM.

AUGUSTUS HILL GARLAND.

The Hon. John W. Griggs, Attorney General of the United States, addressed the court as follows:

"May it please the court: It is my sad duty to announce to the court the sudden death of an ex-Attorney General of the United States,—Augustus Hill Garland.

"The sudden and unexpected death of this distinguished man comes with a shock of surprise to those of us who have heard of it, as undoubtedly it came to those of this court who witnessed his seizure. He was a man so distinguished in his profession, so distinguished as a statesman in political life, and so connected, officially and professionally, with this court to the last moment of his life, that I deem it proper to suggest to the court that out of respect to his memory they should take a recess until to-morrow, and I make that motion."

The Chief Justice responded:

"The court receives the information of the death of Mr. Garland with sincere sorrow, and fully concurs in the suggestion that has been made. As a mark of respect to the memory of this distinguished member of the bar and eminent public servant, an adjournment will be taken until to-morrow, at the usual hour."

January 26, 1899.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1898.

ORDER.

The reporter having represented that, owing to the number of decisions at the term, it will be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

February 27, 1899.

APPENDIX IV.

Supreme Court of the United States.

October Term, 1898.

IN MEMORIAM.

BARON HERSCHELL.

The Chief Justice: "It is with sincere sorrow that I announce to the members of the bar the sudden death of Baron Herschell, former Lord Chancellor of England, information of which has just been received by the court with deep sensibility.

"Lord Herschell had been some months in this country in a public and international capacity, and but a few days have elapsed since he sat with us here, a compliment which has been extended only once previously, in the instance of the then Lord Chief Justice of England.

"In view of the cordial relations between Lord Herschell and the members of this court, his great distinction in our common profession and on the bench, and his unexpected death while absent from home in the discharge of high public duty, we feel called upon to take notice of this sad event, and as a mark of respect to his memory the court will adjourn until to-morrow at the usual hour.

March 1, 1899.

APPENDIX V.

Supreme Court of the United States.

October Term, 1898.

IN MEMORIAM.

STEPHEN J. FIELD.

The Chief Justice: "It becomes my sad duty to inform the gentlemen of the bar that Mr. Justice Field on yesterday (Sunday) evening passed peacefully from this life. He died full of years and of honors, and attended by all that should accompany old age.

"The judicial career of Mr. Justice Field was unexampled in length and distinction, and he occupied a seat upon this bench for a longer period than any of its members from the beginning. His labors left no region of jurisprudence unexplored, and now that he rests from them, his works will follow him. His retirement when he saw port approaching was so recent that he hardly seems to have been absent, and his death comes home to us the more keenly.

"As a mark of respect to his memory, the court will adjourn until to-morrow."

April 10, 1899.

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1898.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of by the court, be, and the same are hereby, continued until the next term of the court.

May 22, 1899.